June 26, 2023

Melane Conyers-Ausbrooks
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314–3428.

Re: Climate-Related Financial Risk

Via: *https://www.regulations.gov*

Dear Ms. Conyers-Ausbrooks:

I welcome this opportunity to provide comments to the National Credit Union Administration in response to its request for information and comment regarding climate-related financial risk.[1]

Introduction

As I will demonstrate in some detail, if the NCUA goes down anything like the path that the Securities and Exchange Commission,[2] or the Department of Defense, General Services Administration and National Aeronautics and Space Administration[3] have chosen to go down, then the impact on credit unions and the public will be extremely adverse. Such a rule would dramatically impede rather than further the NCUA's mission. The social welfare losses from such a rule would be substantial.

The impact of such a rule would include:

- Vastly higher administrative costs for credit unions and a concomitant (1) reduction in their competitiveness *vis a vis* large banks, and (2) increase in costs that must be borne by credit union members.
- A substantial reduction in the safety and soundness of credit unions.
- Enriching lawyers, accountants, climate consultants and assorted climate change NGOs and their managements. These actors will no doubt be urging the NCUA (in the name of saving the planet) to enrich themselves at the expense of credit union members.

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[1] "Climate-Related Financial Risk," National Credit Union Administration (NCUA), Request for Information and Comment, *Federal Register*, Vol. 88, No. 79, April 25, 2023, pp. 25028 – 25031 https://www.govinfo.gov/content/pkg/FR-2023-04-25/pdf/2023-08715.pdf.

[2] "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Securities and Exchange Commission, Proposed Rule, *Federal Register*, Vol. 87, No. 69, April 11, 2022, pp. 21334-21473 https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf. See also the SEC version of the proposing release, March 21, 2022 https://www.sec.gov/rules/proposed/2022/33-11042.pdf (506 pages).

[3] "Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk," Department of Defense, General Services Administration, and National Aeronautics and Space Administration, Proposed Rule, *Federal Register*, Vol. 87, No. 218, November 14, 2022, pp. 68312-68334 https://www.govinfo.gov/content/pkg/FR-2022-11-14/pdf/2022-24569.pdf.

- Reduced economic growth due to the political allocation of credit.

Among financial institutions, the adverse impact of complex "climate related financial risk" regulations will be most dramatic among credit unions and small banks. Regulatory compliance costs do not increase linearly with size. Thus, high regulatory compliance costs accord a competitive advantage to large institutions. And the various climate related financial risk regulations impose unprecedented costs. The SEC rule, for example, would quadruple the cost of being a public company (using the SEC's own estimates).[4]

These effects are already quite visible due to other costly regulations. The top ten banks control roughly half of all deposits. 200 to 300 broker-dealers are lost each year. The climate-related financial risk rules will accelerate this trend.

As explained below, such a rule would **not** include any actual material impact on the climate. Climate change virtue signaling and political pressure from the White House[5] are the true motivation for these rules among financial regulators,[6] not any genuine concern that 'climate related financial risk" is somehow different than the multitude of other risks that regulators, issuers, banks, credit unions and the NCUA must evaluate or that bank examiners, bank or credit union managements or others find it difficult to recognize material risks under current rules without the aid of additional rules, additional paperwork or additional politically motivated scrutiny by examiners.

The following "systemic" or economy-wide risks pose a far greater risk to credit unions, banks and the stability of the financial system than does climate change (probably by an order of magnitude or more):

- The financial, economic, supply chain and physical risks associated with the ongoing major war in Europe (over Ukraine) and potential broader wars between great powers in Europe and Asia (over Taiwan);

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[4] The original proposing release estimated that the climate change rule would *triple* issuer costs. This has since been revised upwards. See Mark T. Uyeda, Commissioner, U.S. Securities and Exchange Commission, "Remarks at the 2022 Cato Summit on Financial Regulation," November 17, 2022, https://www.sec.gov/news/speech/uyeda-remarks-cato-summit-financial-regulation-111722; Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission, "It's Not Just Scope 3: Remarks at the American Enterprise Institute," December 7, 2022, https://www.sec.gov/news/speech/peirce-remarks-american-enterprise-institute-120722; comment letter from David R. Burton to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, "Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors [File No. S7-10-2; Release No. 33-11042; RIN 3235-AM87]," June 17, 2022, https://www.sec.gov/comments/s7-10-22/s71022-20131980-302443.pdf.

[5] For the public facing aspect of this pressure, see "Climate-Related Financial Risk," Executive Order 14030 of May 20, 2021, *Federal Register*, Vol. 86, No. 99, May 25, 2021, pp. 27967-27970 https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11168.pdf and "Tackling the Climate Crisis at Home and Abroad," January 27, 2021, Executive Order 14008, https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf.

[6] Besides the SEC (see footnote 2) and FSOC (see https://home.treasury.gov/system/files/261/FSOC_20220728_Factsheet_Climate-Related_Financial_Risk.pdf), the Federal Reserve, FDIC, OCC and CFTC have put out RFIs.

- Asset price inflation (i.e. a financial market and real property 'bubble') created by Federal Reserve monetary policy and was a major contributing factor to the recent failure of three banks;
- Goods and service price inflation created by Federal Reserve monetary policy;
- Irresponsible and unsustainable Congressional fiscal policy;[7]
- The entitlement crisis;[8] and
- The Executive Branch regulatory Tsunami that will harm productivity growth and real wages for years to come.

There are no *Federal Register* notices – with requests for information, statements of principles or contemplated rulemakings – regarding these risks. The NCUA remains silent regarding these risks even though they pose greater risk to the financial system and to credit unions. That the NCUA is considering prioritizing the highly uncertain, contingent and distant risks associated with climate change over these very real, very large and very immediate risks shows that it is considering placing the credit unions and their customers at risk in furtherance of progressive political aims. This, the NCUA should not do.

This notice is also demonstrative of the NCUA's *de facto* lack of independence. It shows that the Board is following the lead of the White House[9] and the Financial Stability Oversight Council (FSOC)[10] rather than exercising independent judgement and discharging its actual mission.

All of this is way outside of NCUA's lane. As the NCUA describes in the request for information and comment:

> The NCUA is charged with protecting the safety and soundness of FICUs [federally insured credit unions] and, in turn, the SIF [National Credit Union Share Insurance Fund] through regulation and supervision. The NCUA also works to protect credit union members and consumers. The NCUA's mission is to

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[7] *The 2022 Long-Term Budget Outlook*, Congressional Budget Office, July 2022 https://www.cbo.gov/publication/58340. Trends that can't go on forever, won't. The debt crisis that will eventually happen in the absence of very major policy changes will have an unequaled deleterious impact on the financial system and on banks.

[8] Social Security and Medicare alone have unfunded liabilities of approximately $20.5 trillion and $52.6 trillion, respectively. See "The 2022 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds," June 2, 2022 Table IV.B6, p. 75 https://www.ssa.gov/OACT/TR/2022/tr2022.pdf; "2022 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds," June 2, 2022 Table V.F2 p. 208 https://www.cms.gov/files/document/2022-medicare-trustees-report.pdf. Imagine what the inflation rate, economic dislocation and heightened risk would be if even a fraction of these liabilities are monetized. This is, of course, in addition to the $24.6 trillion national debt owed to the public. See "Fiscal Data" https://fiscaldata.treasury.gov/datasets/debt-to-the-penny/debt-to-the-penny.

[9] "Tackling the Climate Crisis at Home and Abroad," January 27, 2021, Executive Order 14008, https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf; "Climate-Related Financial Risk," May 20, 2021, Executive Order 14030 https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11168.pdf.

[10] "Report on Climate-Related Financial Risk," Financial Stability Oversight Council, 2021 https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf.

> 'protect the system of cooperative credit and its member-owners through effective chartering, supervision, regulation, and insurance.'[11]

An examination of the statutes governing the NCUA[12] will fail to find any indication that the NCUA is an environmental regulator or has any authority from Congress to so regulate. This is deeply problematic for those in the agency that want to turn it into an environmental regulator. If Congress has not granted the authority to the Executive Branch (to wit, the various proposing agencies) by statute, then the Executive Branch (to wit, the President) may not grant the power to itself by Executive Order. Neither may an agency grant itself such authority *sua sponte*. As the Supreme Court made clear in *West Virginia vs. Environmental Protection Agency,* an agency (or agencies) may not "adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." [13] Congress has declined to enact the "Green New Deal" or any legislative regime related to climate-related financial risk.[14] It cannot be implemented by regulation.

Presuming the NCUA wants whatever rule that may come out of this process to survive judicial review, it must stay in its lane and only undertake rulemakings authorized by Congress. Anything close to the SEC or DoD/GSA/NASA approach will ultimately be overturned because the requirements are grossly disproportionate to the risks they purport to regulate and beyond the scope of the authority granted to the agency. Nor has there been any showing by any financial regulator that the existing regulatory framework that addresses material risks of all kinds is somehow unable to deal with "climate related" financial risk.

The SEC proposed rule, using the SEC's own figures, will quadruple the cost of being a public company to address a relatively minor risk compared to all of the other risks that investors must evaluate. It is clear to any even moderately dispassionate observer that the real motivation for such proposed rules is not "financial risk" per se but instead a desire to impose environmental rules and to discourage the allocation of capital to the development and distribution of fossil fuels. The problem, of course, is that Congress did not authorize financial regulators to become environmental regulators. We do have an Environmental Protection Agency, after all.

Moreover, as a small agency with approximately 1,200 employees,[15] the NCUA is singularly ill-equipped to make substantive judgements about climate science. The request for information and comment provides no evidence that anyone at NCUA knows anything about climate science. It makes basic errors, and it is a simple document. The resources necessary to build that expertise and train the examination staff will be massive and will drain resources from NCUA's important

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[11] "Climate-Related Financial Risk," National Credit Union Administration (NCUA), Request for Information and Comment, *Federal Register*, Vol. 88, No. 79, April 25, 2023, p. 25028 (col. 3) https://www.govinfo.gov/content/pkg/FR-2023-04-25/pdf/2023-08715.pdf .

[12] Chapter 14 of Title 12, 12 U.S. Code §1751 et seq., especially §1752a.

[13] 597 U.S. ___ (2022) https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf (Decided June 30, 2022).

[14] For example, H. R. 2570 (117th Congress), the Climate Risk Disclosure Act of 2021, was reported out of the House Financial Services Committee but never voted on by the House. The companion bill in the Senate (S.1217) went nowhere.

[15] "2023–2024 Budget Justification," National Credit Union Administration, September 29, 2022 p. 24 https://ncua.gov/files/publications/budget/budget-justification-proposed-2023-2024.pdf .

actual mission, to wit, ensuring the safety and soundness of the country's credit unions and protecting their members.

On a personal note, I 'bank' with a credit union not a bank. I find the level of service at my credit union to be superior to a bank. I do not want the NCUA to damage credit unions nationwide through heavy-handed regulation in furtherance of a progressive political agenda particularly since the type of rules being contemplated will have no actual impact on the climate or the environment.

Economic Analysis of Climate Change

Let me start at the beginning. The first two substantive sentences in the request for information and comment are:

> Climate change is accelerating and the number—and cost—of climate-related natural disasters is rising. The economic effects of these events are clear.

Whoever wrote the second sentence is either deeply misinformed or purposefully misleading the NCUA board and the public. The economic effects of climate change are about as clear as mud.

Serious economic analysis of climate-related financial risk is nearly non-existent. Bald assertions without a theoretical or empirical basis are not serious analysis. "Analysis," particularly when it has virtually no theoretical or data predicate, by those that stand to make many millions of dollars – many billions in the aggregate – needs to be evaluated skeptically. For example, you would think that the SEC, in its voluminous proposed rulemaking,[16] would have included such an analysis in detail in its proposing release since it is the factual predicate for the rulemaking. There are a few citations to a few studies. But those studies are advocacy pieces by those with a political agenda.

Any estimate of the economic impact of climate change will have to rely on the highly uncertain and divergent climate model results. Most of these models have failed to accurately predict reality for the past two decades. They ran "hot." Economics models are even more uncertain because of necessity they are built on top of the climate models. Thus, if the climate models have a band of results plus or minus X percent, the economics models will have a band of results that is greater than plus or minus X percent.

In addition to the high degree of uncertainty in the climate models will be added an entirely new family of economic ambiguity and uncertainty. Any economic estimate of the impact of climate change will also have to choose a discount rate to arrive at the present discounted value of future costs and benefits[17] of climate change and to estimate the future costs and benefits of various

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[16] "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Securities and Exchange Commission, Proposed Rule, *Federal Register*, Vol. 87, No. 69, April 11, 2022, pp. 21334-21473 https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf. See also the SEC version of the proposing release, March 21, 2022 https://www.sec.gov/rules/proposed/2022/33-11042.pdf (506 pages).

[17] There **are** benefits. For example, large portions of northern areas such as Alaska, Canada, Russia and Scandinavia would presumably become suitable for agriculture and growing seasons in the northern United States would lengthen. Carbon dioxide substantially promotes plant growth (evidently by about 30 percent in the 20th century).

regulatory or private initiatives. The choice of discount rate is controversial and important.[18] Estimates will need to be made of the cost of various aspects of climate change (sea level rises, the impact on agriculture, etc). Estimates will need to be made of the cost of various remediation techniques. Guesses will need to be made about the rate of technological change. Guesses will need to be made about the regulatory, tax and other responses of a myriad of governments.[19] Estimates will need to be made using conventional economic techniques regarding the economic impact of those changes which, in turn, will reflect a wide variety of techniques and in many cases a thin or non-existent empirical literature. Guesses will need to be made of market responses to all of these changes since market participants will not stand idly by and do nothing as markets, technology and the regulatory environment change.

Although I am more informed than most who comment on the subject matter, I am not a climate science expert. However, nothing in the RFI indicates that anyone at NCUA possesses scientific expertise. Quite the contrary, actually.

I do know a thing or two about modeling in an economics context. Models are typically highly dependent on a few relationships specified in their equations and parameters. A small number of assumptions about relationships and parameters drive results. For example, a model examining the impact of proposed tax policy might adopt a neoclassical view where the impact of the proposed tax changes on the user cost of capital and labor response are central (as specified in the equations) and the empirical parameters (as specified in the elasticities) governing investment and labor are key.[20] Seemingly small adjustments to elasticities (even though within the bounds established in the empirical literature) result is significantly different results. A Keynesian "macroeconomic" approach focusing on aggregate demand would yield dramatically different results, operate on different principles and lead to different policy recommendations. And so on.

Climate modeling is, in principle, no different. A small number of equations and empirical parameters drive results. Even the conventional governmental source -- the Intergovernmental Panel on Climate Change – shows massive variations in projections and shows the wide

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See Campbell, J., Berry, J., Seibt, U. *et al.*, "Large Historical Growth in Global Terrestrial Gross Primary Production." *Nature*, 544, 84–87 (April 6. 2017). https://doi.org/10.1038/nature22030. Deaths from cold weather (which, accordingly to the EPA, are about double those from hot weather in the United States) will decline. See, e.g., "Climate Change Indicators: Heat-Related Deaths," https://www.epa.gov/climate-indicators/climate-change-indicators-heat-related-deaths and "Climate Change Indicators: Cold-Related Deaths," https://www.epa.gov/climate-indicators/climate-change-indicators-cold-related-deaths. And so on.

[18] See, for example, David Kreutzer, "Discounting Climate Costs," Heritage Foundation Issue Brief No. 4575, June 16, 2016 http://thf-reports.s3.amazonaws.com/2016/IB4575.pdf; Kevin Dayaratna, "An Analysis of the Obama Administration's Social Cost of Carbon," Testimony before Committee on Natural Resources, United States House of Representatives on July 23, 2015 https://www.heritage.org/testimony/analysis-the-obama-administrations-social-cost-carbon.

[19] To get a sense of how daunting a task it is to keep track of the many government policy responses, see "Climate Change Laws of the World," Grantham Research Institute on Climate Change and the Environment at LSE https://climate-laws.org/. Merely keeping track of these many rules is one thing. Accurately predicting how they will change introduces an entirely new level of complexity and uncertainty. Accurately estimating the economic impact of this evolving morass is basically impossible.

[20] Parker Sheppard and David Burton, "How the GOP Tax Bill Will Affect the Economy," *Daily Signal*, November 17, 2017 https://www.dailysignal.com/2017/11/17/gop-tax-bill-will-affect-economy/. In this case, we used the Hall-Jorgenson user cost of capital equation, the Cobb-Douglas production function and conventional price theoretic labor market modeling.

divergence in the ability of models to account for past warming[21] and the degree of warming that is anthropogenic.[22] The worst-case concentration pathway, for example, assumes highly unlikely projections of coal use, high population growth, low economic growth and slow technological progress.[23] Using the worst-case scenario of these emissions concentration pathways as the business-as-usual scenario will mislead the private sector, policymakers, regulators and the public on the estimated climate impacts, risks and costs.[24]

Once you broaden your reading to include those that do not have a financial or political interest in climate change alarmism, it becomes clear that the variance and uncertainty in climate modeling is even higher than the IPCC report indicates.[25] It is clear that various models yield dramatically different results. Explaining the details is beyond the scope of this letter and my current competence. It is also beyond the ability of the NCUA and credit union managements.

The results of any given model will depend on what assumptions or guesses the modeler makes regarding these many highly uncertain issues. The SEC, in its proposed rule, provides literally no

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[21] See, for instance, Byron A. Steinman, Michael E. Mann and Sonya K. Miller, "Atlantic and Pacific Multidecadal Oscillations and Northern Hemisphere Temperatures," *Science*, February 27, 2015, Vol. 347, Issue 6225, pp 988-991, https://science.sciencemag.org/content/347/6225/988#aff-1 and Joseph Majkut, "Climbing the Staircase of Global Warming," Niskanen Center, July 27, 2016, https://www.niskanencenter.org/climbing-staircase-global-warming/ .

[22] *Climate Change 2014 Synthesis Report*, Intergovernmental Panel on Climate Change https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf See, for example, "The Representative Concentration Pathways," (p. 57); "Box 2.3, Models and Methods for Estimating Climate Change Risks, Vulnerability and Impacts," (pp. 58-59); "Table 2.1, Projected Change in Global Mean Surface Temperature and Global Mean Sea Level Rise for the Mid- and Late 21st Century, Relative to the 1986–2005 Period," (p. 60); "Cumulative Total Anthropogenic CO2 Emissions from 1870 (GtCO2)," (p. 63); "Table 2.2, "Cumulative Carbon Dioxide (CO2) Emission Consistent with Limiting Warming to Less than Stated Temperature Limits at Different Levels of Probability, Based on Different Lines of Evidence," (p. 64). The updated sixth version of the Synthesis Report is due for release in the Fall of 2022.

[23] Justin Ritchie and Hadi Dowlatabadi, "Why Do Climate Change Scenarios Return to Coal?" *Energy*, December 2017, Vol. 140, Part 1, pp 1276-1291, https://www.sciencedirect.com/science/article/abs/pii/S0360544217314597.

[24] Roger Pielke and Justin Ritchie, "Systemic Misuse of Scenarios in Climate Research and Assessment," April 21, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581777.

[25] Steven E. Koonin, *Unsettled: What Climate Science Tells Us, What It Doesn't, and Why It Matters*, Chapter 4, "Many Muddled Models," (Dallas, TX: BenBella Books, 2021); Bjorn Lomborg, *False Alarm: How Climate Change Panic Costs Us Trillions, Hurts the Poor, and Fails to Fix the Planet*, (New York: Basic Books, 2020); Pat Michaels and Chip Knappenberger, *Lukewarming: The New Climate Science that Changes Everything*, (Washington: Cato Institute, 2016); Benjamin Zycher, Resident Scholar, American Enterprise Institute, Statement before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Hearing on the "21st Century Economy: Protecting the Financial System from Risks Associated with Climate Change" March 18, 2021 https://www.banking.senate.gov/imo/media/doc/Zycher%20Testimony%203-18-21.pdf; Kevin Dayaratna, Ross McKitrick and David Kreutzer, "Empirically Constrained Climate Sensitivity and the Social Cost of Carbon," *Climate Change Economics*, Vol. 8, No. 2, 2017, pp. 1-12 https://econpapers.repec.org/article/wsiccexxx/v_3a08_3ay_3a2017_3ai_3a02_3an_3as2010007817500063.htm; Ross McKitrick and John Christy, "A Test of the Tropical 200- to 300-hPa Warming Rate in Climate Models," *Earth and Space Science*, September 2018, https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2018EA000401; Roger Pielke and Justin Ritchie, "How Climate Scenarios Lost Touch With Reality," *Issues in Science and Technology*, Summer 2021, https://issues.org/climate-change-scenarios-lost-touch-reality-pielke-ritchie/; Zeke Hausfather , Kate Marvel , Gavin A. Schmidt , John W. Nielsen-Gammon and Mark Zelinka, "Climate Simulations: Recognize the 'Hot Model' Problem," *Nature* https://www.nature.com/articles/d41586-022-01192-2.

guidance on these issues. Neither has the Federal Reserve in its 'principles.'[26] Neither have the DoD, GSA or NASA. Call me a pessimist, but I doubt the NCUA is going to do better. But if the NCUA adopts a rule without providing meaningful guidance to those it regulates, like these agencies have done, where does that leave the credit unions who do not have means to deal with all of this. In contrast, large banks, large investment banks or large public companies can at least spend a few tens of millions of dollars each to put together models, guestimates and analysis that appear plausible and that their regulators cannot improve upon.

As mentioned above, the request for information states that:

> Climate change is accelerating and the number—and cost—of climate-related natural disasters is rising. The economic effects of these events are clear.

It goes on to state:

> Each year, natural disasters like hurricanes, wildfires, droughts, and floods impose a substantial financial toll on households and businesses alike. The physical effects of climate change along with associated transition costs pose significant risks to the U.S. economy and the U.S. financial system.

It goes on and on in this vein.

All of this is not clear. It is not obvious. And it is not documented. Once you past weasel words like 'significant' and try to attach actual numbers to actual estimates it is an extraordinarily complex morass.

For example, in contrast to the assertions in the NCUA's RFI, the National Oceanic and Atmospheric Administration, which presumably knows a bit more about climate change than the NCUA, stated this year:

> There is disagreement among the few published analyses on whether U.S. hurricane damage, when normalized by temporal changes in exposed wealth, has increased since 1900. However, these studies agree that increases in population and wealth, including the value of built infrastructure in hurricane-prone regions, are dominant over hurricane changes in explaining the increase over the past century in annual economic damage from U.S. landfalling hurricanes.[27]

Ergo, the factual predicate of the entire RFI is, at best, highly questionable. Who is a poor credit union manager to believe. The NCUA or NOAA?

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[26] "Principles for Climate-Related Financial Risk Management for Large Financial Institutions," The Board of Governors of the Federal Reserve System, Notice and Request for Comment, *Federal Register*, Vol. 87, No. 235, December 8, 2022, pp. 75267-75271 https://www.govinfo.gov/content/pkg/FR-2022-12-08/pdf/2022-26648.pdf.

[27] State of the Science, Fact Sheet, Atlantic Hurricanes and Climate Change, National Oceanic and Atmospheric Administration, May 2023 https://sciencecouncil.noaa.gov/wp-content/uploads/2023/05/1.1_SOS_Atlantic_Hurricanes_Climate.pdf .

Does the NCUA really think that it is in the public interest to drag every credit union in the country into this morass and make climate change related financial risk, such as it is, central to examinations? Should the NCUA impose massive costs on credit unions so that they can guess the impact of climate change on their operations years into the future. I do not think so. The NCUA should exercise its independence from the Biden administration. For the sake of credit unions and those that use them, it should just stay out of this mess.

Any Proposed Rule Will Not Have a Meaningful Impact on Climate Change

Any NCUA proposed rule would have somewhere between either a vanishingly small or no effect on actual greenhouse gas emissions or climate change. *Entirely eliminating* net U.S. emission would reduce global temperatures by only 0.2 degrees Celsius by 2100.[28] Thus, as a practical matter, no NCUA proposed rule would have a measurable impact on global warming. Period. Full stop.

Moreover, lengthy risk scenario analyses full of amorphous, legally scrubbed language based on highly doubtful climate and economics models presented on NCUA forms are not going to have a measureable impact on emissions. Employing large number of accountants, economists, lawyers and consultants to make guesses about the impact of climate change is unlikely to materially affect either the health of credit unions, the stability of the financial system or the climate.

Federal Financial Regulation is a Poor Mechanism to Address Externalities

The economic justification for climate change regulations is that they are designed to address a negative externality. An externality is (1) a cost that is imposed on (negative externality) or (2) a benefit accorded to (positive externality) someone that is not a party to a transaction or not engaged in an action. There are countless positive and negative externalities all around us. Air pollution is a typical example of a negative externality.

There are many ways to address negative externalities. Improved property rights,[29] tort law,[30] regulation,[31] or a tax equal to the cost involuntarily imposed by the economic actor creating the externality on those "external" to the transaction.[32] A tax subsidy for politically favored interests

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[28] Kevin D. Dayaratna, Katie Tubb, and David Kreutzer, "The Unsustainable Costs of President Biden's Climate Agenda," Heritage Foundation Backgrounder No. 3713, June 16, 2022 https://www.heritage.org/sites/default/files/2022-06/BG3713_0.pdf ("eliminating all U.S. emissions would reduce global temperatures by less than 0.2 degrees Celsius by 2100." This result is obtained using a clone of the National Energy Model System 2021 Full Release (NEMS) used by the Energy Information Administration (EIA) in the Department of Energy.). See also Comment Letter of Benjamin Zycher, American Enterprise Institute to the Securities and Exchange Board regarding "The Enhancement and Standardization of Climate-Related Disclosures for Investors," June 17, 2022 https://www.sec.gov/comments/s7-10-22/s71022-20132286-302818.pdf.

[29] In the case of air and water that are usually unowned resources, this is problematic. In other cases, this can be the solution, although transactions costs can impede a private solution. See Ronald H.Coase, "The Problem of Social Cost," *Journal of Law and Economics*, Vol. 3, October, 1960, pp. 1–44.

[30] The common law of nuisance and various more modern environmental torts.

[31] Most notably by the Environmental Protection Agency and state analogs.

[32] This is commonly known as a Pigouvian tax. See Arthur Cecil Pigou, *The Economics of Welfare* (1920 and various later editions); "Pigouvian Taxes," *The Economist*, August 19, 2017

with strong lobbies would be fairly far down the list of efficacious means of addressing the problem of negative externalities but there are many provisions in the Internal Revenue Code with this purpose. To achieve the desired effect, the policy designed to address the externality must be calibrated to accurately internalize the actual cost of the externality. This requires estimating the costs imposed by the externality and imposing costs in an equal and off-setting amount on the economic actor in question. Detailed scientific, cost and market information must be obtained to get this even close to right.[33]

Trying to achieve this result through financial regulations is comparable to trying to score in basketball by bouncing the ball off the floor and then the backboard. It is theoretically possible, but there is a vanishingly small chance that it will achieve the desired result. And any team that tried that on a regular basis would lose. Similarly, federal financial regulations are not the place to do environmental regulation.

The United States does have an Environmental Protection Agency. Its mission is to police externalities. It already requires GHG emissions reporting.[34] The EPA estimates that the required reporting under their rule covers 85–90% of all GHG emissions from over 8,000 facilities in the United States.[35] Policing externalities directly using an agency that has actual expertise on the subject matter is much more efficacious than the procurement bank shot approach.

The Safety and Soundness of Credit Unions will be Imperiled by a Climate Change Rule

Regulatory compliance costs do not increase linearly with size. Thus, high regulatory compliance costs accord a competitive advantage to large institutions. And the various climate related financial risk regulations impose unprecedented costs. The SEC rule, for example, would quadruple the cost of being a public company (using the SEC's own estimates).[36]

Adopting any rulemaking that dramatically increases the costs of operating credit unions will imperil their safety and soundness. It will make them less competitive vis a vis large banks. It will reduce their operating margins and force them to either raise interest rates on loans or pay less on deposits. If the costs imposed bear any resemblance to what the SEC or the

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https://www.economist.com/news/economics-brief/21726709-what-do-when-interests-individuals-and-society-do-not-coincide-fourth.

[33] See David R. Burton, "Post Tax Reform Evaluation of Recently Expired Tax Provisions," Testimony before The Committee on Ways and Means, Subcommittee on Tax Policy, United States House of Representatives, March 14, 2018 https://www.heritage.org/testimony/post-tax-reform-evaluation-recently-expired-tax-provisions.

[34] Greenhouse Gas Reporting Program (GHGRP) https://www.epa.gov/ghgreporting/ghgrp-reported-data.

[35] Proposing release at p. 21414.

[36] The original proposing release estimated that the climate change rule would *triple* issuer costs. This has since been revised upwards. See Mark T. Uyeda, Commissioner, U.S. Securities and Exchange Commission, "Remarks at the 2022 Cato Summit on Financial Regulation," November 17, 2022, https://www.sec.gov/news/speech/uyeda-remarks-cato-summit-financial-regulation-111722; Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission, "It's Not Just Scope 3: Remarks at the American Enterprise Institute," December 7, 2022, https://www.sec.gov/news/speech/peirce-remarks-american-enterprise-institute-120722; comment letter from David R. Burton to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, "Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors [File No. S7-10-2; Release No. 33-11042; RIN 3235-AM87]," June 17, 2022, https://www.sec.gov/comments/s7-10-22/s71022-20131980-302443.pdf.

DoD/GSA/NASA have proposed, these effects will be dramatic and credit unions across the country will start to fail.

This is diametrically opposed to the NCUA mission.

The Political Allocation of Capital has High Social Costs

The entire Biden administration/FSOC climate related financial risk initiative is designed to direct capital away from fossil fuel production and distribution by treating fossil fuel loans and investments as risky while treating alternative energy source loans and investments as less risky. The opposite is true but financial institutions will be pressured by regulators to make inferior quality loans in compliance with financial and procurement regulations relating to climate related financial risk.

Two things will happen. First, these low quality loans and investments will disproportionately default or fail since they are uneconomic and politically motivated. Second, the economy will become marked less efficient as capital is allocated to less efficient, uneconomic investments. The Germans (formerly a European manufacturing powerhouse) are experiencing the impact of this folly now.

The Social Costs of ESG

The broader social costs associated with ESG requirements (including climate change disclosure requirements, risk analysis, capital allocation requirements and so on) can, in principle, be quantified. This section provides an analytical framework that may be useful in analyzing the social welfare costs of ESG requirements.

To the extent ESG objectives are not pursued by businesses for the purpose of making a profit, $R > R_{ESG/CSR}$, where R is the rate of return on investment in the absence of ESG, CSR, sustainability requirements, diversity requirements, or stakeholder theory implementation, and $R_{ESG/CSR}$ is the rate of return after implementation of those requirements. The difference, $R - R_{ESG/CSR}$, is economically analogous to a tax. It is a reduction in return due to the pursuit of ESG objectives. Thus, $R - R_{ESG/CSR} = Tax_{ESG/CSR}$. This means that various techniques used in public finance to analyze the social welfare impact of taxes may be used to quantitatively analyze the social welfare cost of these provisions (i.e., $Tax_{ESG/CSR}$).

A tax has an excess burden or deadweight loss that can be calculated.[37] By introducing a wedge ($Tax_{ESG/CSR}$) between, in this case, the gross return and the net return, ESG/CSR reduces the size of the capital market and therefore output and employment. In a well-functioning market, the price of a capital asset should be equal to the present value of the expected future income stream

[37] Arnold C. Harberger, "The Incidence of the Corporation Income Tax," *Journal of Political Economy* (June 1962), pp. 215–240; Alan J. Auerbach and James R. Hines, "Taxation and Economic Efficiency," in Martin Feldstein and A. J. Auerbach, eds., *Handbook of Public Economics* (Amsterdam: North Holland, 2002); and John Creedy, "The Excess Burden of Taxation and Why It (Approximately) Quadruples When the Tax Rate Doubles," New Zealand Treasury *Working Paper* No. 03/29, December 2003, https://treasury.govt.nz/sites/default/files/2007-10/twp03-29.pdf. See also, for example, N. Gregory Mankiw, *Principles of Economics*, 4th ed. (Boston: Cengage Learning, 2006), chapter 8 (or many other textbooks on price theory, microeconomics, or principles of economics).

generated by the asset net of taxes and depreciation.[38] Introducing a new tax (in this case $Tax_{ESG/CSR}$) would reduce the expected future income stream, and therefore, the price of the asset. It would also cause investment to flow out of the affected sector or jurisdiction.

Who bears the actual economic burden of the corporate income tax is an open question.[39] The analysis of who bears the burden of $Tax_{ESG/CSR}$ would be the same. One thing is certain: It cannot be corporations. A corporation is a legal fiction, and legal fictions do not pay taxes—people pay taxes. The corporate tax could be borne by corporate shareholders in the form of lower returns;[40] owners of all capital (again in the form of lower returns);[41] corporate customers in the form of higher prices;[42] or employees (in the form of lower wages).[43] It is, almost certainly, some combination of these.[44] The economics profession has changed its thinking on this issue several

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[38]See Robert E. Hall and Dale Jorgenson, "Tax Policy and Investment Behavior," *American Economic Review*, Vol. 57, No. 3 (June 1967), pp. 391–414. This section covers the basic user cost of capital analysis with taxes. See also Dale W. Jorgenson, *Investment: Capital Theory and Investment Behavior* (Cambridge, MA: MIT Press, 1996), and John Creedy and Norman Gemmell, "Taxation and the User Cost of Capital: An Introduction," New Zealand Treasury *Working Paper* No. 04/2015, March 2015, https://www.wgtn.ac.nz/cpf/publications/pdfs/2015-pubs/WP04_2015_Taxation-and-User-Cost.pdf.

[39]In the economics literature, this question is usually phrased as, "What is the incidence of the corporate income tax?"

[40]Government estimators are among the few who cling to the view that shareholders bear most of the burden. Joint Committee on Taxation, "Modeling the Distribution of Taxes on Business Income," JCX–14–13, October 16, 2013, https://www.jct.gov/publications.html?func=download&id=4528&chk=4528&no_html=1 (25 percent labor), and Julie Anne Cronin et al., "Distributing the Corporate Income Tax: Revised U.S. Treasury Methodology," *National Tax Journal*, March 2013, https://www.ntanet.org/NTJ/66/1/ntj-v66n01p239-62-distributing-corporate-income-tax.pdf (18 percent labor).

[41]The non-corporate sector can be affected because competition will eventually cause wages, prices, and after-tax returns in the corporate *and* non-corporate sectors to be the same. For a more detailed explanation, see Arnold C. Harberger, "The Incidence of the Corporation Income Tax," *Journal of Political Economy*, Vol. 70, No. 3 (June 1962), pp. 215–240.

[42]The focus of the economics profession to date has been almost exclusively the impact on capital and labor rather than customers.

[43]Arnold C. Harberger, "The ABCs of Corporation Tax Incidence: Insights into the Open-Economy Case," in *Tax Policy and Economic Growth* (Washington, DC: American Council for Capital Formation, 1995); Arnold C. Harberger, "The Incidence of the Corporation Income Tax Revisited," *National Tax Journal*, Vol. 61, No. 2 (June 2008), pp. 303–312, http://www.ntanet.org/NTJ/61/2/ntj-v61n02p303-12-incidence-corporation-income-tax.pdf; Matthew H. Jensen and Aparna Mathur, "Corporate Tax Burden on Labor: Theory and Empirical Evidence," *Tax Notes*, June 6, 2011, https://www.aei.org/wp-content/uploads/2011/06/Tax-Notes-Mathur-Jensen-June-2011.pdf; Kevin A. Hassett and Aparna Mathur, "A Spatial Model of Corporate Tax Incidence," American Enterprise Institute, December 1, 2010, https://www.aei.org/wp-content/uploads/2011/10/-a-spatial-model-of-corporate-tax-incidence_105326418078.pdf; Robert Carroll, "The Corporate Income Tax and Workers' Wages: New Evidence from the 50 States," Tax Foundation *Special Report* No. 169, August 3, 2009, https://taxfoundation.org/corporate-income-tax-and-workers-wages-new-evidence-50-states/; Desai Mihir, Fritz Foley, and James Hines, "Labor and Capital Shares of the Corporate Tax Burden: International Evidence," December 2007, http://piketty.pse.ens.fr/files/Desaietal2007.pdf; and "Why Do Workers Bear a Significant Share of the Corporate Income Tax?" in Jason J. Fichtner and Jacob M. Feldman, "The Hidden Cost of Federal Tax Policy," 2015, https://www.mercatus.org/system/files/Fichtner-Hidden-Cost-ch4-web.pdf. For a contrary view, see Kimberly A. Clausing, "In Search of Corporate Tax Incidence," *Tax Law Review*, Vol. 65, No. 3 (2012), pp. 433–472, http://ssrn.com/abstract=1974217.

[44]It requires extreme, implausible assumptions about elasticities of demand for, or supply of, factors for this not to be the case. Alan J. Auerbach, "Who Bears the Corporate Tax? A Review of What We Know," National Bureau of Economic Research *Working Paper* No. 11686, October 2005, http://www.nber.org/papers/w11686.pdf; William M. Gentry, "A Review of the Evidence on the Incidence of the Corporate Income Tax," Department of the Treasury,

times over the past four decades, but the latest —and highly plausible —consensus is that workers probably bear *more than half* of the burden of the corporate income tax because capital is highly mobile.[45] Labor's share of the corporate tax burden is potentially as high as three-quarters.[46] Shareholders (investors) probably bear most of the remainder.[47] Initially (i.e., in the short run), the impact on shareholder returns would be greater. Adjustments take time. In the long run, ESG requirements ($Tax_{ESG/CSR}$) would have a disproportionately negative impact on labor due to capital factor mobility.

The NCUA's Authority

In *West Virginia v. EPA*, the Supreme Court held that an agency must act pursuant to clear delegation of authority from Congress. In holding an exercise of regulatory power by the EPA invalid, the court wrote:

> Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme.[48]

This is an affirmation of a line of cases that the NCUA needs to heed. It cannot go too far down the climate change, environmental regulation path without considering limits on its statutory authority. Otherwise, any proposed rule will be successfully challenged in court.

In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court, granting *Chevron* deference to the agency, found that the Food and Drug Administration did not have authority to regulate tobacco.

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning - or ambiguity - of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore

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Office of Tax Analysis, *OTA Paper* No. 101, December 2007, https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-101.pdf; and Stephen J. Entin, "Tax Incidence, Tax Burden, and Tax Shifting: Who Really Pays The Tax?" Heritage Foundation *Center for Data Analysis Report* No. 04–12, November 5, 2004, http://s3.amazonaws.com/thf_media/2004/pdf/cda04-12.pdf.

[45]In a competitive market, capital will flow from jurisdictions with a relatively low expected after-tax return to jurisdictions with a relatively high expected after-tax return until the expected after-tax returns are equal. Social and legal barriers reduce labor mobility relative to capital mobility. Gentry, "A Review of the Evidence on the Incidence of the Corporate Income Tax"; William C. Randolph, "International Burdens of the Corporate Income Tax," Congressional Budget Office *Working Paper* 2006–09, August 2006, https://cbo.gov/sites/default/files/cbofiles/ftpdocs/75xx/doc7503/2006-09.pdf; and R. Alison Felix, "Passing the Burden: Corporate Tax Incidence in Open Economies," Federal Reserve Bank of Kansas City, October 2007, https://www.kansascityfed.org/Publicat/RegionalRWP/RRWP07-01.pdf.

[46]Ibid.

[47]As opposed to non-corporate capital and customers.

[48] Slip Opinion at p. 18.

> interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole." Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.[49] (citations omitted)

If the proposed rule is of "great economic and political magnitude," then it is likely to be ruled invalid since there is no authority for a rule governing climate-related financial risk in any of the statutes. But imposing vast costs on credit unions to assess risks that are both immaterial (in the traditional sense), unauthorized by statute and have as the true aim allocating capital away from fossil fuels, will likely to be found by the court of be great economic and political magnitude.

In *FDA v. Brown & Williamson Tobacco Corp.*, the court also wrote that:

> By no means do we question the seriousness of the problem that the FDA has sought to address. The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. Nonetheless, no matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."[50] (citations omitted)

Thus, a court can accept the importance of climate change and even accept the much more questionable proposition that an NCUA rule would have meaningful climate change mitigation affects or other benefits that exceed its costs and yet it still must find that the statutes governing the NCUA do not authorize it to regulate in the manner that is being contemplated.

Similarly, in *NAACP v. FPC*, 425 U.S. 662 (1976) the Supreme Court held that the Federal Power Board did not have the authority to prohibit discriminatory employment practices.

> The parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation. The use of the words "public interest" in the Gas and Power Acts is not a directive to the Board to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates. … The Federal Power Board is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees

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[49] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000).
[50] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

only insofar as such consequences are directly related to the Board's establishment of just and reasonable rates in the public interest."[51]

In *NFIB v. OSHA*,[52] the Supreme Court granted a stay enjoining OSHA from imposing vaccine mandates on employees because OSHA does not have the authority to do so under its authorizing statute.

> Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.[53]

In this case, there is no such "clear grant of authority from Congress" to the NCUA to be an environmental regulator.

The real purpose of the any such rule is to further the Biden administration climate agenda. This is environmental regulation masquerading as financial regulation, and everyone knows it. The primary impact of any such rule will not be to improve the safety and soundness of credit unions (the opposite actually) nor to mitigate climate change, but to enrich the climate-industrial complex – the bevy of lawyers, accountants, consultants and NGOs that live off of climate change complexity.

Many Such Proposed Rules Violate the Private Non-Delegation Doctrine

Many such proposed rules violate the private non-delegation doctrine which is grounded both in the Fifth Amendment Due Process Clause and the Vesting Clauses. The DoD/GSA/NASA rule is the clearest example.

Discussing the Supreme Court's private non-delegation doctrine in another context, Heritage Foundation Legal Research Fellow Paul Larkin wrote:

> The Fifth Amendment Due Process Clause ensures that the actors in each department cannot evade the Framers' carefully constructed regulatory scheme by delegating their federal lawmaking power to unaccountable private parties, individuals beyond the direct legal and political control of superior federal officials and the electorate. That is, the due process requirement that federal government officials act pursuant to "the law of the land" when the life, liberty, or property interests of the public are at stake prohibits the officeholders in any of those branches from delegating lawmaking authority to private parties who are

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[51] *NAACP v. FPC*, 425 U.S. 662, 670-671 (1976).
[52] *NFIB v. OSHA,* 595 U. S. ____ (2022) https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.
[53] Op. Cit., p. 4.

> neither legally nor politically accountable to the public or to the individuals whose conduct they may regulate.[54]

In *Carter v. Carter Coal Co.*,[55] the Supreme Court invalidated a law that granted a majority of coal producers and miners in a given region the authority to impose maximum hour and minimum wage standards on all other miners and producers in that region. The Court found that the law was "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[56]

That is precisely what the DoD, GSA and NASA did in their proposed rule.[57] Whatever the NCUA does, it should not go down this particular path. The Task Force on Climate-Related Financial Disclosures (TCFD) is an opaque private organization governed by those who have a major financial interest in creating complex climate regulations so they can profit by billions of dollars from the promulgation and implementation of their rules. Michael Bloomberg is the Chairman of the TCFD and it is composed of 31 individuals who work for private organizations. Most of these organizations have a financial interest in furthering complex climate change financial disclosure rules. Alternatively, the individual's position depends on the existence of such rules. None of the due process, regulatory process or transparency protections associated with government exist with respect to the TCFD.

The proposing agencies have made an impermissible delegation when the proposed rule requires compliance with TCFD's rules.[58] The proposing agencies cannot eschew the hard work of

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[54] Paul J. Larkin, Jr., "The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking," *Harvard Journal of Law & Public Policy*, Vol. 38, No. 1 (2015), pp. 416-417 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556440.

[55] 298 U.S. 238 (1936).

[56] 298 U.S. 238, 311 (1936).

[57] See, e.g., proposed 8 CFR 23.XX02(1):

> Annual climate disclosure means an entity's set of disclosures that—
>
> (1) Aligns with—
>
> (i)The 2017 Recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) (see https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf), which cover governance, strategy, risk management, and metrics and targets (see figure 4 of the 2017 recommendations for an outline of disclosures); and
> (ii) The 2021 TCFD Annex: Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures, which includes updates to reflect the evolution of disclosure practices, approaches, and user needs (see https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf)

[58] See proposed 8 CFR 23.XX02(1):

Annual climate disclosure means an entity's set of disclosures that—

(1) Aligns with—

actually drafting rules by outsourcing them to Michael Bloomberg's TCFD. Neither can the NCUA.

Doing so is not only unconstitutional but violates the Administrative Procedure Act and other administrative law provisions governing the rulemaking process because the proposing agencies cannot evade the APA and other administrative law requirements by outsourcing the rule making to a private entity.[59]

In *Department of Transportation v. Association of American Railroads*,[60] the Court held that Amtrak was a government agency rather than a private corporation, *ergo* the private non-delegation doctrine did not apply. In their concurrences, both Justice Alito and Justice Thomas discussed at length the private non-delegation doctrine and its applicability were Amtrak deemed a private corporation since, in their view, it is.

Justice Alito: The principle that Congress cannot delegate away its vested powers exists to protect liberty.[61] … When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative powers."[62]

Justice Thomas: Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called "private nondelegation doctrine" flows logically from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the "private nondelegation doctrine" is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private. For this reason, a conclusion that Amtrak is private—that is, not part of the Government at all—would necessarily mean that it cannot exercise these three categories of governmental power.[63]

Since TCFD is a private entity and governed entirely by private persons not government officials, the private non-delegation doctrine clearly applies. The delegation of rule-making power by the proposing agencies to the TCFD is unlawful.

(i)The 2017 Recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) (see https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf), which cover governance, strategy, risk management, and metrics and targets (see figure 4 of the 2017 recommendations for an outline of disclosures); and
(ii) The 2021 TCFD Annex: Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures, which includes updates to reflect the evolution of disclosure practices, approaches, and user needs (see https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf).

[59] They certainly cannot do so without explicit Congressional authorization such as occurs with certain so-called self-regulatory organizations in a financial regulation context (e.g. the Financial Industry Regulatory Authority). This is explicitly authorized by statute *and* the SRO rules must be approved by a government agency (the SEC in the case of FINRA) in order to take effect. No such Congressional authorization or agency approval process is present in the DoD/GSA/NASA rule.

[60] 575 U. S. 43, 135 S. Ct. 1225 (2015).

[61] Id. at p. 61.

[62] Id. at p. 62.

[63] Id. at p. 87-88.

Compelled Speech

The Supreme Court has applied strict scrutiny to content-based laws. Compelled speech is generally unconstitutional.[64] While businesses, thankfully,[65] have First Amendment rights,[66] they are more limited than those of natural persons.

The Supreme Court noted in *National Institute of Family and Life Advocates v. Becerra* (2018)[67] that it

> … has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose ***factual, noncontroversial information*** in their "commercial speech. Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. (emphasis added) (citations omitted) [68]

The court continued:

> Outside of the two contexts discussed above — disclosures under Zauderer and professional conduct — this Court's precedents have long protected the First Amendment rights of professionals. … Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields.[69]

For example, the DC Court of Appeals recently explicated what the term "controversial" means in the context of ruling the SEC conflict minerals rule unconstitutional. That analysis is on point and, in fact, directly mentions the question of global warming disclosures.

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[64] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.") 319 U. S. 624, 642 (1943).

[65] Since most of media are corporately owned, holding otherwise would eviscerate the First Amendment.

[66] See, e.g., *Citizens United v. Federal Election Board*, 558 U.S. 310 (2010) ("The Court has recognized that First Amendment protection extends to corporations."). See also the many cases cited therein.

[67] *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___ (2018), 138 S. Ct. 2361; 201 L. Ed. 2d 835. See slip opinion at pp. 8-9 https://www.supremecourt.gov/opinions/17pdf/16-1140_5368.pdf.

[68] Citations omitted to *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U. S. 229, 250 (2010); *Ohralik v. Ohio State Bar Assn*., 436 U. S. 447, 455–456 (1978), *id*., at 456; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 884 (1992) (opinion of O'Connor, KENNEDY, and Souter, JJ.)."

[69] *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___ (2018). See slip opinion at pp. 11-12, 13 https://www.supremecourt.gov/opinions/17pdf/16-1140_5368.pdf.

> One clue is that "uncontroversial," as a legal test, must mean something different than "purely factual." Hence, the statement in AMI we just quoted, describing "controversial in the sense that [the compelled speech] communicates a message that is controversial for some reason other than [a] dispute about simple factual accuracy." AMI, 760 F.3d at 27. Perhaps the distinction is between fact and opinion. But that line is often blurred, and it is far from clear that all opinions are controversial. Is Einstein's General Theory of Relativity fact or opinion, and should it be regarded as controversial? If the government required labels on all internal combustion engines stating that "USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING" would that be fact or opinion? It is easy to convert many statements of opinion into assertions of fact simply by removing the words "in my opinion" or removing "in the opinion of many scientists" or removing "in the opinion of many experts."[70] (Capital letter emphasis in original)

> It [the conflict minerals rule] requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that `message' through `silence.' See Hurley, 515 U.S. at 573, 115 S.Ct. 2338. By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.[71]

The NCUA must avoid imposing requirements that constitute impermissible compelled speech. Compelled climate disclosures may well be held to do so.

The NCUA should be as Skeptical of the Climate Lobby as They Would be of any Other Lobby.

Politics should be stripped of its romance. The climate-industrial complex is a big business. Notwithstanding its daily protestations, the climate lobby acts in its own interest not the public interest. The SEC, for example, in its proposing release, Paperwork Reduction Act Table 4, estimates that $6.4 billion annually will flow to the economists, accountants, attorneys, compliance officers, consultants, "GHG emissions attestation providers" and NGOs that will live off of the SEC's proposed rule.[72] That is a lot of money, particularly from one rule. Once the rules being considered by other financial regulators are considered, and the proposed procurement rule, it will be a large multiple of that amount – many tens of billions. European Union rules are a source of still more money. These actors are a potent lobby for adopting climate-related rules because they profit to the tune of billions of dollars from the adoption of these rules. The NCUA should be under no illusion about what is going on here. Financial and procurement regulation is a profit center for the climate lobby.

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[70] *National Association of Manufacturers v. S.E.C.*, 800 F.3d 518, 528 (D.C. Cir., 2015).
[71] Ibid. at p. 529.
[72] See PRA Table 4 at p. 21461 of "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Securities and Exchange Board, Proposed Rule, Federal Register, Vol. 87, No. 69, April 11, 2022, pp. 21334-21473 https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf.

Response to Specific Requests for Information and Comment

Physical Risk

1. Q. Climate-related events, including floods, sea level rise, hurricanes, winds, wildfires, and drought, may affect credit union operations (for example, office buildings, supply chain); commercial and residential real estate; agricultural, commercial, and industrial lending; and small business lending. What climate-related physical risks, if any, are affecting the industry? How might physical risks and the impact of these risks on credit unions and their members change over time?

   A. These matters will typically be handled under conventional risk management. Property used as collateral should be insured. Risks should be diversified. Climate related risk is one risk among many and is almost always a much lower and more distant risk than other more conventional risks.

2. Q. What risk management strategies could institutions implement to prepare for or minimize the effects of physical risk? Is there anything regulators should do to help institutions address physical risks?

   A. Regulators should not treat climate related risk as 'special.' It is not. It is one risk among many and is typically a much smaller risk than other risks.

3. Q. What impact are physical risks expected to have on credit union members, particularly financially vulnerable populations, including lower-income communities, communities of color, Native American, and other under-resourced communities? What steps could credit unions take to mitigate physical risks to ensure continued lending to these populations?

   A. Lower income populations are not typically purchasing, for example, beach front properties that may have a higher risk of being damaged by a hurricane. Although this is a nice progressive talking point, I am aware of no *actual evidence* that "financially vulnerable populations" bear a disproportionate risk from "climate related financial risk." The opposite is almost certainly true.

   However, lower income populations will affirmatively be hurt if the NCUA goes down the SEC or DoD path and imposes massive costs on credit unions. Credit unions will then be forced to charge higher interest rates on loans and pay lower interest rates on deposits and many credit unions will become financially imperiled.

Transition Risk

4. Q. Transition risks from climate change can come from government policy changes, including changes to zoning laws; other federal, state and local laws and regulations; technological changes; and consumer and market demand. What climate-related

transition risks are affecting or could affect credit unions in the various areas of business activities, including, but not limited to, operations, real estate lending, commercial lending, and small business lending?

A. The biggest transition risk that credit unions face is from the NCUA. The NCUA could radically increase their operating costs. Of course, the NCUA should not do that.

5. Q. What risk management strategies could credit unions implement to prepare for or minimize the effects of transition risk? Is there anything regulators can do to help credit unions address transition risk?

   A. The most effective thing that credit union managements could do is to communicate that the last thing they need is to have their compliance costs increased by a factor of two or three by the NCUA. Of course, some credit union managements will be reluctant to do that for political reasons or because they do not understand the economics of climate change or climate science any better than the NCUA or other regulators appear to.

6. Q. What effects are transition risks expected to have on credit union members, particularly financially vulnerable populations, including lower-income communities, communities of color, Native American, and other under-resourced communities? What steps could credit unions take to mitigate transition risks to ensure continued lending to these populations?

   A. The biggest transition risk that credit unions face is from the NCUA. The NCUA could radically increase their operating costs. Of course, the NCUA should not do that. Lower income populations will affirmatively be hurt if the NCUA goes down the SEC or DoD path and imposes massive costs on credit unions. Credit unions will then be forced to charge higher interest rates on loans and pay lower interest rates on deposits and many will become financially imperiled.

Operations

7. Q. What adjustments should credit unions make to their operations (including relationships with supply chain and third parties, new product and service offerings, among others) in response to climate-related financial risks?

   A. Any adjustments should be based on an assessment of material financial risks. Climate related risk is one among many and typically of much less importance than other risks.

Governance

8. Q. What role should a credit union's board of directors have in the oversight and analysis of financial risks due to climate change?

   A. The Board of Directors should assess material financial risks. It should ensure that the credit union’s risks are diversified. It should ensure that elementary risk abatement

strategies are pursued (e.g. the insurance of properties used as collateral). Climate related risk is one among many and typically of much less importance than other risks. The Board should not be influenced by political considerations to treat lesser climate-related risks as more important than other more important conventional risks.

9. Q. How can credit unions incorporate climate-related financial risks into their overall risk management and governance framework?

   A. Credit unions should assess material financial risks. They should ensure that their risks are diversified. They should ensure that elementary risk abatement strategies are pursued (e.g. the insurance of properties used as collateral). Climate related risk is one among many and typically of much less importance than other risks. Credit unions should not be influenced by political considerations to treat lesser climate-related risks as more important than other more important conventional risks.

10. Q. Do credit unions have board members, committees, or senior management functions that are responsible for climate-related financial risks? If yes, please provide examples.

    A. Not applicable.

11. Q. What are the top barriers/challenges for credit unions in designating board members, committees, and/or senior management functions to be responsible for climate-related financial risks?

    A. Politics. Climate-related risks are one among many and typically of much less importance than other risks. Treating climate-related risks as special, when they are not, will lead to mistaken risk assessments.

12. Q. Do credit union boards and senior management have, or are they aware of and have an understanding of, the tools and resources necessary to evaluate and address climate-related financial risk? What, if any, are other barriers for addressing climate-related financial risks?

    A. Generally, no. Climate science and the economic analysis of climate change is highly complex and highly uncertain. Neither credit unions nor the NCUA have expertise on the subject.

Business Strategies

13. Q. How should credit unions consider climate-related financial risks in developing business strategies? How do these risks impact product and service offerings?

    A. Credit unions should assess material financial risks. They should ensure that their risks are diversified. They should ensure that elementary risk abatement strategies are pursued (e.g. the insurance of properties used as collateral). Climate related risk is one among many and typically of much less importance than other risks. Credit unions should not be

influenced by political considerations to treat lesser climate-related risks as more important than other more important conventional risks.

14. Q. In what ways may credit unions need to incorporate climate-related financial risks into business strategies and product and service offerings?

    A. Credit unions should assess material financial risks. They should ensure that their risks are diversified. They should ensure that elementary risk abatement strategies are pursued (e.g. the insurance of properties used as collateral). Climate related risk is one among many and typically of much less importance than other risks. Credit unions should not be influenced by political considerations to treat lesser climate-related risks as more important than other more important conventional risks.

15. Q. If you are a credit union, has your board and management assessed the impact of climate change on the credit union's products and services? If yes, please briefly describe how you have assessed the impact of climate change on your credit union's products and services.

    A. Not applicable.

16. Q. What barriers or challenges do credit unions face in considering climate change in business strategies and product offerings? Does your board or senior management believe climate change is a material risk to the credit union's business?

    A. Not applicable.

17. Q. Do credit unions have sufficient expertise or are they aware of and have an understanding of the tools and resources necessary to address the financial risks and opportunities associated with climate change and their impact on credit union performance? Do you think considering climate-related financial risks may put credit unions at a competitive disadvantage?

    A. Regulatory compliance costs do not increase linearly with size. Thus, high regulatory compliance costs accord a competitive advantage to large institutions. And the various proposed climate related financial risk regulations would impose unprecedented costs. The SEC rule, for example, would quadruple the cost of being a public company (using the SEC's own estimates).

    Adopting any rulemaking that dramatically increases the costs of operating credit unions will imperil their safety and soundness. It will make them less competitive vis a vis large banks. It will reduce their operating margins and force them to either raise interest rates on loans or pay less on deposits. If the costs imposed bear any resemblance to what the SEC or the DoD/GSA/NASA have proposed, these effects will be dramatic and credit unions across the country will start to fail.

18. Q. Do credit unions take steps to assess, reduce, or mitigate its climate impact? If you are a credit union answering this question, please describe what your credit union has done. If your credit union has not taken such steps, do you plan to do so and what is your time frame? If your credit union does not plan to take such steps, please briefly describe the reason(s) for not doing so. What barriers exist that prevent your credit union from taking such steps?

    A. Not applicable.

Risk Management

19. Q. What methods can credit unions use to identify, measure, monitor, manage, and report on their exposure to climate-related financial risks? Please provide a brief description of the risk management process credit unions should take. If you are a credit union, please provide a link to your climate policy. If you are a credit union and do not have a risk management process, do you plan to develop a process? What is the anticipated time frame for developing such a process? If you do not plan to develop such a process, please explain your rationale for this decision.

    A. Credit unions should assess material financial risks. They should ensure that their risks are diversified. They should ensure that elementary risk abatement strategies are pursued (e.g. the insurance of properties used as collateral). Climate related risk is one among many and typically of much less importance than other risks. Credit unions should not be influenced by political considerations to treat lesser climate-related risks as more important than other more important conventional risks.

20. Q. Credit unions typically evaluate credit risk, interest rate risk, liquidity risk, transaction risk, strategic risk, reputation risk, and compliance risk. How do climate-related financial risks impact these traditional risk areas? To what extent should a credit union consider climate change in analyzing these and other existing risk factors?

    A. Credit unions should assess material financial risks. They should ensure that their risks are diversified. They should ensure that elementary risk abatement strategies are pursued (e.g. the insurance of properties used as collateral). Climate related risk is one among many and typically of much less importance than other risks. Credit unions should not be influenced by political considerations to treat lesser climate-related risks as more important than other more important conventional risks.

21. Q. What risk mitigation strategies can credit unions use to transfer some or all of the financial risks associated with climate change? Are these mitigation tools cost effective?

    A. Credit unions should assess material financial risks. They should ensure that their risks are diversified. They should ensure that elementary risk abatement strategies are pursued (e.g. the insurance of properties used as collateral). Climate related risk is one among many and typically of much less importance than other risks. Credit unions should not be

influenced by political considerations to treat lesser climate-related risks as more important than other more important conventional risks.

22. Q. When credit unions consider climate change in analyzing existing risk factors, should they include the risk of adverse effects of climate change on financially vulnerable populations, including lower-income communities, communities of color, Native American, and other disadvantaged or under-resourced communities? If you are a credit union, are you considering climate-related financial risks specific to financially-vulnerable populations?

    A. See answers above.

23. Q. If your credit union does not currently consider climate change in analyzing its existing risk factors, do you anticipate doing so? How long will it take to do so? If you do not plan to do so, please briefly describe your reasons or barriers.

    A. Not applicable.

24. Q. What are the top barriers for credit unions to consider (or that credit unions have encountered) in creating a risk management process for climate-related financial risks and/or including climate change in its analysis of existing risk factors? Does your board or senior management not consider climate change as posing a material risk to your credit union's business?

    A. Not applicable.

25. Q. What types of data or products are necessary to assist credit unions in evaluating exposure to climate-related financial risks?

    A. The answer to this question depends primarily on what rules the NCUA imposes on credit unions. Credit unions should assess material financial risks. They should ensure that their risks are diversified. They should ensure that elementary risk abatement strategies are pursued (e.g. the insurance of properties used as collateral). Climate related risk is one among many and typically of much less importance than other risks. Credit unions should not be influenced by political considerations to treat lesser climate-related risks as more important than other more important conventional risks.

    If on the other hand, the NCUA imposes destructive requirements on credit unions analogous to what the SEC, the DoD/GSA/NASA and the Federal Reserve are proposing, then at the very least the NCUA needs to explain what they actually want instead of imposing nebulous requirements and expecting credit union management and examiners to figure out what might be meant. Given the relatively small size of credit unions, the NCUA has a special obligation to write rules that provide actual guidance and not to waste credit union resources putting out voluminous reports prepared by expensive consultants.

26. Q. Do credit unions have sufficient understanding of the climate-related risk management process? Do credit unions have sufficient understanding of how climate change affects existing risk factors? Please specify any other barriers credit unions face in assessing climate-related risk.

    A. See answer above.

27. Q. If your credit union is involved in the mortgage business, what tools does your credit union use to manage flood risk? What additional tools would be helpful to your credit union?

    A. Not applicable.

Reporting and Targets

28. Q. What internal reporting systems are you aware of that would assist credit unions in evaluating climate-related financial risks? Please provide a brief description of these internal reporting systems. If provided by third parties, what are the costs of these reporting systems?

    A. Not applicable.

Climate-Related Opportunities

29. Q. Climate change and efforts to address climate change may also present new opportunities for credit unions. What products and services do credit unions offer in response to physical and transition risk (for example renewable energy loan products and services, such as loans for solar power generation or biodiesel development)? What are the top drivers for offering these products and services?

    A. The risk associated with alternative energy projects are high. Such projects generally are not economically sound but for the government subsidies which may or may not last. Credit unions and the NCUA should be wary of letting political considerations outweigh sound lending policies.

30. Q. Are you aware of credit unions or does your credit union finance clean energy projects such as residential or commercial energy efficiency upgrades and solar installations? Is this financing of clean energy products just one of many services provided by the credit union or part of an overall business strategy? If you provide clean energy products, please provide the estimated size of your clean energy portfolio and what percent it represents of your overall lending. If no, please briefly describe any challenges for credit unions to offering this type of lending. Please also discuss the barriers to underwriting clean energy loans within under-resourced communities.

    A. Not applicable.

31. Q. Each type of lending involves various areas of expertise such as underwriting, guidance for loan loss reserves, and/or technical assistance such as how to lend or acquire interest in climate-related and environmentally conscious loan products. What kind of support do credit unions need to expand products and services? Please describe any barriers to entry as well as the types of information or resources needed to facilitate a credit union's ability to offer climate-related and environmentally conscious loan products.

    A. Not applicable.

32. Q. Are there any climate-related opportunities, in addition to renewable energy, that credit unions should consider?

    A. No.

33. Q. What regulatory changes would be necessary to encourage credit unions to develop products and services designed to capitalize on opportunities presented by the transition to clean energy and a less carbon intensive economy?

    A. The last thing that the NCUA should be considering is altering the regulatory landscape to encourage credit unions to make uneconomic loans based on political considerations.

Suggestions for NCUA

34. Q. The NCUA understands that managing the financial risks of climate change is an evolving field and new to some credit unions. The NCUA is exploring several options to support credit unions in these efforts, including sharing industry best practices, providing guidance on how to manage the potential financial risks from climate change, convening workshops with the industry to discuss climate-related financial risk topics, and hosting educational seminars on how climate change may impact the financial system and individual credit unions. What efforts would be the most beneficial to credit unions?

    A. First and foremost, the NCUA should resist the temptation to further progressive political goals by forcing or encouraging credit unions to engage in uneconomic lending that will endanger their safety and soundness. Second, the NCUA should resist the temptation to impose massively expensive rules that will endanger the safety and soundness of credit unions and place them at a competitive disadvantage vis a vis large financial institutions.

35. Q. Should the NCUA modify its examination procedures and supervisory posture in relation to climate-related financial risk? This would be including, but not limited to, Flood Disaster Protection Act, Disaster Preparedness reviews, CAMELS ratings, and assessments of the level and direction of the various areas of risk.

A. Examinations and CAMELS ratings should be based on material financial risk. Period. Climate-related financial risk is not special. It is one risk among many.

Data Gathering

36. Q. How can the NCUA support efforts to develop standards of classification and data reporting on climate-related financial risks?

    A. In general, it should not. Only if the climate-related financial risk is demonstrably different than other risks and there is actual evidence that credit unions are routinely "missing" the risk. Neither politics nor environmental regulatory goals should be a part of this process.

37. Q. What data could the NCUA collect to improve credit unions' understanding of climate-related financial risks and support credit union efforts to manage these risks?

    A. See discussion above.

Questions for NCUA

38. Q. Please provide any questions or comments not covered in this request for information that you would like the NCUA to address regarding to climate-related financial risk.

A. See discussion above.

Sincerely,

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