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COMMENT

MANDATING CLIMATE-RELATED RISKS AND GHG EMISSIONS: DOES THE SECURITIES AND EXCHANGE COMMISSION HAVE THE POWER?

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The Securities and Exchange Commission ("SEC") recently proposed a new rule that would require public companies to disclose material climate-related risks and greenhouse gas ("GHG") emissions based on the Task Force on Climate-Related Financial Disclosure ("TCFD") framework and GHG Protocol.[1] The proposed rule stems from Environmental, Social, and Governance ("ESG") investing principles—the general belief that public companies should disclose non-financial information such as environmental, social, and governance issues to inform investors about a company's performance and make shareholder proxy voting decisions.[2] Opponents of the proposed rule have complained that these disclosures go beyond the SEC's authority and mission, arguing that environmental information is not material to investors.[3] History, SEC past practice, and court decisions, however, strongly counsel that the proposed rule's required disclosure of material climate-related risks are within the SEC's statutory authority and

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1. This will be referred to as the "proposed rule." The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,345–47 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

2. 8 WILLIAM SAVITT, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 98:1 (Robert L. Haig ed., 5th ed. 2022), Westlaw; *see also* Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018, 10:09 AM), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=156e37f61695.

3. *E.g.*, Hester M. Peirce, *We Are Not the Securities and Environment Commission - At Least Not Yet*, SEC (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

mission.[4] The only aspect of the rule that may not be within the SEC's power is the mandated disclosure of GHG emissions, and the proposed rule would be improved if modifications were made to lessen their impact or eliminate them entirely.[5]

First, Part I provides information on ESG, the SEC's authority, current rules to enforce environmental disclosures, and the basic features of the proposed rule.[6] Second, Part II splits the proposed rule into three main Sections and analyzes whether each aspect of the proposed rule fits within the SEC's authority and mission as shown by past practice, rulemakings, and legislative history.[7]

I. BACKGROUND

The proposed rule will require public companies to report climate-related risks to their business[8] and GHG emissions[9] based on standardized disclosure frameworks.[10] The heart of the controversy over the SEC's proposed rule lies primarily on differing beliefs over the role that qualitative information[11] should play in evaluating a public company.[12] This controversy dates back to debates during the beginning of securities regulation in the

4. *About the SEC*, SEC (Nov. 25, 2016), https://www.sec.gov/about.shtml ("The mission of the SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. The SEC strives to promote a market environment that is worthy of the public's trust."); *see infra* Section I.B.1.

5. *See infra* Section II.C.

6. *See infra* Part I.

7. *See infra* Part II.

8. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,353–73 (proposed Mar. 21, 2022).

9. *Id.* at 21,373–405.

10. *Id.* at 21,343–45.

11. Quantitative information is that which is used to evaluate a company in traditional monetary values like revenue, debts, and assets. *See* 17 C.F.R. § 229.101(a)(1)(iv)–(c)(i) (2023) (requiring disclosure of revenue-generating activities and assets). Qualitative information is that which is used to evaluate a company by indirect monetary values like mine safety practices and executive salaries. *See id.* §§ 229.104, 229.402 (requiring disclosure of mine safety practices and executive compensation); *see also* J. ROBERT BROWN, JR., THE REGULATION OF CORPORATE DISCLOSURE § 11.07(B)(1) (Allison Herren Lee ed., 4th ed. Supp. 2020) ("[Q]ualitative materiality defies definition and, accordingly, has been largely left to judicial development on a case-by-case basis.").

12. *Compare* Allison Herren Lee, *Regulation S-K and ESG Disclosures: An Unsustainable Silence*, SEC (Aug. 26. 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26 ("[C]limate change poses a threat to economic stability that transcends typical financial risk . . . ."), *with* Mark T. Uyeda, Comm'r, SEC, Remarks at the Georgetown Law Hotel and Lodging Summit before the Harvard Law School Forum on Corporate Governance (Oct. 28, 2022), https://corpgov.law.harvard.edu/2022/10/28/remarks-by-commissioner-uyeda-at-the-georgetown-law-hotel-and-lodging-summit/ ("If we move away from a materiality that is focused on financial returns, we risk a regime that is subject to the whims of the administration in power . . . .").

United States and attempts to balance several concepts such as investors' desire for information and the burden on companies to disclose it,[13] the efficiency of pure free markets and regulation,[14] and the extent to which the government should be allowed to address public health threats by regulating the open market.[15] In order to understand where climate-related risks and GHG emissions disclosures fall within this balance, it is important to first explain general ESG concepts and history;[16] the SEC's authority, mission, materiality concepts, and current mechanisms to enforce fraudulent environmental disclosures;[17] and key aspects of the proposed rule and its criticisms.[18]

A. ESG Concept and Beginnings

The recent push for environmental disclosures must be understood as the result of the ESG trend, which encompasses other information as well.[19] Prior to ESG, the term Corporate Social Responsibility ("CSR") was used to describe the general idea that companies should consider the public good in decision making instead of just profit maximization.[20] Under the umbrella of CSR, more specific strategies to influence corporate behavior developed, such as Socially Responsible Investing ("SRI")[21] and impact investing.[22] SRI

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13. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448–49 (1977) (explaining that requiring companies to disclose too much information will subject them to liability for trivial omissions or misstatements and make corporations bury shareholders in an avalanche of information).

14. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1212, 1214–15 (1999) (describing that Supreme Court Justice Louis Brandeis influenced President Roosevelt while the securities laws were written and wrote about the necessity of disclosure regulations to break up concentrated wealth of the few investment banks to enhance free market efficiency).

15. *Id.* at 1216–17 (describing how Adolf Berle and Gardiner Means, major intellectual contributors to the 1933 and 1934 securities laws, were concerned that giant corporations had too much power over public and social aspects of society that went beyond private enterprise).

16. *See infra* Section I.A.

17. *See infra* Section I.B.

18. *See infra* Section I.C.

19. *See* Kell, *supra* note 2.

20. *See* 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 9:97 (2022), Westlaw. CSR was not based on rigid principles or techniques, and practices varied from simply engaging corporate personnel in community volunteering and implementing recycling policies to directing a corporation's philanthropic and sustainability efforts. 8 SAVITT, *supra* note 2, § 98:3.

21. Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 736–37 (2019). SRI investments use negative screens to filter companies from an investment portfolio if it engaged in morally or ethically improper behavior. *Id.* at 737.

22. *Id.* at 742–45. Impact investing funds specifically go toward addressing a social or environmental issue such as funding a clinic that provides low-cost maternity care, creating jobs for adults with criminal records, or a recycling business. *Id.* at 742–43.

gained some niche interest among groups bringing attention to social causes[23] and encouraging others not to invest in "sin" stocks such as oil, tobacco, and liquor companies.[24] ESG was a term first coined in 2005.[25] The "E" stands for environmental and refers to disclosure of information like land use, carbon emissions, and weather events.[26] The "S" stands for social and includes information having to do with diversity issues, human capital management, and union relationships.[27] The "G" stands for governance and includes information like bribery, anti-corporate takeover measures, and ownership structures.[28]

Importantly, ESG's investing philosophy is different from CSR, SRI, and impact investing because it is premised on the belief that ESG scores can be used to better evaluate companies' economic performance, opportunities, and risks.[29] ESG can also use frameworks that employ traditional methods to evaluate a company or investment fund.[30] ESG's focus on evaluating the economic performance of the company with financial metrics—rather than purely trying to compel ethical corporate behavior—is likely why it has

23. *Id.* at 737–38 (explaining that SRI funds were used to screen out companies that did business in South Africa during apartheid).

24. *See* Casey C. Clark & Andy Kirkpatrick, *Impact Investing Under the Uniform Prudent Investor Act*, 32 PROB. & PROP., Mar.–Apr. 2018, at 32, 33; *see also* Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1930 (2020).

25. *See* Kell, *supra* note 2.

26. *See* GORDON L. CLARK ET AL., FROM THE STOCKHOLDER TO THE STAKEHOLDER 12 tbl.1 (2015) (showing a list of potential considerations for "E," "S," and "G" information). For example, the Coca-Cola Company disclosed several environmental risks in its annual 10-K report for 2021, including current litigation stemming from violations of environmental laws in different countries, the impact of water scarcity on costs, reduced demand stemming from concerns about the environmental impact of plastic bottles and other packaging materials, negative effects from increased demand for food products and decreased agricultural productivity, and adverse impacts from climate change and weather conditions. Coca-Cola Co., Annual Report (Form 10-K) 23–24 (Feb. 2, 2022), https://www.sec.gov/Archives/edgar/data/21344/000002134422000009/ko-20211231.htm#i7e5c6308455441aaa39bed2ec7a9b435_46 [hereinafter "Coca-Cola 10-K"].

27. CLARK ET AL., *supra* note 26. For example, the Coca-Cola Company disclosed several social risks to its business in its annual 10-K report for 2021, including effects from bad publicity due to workplace and human rights issues, and an inability to attract a diverse workplace. Coca-Cola 10-K, *supra* note 26, at 13, 16.

28. CLARK ET AL., *supra* note 26. For example, the Coca-Cola Company disclosed governance information and risks in its annual 10-K report for 2021, including biographical information about executive officers, executive compensation, and potential financial harm from an inability to integrate and manage acquired businesses. Coca-Cola 10-K, *supra* note 26, at 14, 28–29, 129.

29. *See* Gary, *supra* note 21, at 746.

30. *See, e.g.*, Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Securities Act Release No. 5170, Exchange Act Release No. 9252, 1971 WL 127132, at *1 (July 19, 1971).

gained more traction in the United States, where CSR, SRI, and impact investing have not.[31]

Pressure for corporations to disclose environmental information started as early as the 1960s, prompting the SEC to release a guidance document on environmental disclosures in 1971.[32] In 1974, the National Resources Defense Council ("NRDC") attempted to compel the SEC to require corporations to disclose injuries that the corporation has caused to the environment.[33] The SEC ultimately rejected the rulemaking petition,[34] and in the following years private international groups like the Coalition for Environmentally Responsible Economies ("CERES") were founded to formulate a set of principles for responsible environmental behavior by corporations.[35] In 2005, the United Nations Environmental Programme Finance Initiative issued an influential 150-page study arguing that fiduciaries and institutional investors should implement ESG into investing decisions.[36] It also expressed concern that investors were prioritizing short-term stock price maximization over socially and environmentally destructive outcomes.[37] From that point, environmental disclosures started to gain traction when international agencies began to develop standardized disclosure frameworks to measure ESG and environmental information.[38] Some of the earliest frameworks to standardize environmental criteria and gain signatories were CERES's Global Reporting Initiative,[39] the United Nations' Principles for Responsible Investment,[40] and the 2011 Sustainability Accounting Standards Board recommendations.[41] By the end of 2020, it was

31. The reason that a focus on economic performance has likely helped ESG gain traction in the United States is because the SEC has historically taken the position that non-financial information disclosures should help evaluate a company's economic position, so ESG is likely better received than previous investing philosophies because it is more focused on compelling ethical behavior. *See infra* notes 224, 250, 261 and accompanying text.

32. *See supra* note 30.

33. *See* Nat. Res. Def. Council, Inc. v. SEC, 389 F. Supp. 689, 689 (D.D.C. 1974).

34. For further details on the NRDC's attempted rulemaking petition, see *infra* Section II.B.2.

35. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1182 (9th ed. 2021) ("It seeks to achieve some standardization and encompasses criteria for sustainability that transcend narrow environmental, health, and safety concerns.").

36. *See* 8 SAVITT, *supra* note 2, § 98:2.

37. *Id.*

38. *See id.* ("Proving once again the adage that what gets measured gets managed, the advent of quantifiable ESG metrics spurred an explosion of ESG activity, among companies and investors.").

39. PERCIVAL ET AL., *supra* note 35, at 1181–82 (explaining that the Global Reporting Initiative sought to achieve some standardization criteria for sustainability).

40. *What Are the Principles for Responsible Investment?*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment (last visited Apr. 7, 2023); *see also* 8 SAVITT, *supra* note 2, § 98:2 ("Sixty three asset managers joined in the first year, representing about $6 trillion in assets under management.").

41. 8 SAVITT, *supra* note 2, § 98:2.

a widespread practice for companies to include environmental data in annual reports based on one of these disclosure frameworks.[42]

There are now many different frameworks for reporting and rating corporate environmental information,[43] which has created a problem with reliability, comparability, and consistency of information for investors.[44] ESG funds and disclosures have different definitions, metrics, and broad standards for what companies must show to be included.[45] This allows companies to choose frameworks that are overly broad so that they can disclose vague information and still gain an ESG-friendly label, a practice known as "green-washing."[46] Investors have also complained that companies will fail to disclose environmental information during years when it is not advantageous to them.[47]

42. *See* PERCIVAL ET AL., *supra* note 35, at 1182 ("In its December 2020 report KPMG found that 90 percent of corporations in North America and 80 percent worldwide now report on sustainability . . . ."); *see also* 8 SAVITT, *supra* note 2, § 98:2 ("By 2019, 2450 asset managers had pledged support for UN's 'Principles for Responsible Investing,' representing 82 trillion in assets under management.").

43. Betty Moy Huber & Michael Comstock*, ESG Reports and Ratings: What They Are, Why They Matter*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 27, 2017), https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/ (describing eight different ESG rating services used for ETF investments in the United States).

44. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,429 (proposed Mar. 21, 2022) ("[I]nvestors currently face obstacles in accessing comparable, consistent, and reliable climate-related information due to a combination of registrants not disclosing this information at all, or registrants disclosing this information but with varying degrees of coverage and specificity and in varying formats and locations . . . .").

45. Brakman Reiser & Tucker, *supra* note 24, at 1943–44.

46. Claire Fischer, *Is Twitter the New FTC and EPA? Publicized Private Action as the Anti-Greenwashing Mechanism in Modern Society*, 33 GEO. ENV'T L. REV. 315, 316–18 (2021). Tuna products, for example, have recently been controversial because companies advertise them as dolphin safe despite harmful fishing practices. *See* Jonathan Stempel, *Costco Must Face Lawsuit Over 'Dolphin Safe' Tuna Claim*, REUTERS (Jan. 17, 2023, 6:32 PM), https://www.reuters.com/article/costco-wholesale-lawsuit-tuna-idCAKBN2TW1VA; *see also Companies Accused of Greenwashing*, TRUTH IN ADVERT. (Apr. 24, 2023), https://truthinadvertising.org/articles/six-companies-accused-greenwashing/ (listing companies accused of greenwashing products).

47. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,342 ("[C]ompanies that choose to disclose under these frameworks . . . may choose not to participate every year."); Williams, *supra* note 14, at 1266 ("The materiality of information alone is not enough to give rise to a duty to disclose it. Rather, there must be an independent duty to disclose the information." (footnote omitted)).

B. The Securities and Exchange Commission's Statutory Authority, Materiality, and Current Rules to Enforce Fraudulent Environmental Disclosures

An understanding of why the proposed rule falls within the authority and mission of the SEC requires a brief overview of securities concepts and regulations that currently address environmental disclosures.[48] This Section examines the SEC's broad statutory authority through its mission,[49] materiality,[50] and the SEC's current enforcement mechanisms of environmental disclosures[51] to show how the proposed rule fills a need to protect investors and the public.[52]

1. The SEC's Statutory Authority and Mission

The SEC's ability to regulate climate-related risks comes from its broad statutory authority and mission.[53] The SEC's commonly recited mission statement is "to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation" and "promote a market environment that is worthy of the public's trust."[54] The SEC also relies on a less commonly used authority for the promulgation of the proposed rule that is hinted at in the second half of its mission statement—the public interest power.[55] In its introduction, the proposed rule specifically invokes its authority to protect investors and the public interest before saying it also considered whether the proposed disclosures "will promote efficiency, competition, and capital formation."[56]

The SEC's organic statutes have several references to broad disclosure powers and protection of the public interest.[57] The Securities Act of 1933's purpose invokes a broad mandate to "provide full and fair disclosure of the

48. *See infra* Sections I.B.1–3.

49. *See infra* Section I.B.1

50. *See infra* Section I.B.2.

51. *See infra* Section I.B.3.

52. *See supra* note 4.

53. *About the SEC*, SEC (Nov. 25, 2016), https://www.sec.gov/about.shtml.

54. *Id.*

55. *Id.*

56. *Id.* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,335 (proposed Mar. 21, 2022). The Securities Acts specifically require that when the Commission makes rules pursuant to the public interest, it will consider the protection of investors and "whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 77b(b).

57. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74; Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881.

character of securities sold."[58] The public interest statement first appears in Section Two of the Securities Exchange Act of 1934 stating that "transactions in securities . . . are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto."[59] A shortened version of this is re-iterated in the sections prohibiting fraudulent transactions,[60] listing registration requirements,[61] requiring periodical reports,[62] and prohibiting false proxies.[63]

The public interest statements are cited by some proponents of ESG to justify the disclosure of non-economic data.[64] Scholars point to the legislative history of the Securities Exchange Act and note that the public interest power was contentious when it was drafted and was meant to be distinct from the power to protect investors.[65] Opponents of ESG disclosures argue that the SEC should not read protection of the public interest to include ESG information because it lies outside its subject matter jurisdiction.[66]

58. The full name is: "An Act [t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." Securities Act of 1933, 48 Stat. at 74.

59. Securities Exchange Act of 1934 § 2, 48 Stat. at 881–82.

60. *Id.* § 10(b), 48 Stat. at 891 (prohibiting the use of manipulative devices "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

61. *Id.* § 12(b)(1)(K), 48 Stat. at 893.

62. *Id.* § 13(a), 48 Stat. at 894–95.

63. *Id.* § 14(a)–(b), 48 Stat. at 895.

64. Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1483–85 (2021) (arguing that opponents of ESG have a "blind spot" to the public interest goals of the securities acts); Andy Green, *Making Capital Markets Work for Workers, Investors, and the Public: ESG Disclosure and Corporate Long-Termism*, 69 CASE W. RSRV. L. REV. 909, 911 (2019) (arguing that insufficient corporate transparency and accountability of ESG harms investor and public interest goals in market performance and risk management); Letter from Richard A. Kirby, S'holder, R|K Invest L. PBC & Beth-ann Roth, S'holder, R|K Invest L. PBC, to Vanessa A. Countryman, Sec'y, SEC (June 15, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131449-301642.pdf (explaining that the Supreme Court rejected an interpretation of the First Amendment that would restrict the SEC's ability to mandate disclosures in the public interest).

65. *See* Williams, *supra* note 14, at 1235–36 ("Congress's use of the disjunctive 'or' indicates that the public interest grant of power is distinct from the investor protection grant of power . . . yet the SEC has been hesitant to exercise its public interest proxy authority."); *see also id.* at 1236 n.204.

66. *See, e.g.*, Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 COLUM. BUS. L. REV. 840, 880 (arguing that the SEC should leave the social costs of climate change to non-financial agencies).

2. Materiality

A major purpose of securities laws is to ensure that investors are fully and fairly informed about public companies they purchase stock from.[67] This Section will discuss how the concept of materiality has been legally defined through Supreme Court precedent[68] and SEC regulations.[69] Materiality is meant to strike a balance between ensuring that investors are fully informed without requiring so much information to be disclosed[70] that it buries investors with unnecessary information or overburdens regulated companies.[71] The exact wording and key phrases of these foundational sources are paramount in debates over the legality of required disclosures.[72]

SEC rules promulgated under the Securities Act of 1933 and Securities Exchange Act of 1934 define materiality as limiting "the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered."[73] This is supported by the Supreme Court definition from *TSC Industries, Inc. v. Northway, Inc.*,[74] which held that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[75] To establish that a company failed to disclose material information, plaintiffs must show "a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder,"—in other words, that disclosure would have "significantly altered the 'total mix' of information made available."[76] This materiality determination requires an assessment of what conclusions a

67. *See supra* notes 54, 58 and accompanying text.

68. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (defining materiality in the context of omitting facts in a merger); *see infra* notes 74–77 and accompanying text; Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988) (defining materiality in the context of SEC anti-fraud regulations); *infra* note 78 and accompanying text.

69. 17 C.F.R. § 240.12b-2 (2023) ("The term 'material' . . . limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.").

70. The SEC requires companies to disclose information in forms that are published on the SEC's EDGAR website. *EDGAR*, SEC, https://www.sec.gov/edgar (last visited Apr. 28, 2023).

71. *Basic Inc.*, 485 U.S. at 231.

72. *See, e.g.*, Caroline A Crenshaw, *Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors*, SEC (Mar. 21, 2022), https://www.sec.gov/news/statement/crenshaw-climate-statement-032122 (referencing the Supreme Court definition when arguing that the disclosures will improve the "total mix of available data"); Peirce, *supra* note 3 (arguing that the disclosures stray from the "reasonable investor" standard contemplated by Justice Marshall).

73. 17 C.F.R. § 240.12b-2.

74. 426 U.S. 438 (1976).

75. *Id.* at 449.

76. *Id.*

reasonable shareholder would make from the facts and how much those facts would impact their decisions.[77] The Supreme Court also made it clear that materiality determinations must consider that over-disclosure of information can be harmful to investors as well.[78]

Disclosed information can include both financial[79] and non-financial information.[80] Sometimes the SEC requires disclosure of specific information that it believes is always material to assessing a company, such as executive compensation.[81] Other SEC regulations require disclosure of more general risks to the business, such as market risks.[82] When it comes to these broad disclosure requirements,[83] companies are in a better position to assess all of their potential risks.[84] Broad risk categories can include a massive amount of information that is not relevant to investors, and the materiality filter makes it so that companies do not bog them down with irrelevant information.[85]

How a company decides what information is material occupies the time of securities law practitioners and is fact specific to each company and industry.[86] Companies use court decisions, SEC guidance, security exchange rules, treatises, statistics, market reactions, and many other pieces of data to assess what information must be disclosed.[87] If a company discloses misleading information or fails to disclose an important piece of material information, it may be subject to regulatory actions or lawsuits by the SEC or private citizens.[88]

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77. *Id.* at 450 ("The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him. . . .").

78. *See* Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988) ("[M]inimal [materiality] standard[s] might bring an overabundance of information . . . and lead management 'simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking.'" (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448–49 (1976))).

79. *See, e.g.*, 17 C.F.R. § 229.101(c)(1) (2023) (requiring disclosure of revenue generating activities, products, and services).

80. *See, e.g.*, *id.* §§ 229.104, 229.402 (requiring disclosure of mining safety violations and monetary compensation of executives).

81. *Id.* § 229.402.

82. *Id.* § 229.305.

83. Williams, *supra* note 14, at 1209 ("Regulation S-K defines an issuer's disclosure obligations generally, as filtered through the 'materiality' screen.").

84. *See* Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151 (Aug. 19, 1999) ("The predominant view is that materiality judgements can properly be made only by those who have all the facts." (quoting FIN. ACCT. STANDARDS BD., STATEMENT OF FINANCIAL ACCOUNTING CONCEPTS NO. 2: QUALITATIVE CHARACTERISTICS OF FINANCIAL INFORMATION ¶ 130 (1980))).

85. *See supra* note 78 and accompanying text.

86. PRACTICAL LAW CORPORATE & SECURITIES, DETERMINING MATERIALITY IN SECURITIES OFFERINGS AND CORPORATE DISCLOSURE (2023), Westlaw.

87. *Id.*

88. *See* 17 C.F.R. § 240.10(b)(5) (2023).

3. Securities and Exchange Commission's Current Regulations and Environmental Disclosure Enforcement

In 2010, the SEC issued guidance advising of several areas in SEC filings and reports where companies can voluntarily choose to disclose environmental and climate-related information it deems material.[89] For example, environmental information could be included in areas of SEC filings where any general risks to a business are disclosed.[90] More specific disclosures that implicate environmental concerns could also be made under Item 101 of regulation S-K for the sources and availability of raw materials and resources.[91] Long-term climate hazards to a company could also be disclosed in a proxy statement under the sections "[m]anagement's discussion and analysis of financial condition and results of operations,"[92] "[q]uantitative and qualitative disclosures about market risk,"[93] and the "[p]rospectus summary."[94] The only expressly required environmental disclosures are lawsuits brought against the company for pollution or general environmental protection,[95] and the extent to which the business is seasonal.[96]

In 2021, the SEC also created an ESG Taskforce that brings together the Division of Enforcement, Office of the Whistleblower, and other offices to "identify any material gaps or misstatements" under existing SEC anti-fraud regulations.[97] SEC anti-fraud regulations generally prohibit the use of "any manipulative or deceptive device or contrivance" in the sale of securities.[98] This includes making statements or omitting material facts in SEC filings and

89. *See* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6293 (Feb. 8, 2010).

90. *See, e.g.*, 17 C.F.R. § 229.303(a) ("This includes descriptions and amounts of matters that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations."); *id.* § 230.408 (requiring disclosure of "such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading").

91. *Id.* § 229.101(c)(1)(iii)(A).

92. *Id.* § 229.303(a).

93. *Id.* § 229.305; *see* Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 324 (2017) ("ESG factors are often associated with business risk, including legal, regulatory, and reputational risk, and are also leading indicators of financial and market risk subject to disclosure . . . .").

94. 17 C.F.R. § 229.503(a) (requiring a summary of the information in the prospectus); *see also* Harper Ho, *supra* note 93, at 325.

95. *Id.* § 229.103(c)(3) ("[D]isclosure under this section shall include . . . [a]dministrative or judicial proceedings . . . arising under any Federal, State, or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primarily for the purpose of protecting the environment.").

96. *Id.* § 229.101(c)(1)(iii)(B)(v).

97. Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

98. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (1934).

financial statements.[99] The SEC has been using these rules to enforce fraudulent securities sales and manipulation since its creation, and the Task Force now applies them to omissions and misstatements about climate-related risks.[100]

C. The SEC's Proposed Rule Mandating Material Climate-Related Disclosures and its Criticism

On March 21, 2022, the SEC proposed a rule with the overall purpose of making information related to a corporation's climate-related risks more accessible, comparable, and reliable for investors.[101] This Section discusses the three main parts of the proposed rule including its designation of the Task Force on Climate-Related Financial Disclosures ("TCFD") and Greenhouse Gas ("GHG") Protocol frameworks to disclose environmental information,[102] mandated climate-related risks disclosures,[103] and GHG emissions disclosures.[104] Finally, this Section discusses the main criticisms of the proposed rule.[105]

1. Disclosure Frameworks

The proposed rule aims to increase comparability and reliability of information by requiring the disclosure of climate-related risks based on the TCFD and GHG Protocol frameworks.[106] The TCFD was developed by the Financial Stability Board in 2015, an agency created at the request of the G20 Finance Ministers and Central Bank Governors to develop recommendations for voluntary climate-related financial risk disclosures.[107] In 2017, the TCFD

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99. 17 C.F.R. § 240.10b-5(c) ("To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.").

100. For examples of recent SEC ESG-related enforcement actions, see *Enforcement Task Force Focused on Climate and ESG Issues*, SEC (Apr. 11, 2023), https://www.sec.gov/spotlight/enforcement-task-force-focused-climate-esg-issues.

101. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,334 (proposed Mar. 21, 2022).

102. *See infra* Section I.C.1.

103. *See infra* Section I.C.2.

104. *See infra* Section I.C.3

105. *See infra* Section I.C.4.

106. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,343–45.

107. Communication from the Commission: Guidelines on Non-Financial Reporting 2017 O.J. (C 215) 2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01). The G20 Finance Ministers and Central Bank Governors is a forum comprised of nineteen countries founded to discuss international economic and financial stability. *See* G20, G20–BACKGROUND BRIEF 3 (2023), https://www.g20.org/content/dam/gtwenty/about_g20/overview/G20_Background_Brief_06-03-2023.pdf.

released its first report providing recommendations on reporting environmental information.[108] The TCFD has since released several reports and guidelines that provide specific technical guidance to industries on reporting environmental information.[109] This guidance is also being embraced by other countries, like the European Union, who have recognized the need for disclosure based on one common framework.[110]

The GHG Protocol is an accounting method specifically used to calculate greenhouse gas emissions and categorizes them as Scope 1, Scope 2, and Scope 3.[111] The GHG Protocol provides specific technical guidance, tools, and training on how to calculate those emissions.[112] It was created to be used with Generally Accepted Accounting Principles ("GAAP"), the accounting method for disclosing financial information in SEC filings.[113]

2. Climate-Related Risks

The proposed rule would require disclosure of climate-related risks facing several areas of a business.[114] The proposed rule also includes a phase-in period for existing registrants with compliance dates depending on the size of the company.[115] Any climate-related risks identified by businesses would only have to be disclosed if it is deemed material.[116] Once a climate-related risk is identified as material, the business would disclose how that material risk affects the specified aspects of the business.[117]

108. *About*, TCFD, https://www.fsb-tcfd.org/about (lasted visited Mar. 3, 2023).

109. *TCFD Recommendations*, TCFD, https://www.fsb-tcfd.org/recommendations/ (last visited Mar. 23, 2023); TCFD, FINAL REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (2017), https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf.

110. *Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as Regards Corporate Sustainability Reporting*, at 1, 32, COM (2021) 189 final (Apr. 4, 2021) [hereinafter *EU Proposal Regarding Corporate Sustainability Reporting*], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0189&from=EN.

111. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,344–45.

112. GREENHOUSE GAS PROTOCOL, https://ghgprotocol.org/ (last visited Apr. 13, 2023).

113. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,384.

114. Specifically, the registrant must disclose impacts to its strategy, business, model, and outlook; governance disclosures including processes for identifying, assessing, and managing climate-related risks; risk management disclosures; and financial metrics, impacts, expenditures, and estimates of costs. *Id.* at 21,353–73.

115. *Id.* at 21,346.

116. *Id.* at 21,351.

117. *Id.* at 21,353.

The proposed rule notes that the disclosures are consistent with SEC definitions and Supreme Court materiality precedent.[118] It states that determining materiality of a climate-related risk would be similar to other risks when preparing the management, discussion, and analysis section in the registrant's annual report including "descriptions and amounts of matters that have had a material impact on reported operations" and "future operations."[119] The proposed rule would have companies consider the magnitude and probability of a climate-related risk over the short, medium, and long term.[120]

3. Greenhouse Gas Emissions

The proposed rule also requires disclosure of all Scope 1 and 2 GHG emissions regardless of materiality, and Scope 3 emissions if they are material.[121] Additionally, a company's climate-related targets, goals, and transition plans, must be disclosed if they exist.[122] Scope 1 GHG emissions are direct emissions occurring from sources within the company.[123] Scope 2 GHG emissions are indirect emissions created from the company's electricity use.[124] Scope 3 GHG emissions are those resulting from indirect activities associated with the company outside of its immediate control and are not covered by Scope 1 or Scope 2 emissions.[125]

4. Criticism of the SEC's Proposed Rule by the Business Community

Relevant critical comments of the proposed rule have mostly been aimed at disclosure of GHG emissions[126] or ESG investing as a general concept.[127] Both of these criticisms are important to address because they

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118. *Id.* at 21,351 ("[A] matter is material if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote.").

119. *Id.* at 21,352.

120. *Id.*

121. *Id.* at 21,373–83.

122. *Id.* at 21,361–62.

123. *Id.* at 21,344 ("These might include emissions from company-owned or controlled machinery or vehicles, or methane emissions from petroleum operations.").

124. *Id.* ("[T]hese emissions derive from the activities of another party (the power provider)" and "are considered indirect emissions.").

125. *Id.* at 21,345 ("These might include emissions associated with the production and transportation of goods a registrant purchases from third parties, employee commuting or business travel, and the processing or use of the registrant's products by third parties.").

126. *See infra* notes 129–135 and accompanying text.

127. *See infra* notes 136–141 and accompanying text. For statements from SEC Commissioners in favor of the proposed rule see Gary Gensler, *Statement on Proposed Mandatory Climate Risk Disclosures*, SEC (Mar. 21, 2022), https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321; Caroline A Crenshaw, *Statement on the Enhancement and Standardization of*

show how the proposed rule has been mischaracterized without fully discussing its merits.[128]

Some critics accuse the SEC of attempting to compel corporations to reduce carbon emissions for ethical reasons and not as a sincere effort to provide material information to investors.[129] These critics state that the proposed rule is an attempt to impose climate change goals that are outside of the SEC's statutory authority.[130] A notable voice for this opinion came from SEC Commissioner Peirce.[131] Commissioner Peirce believes that calls for climate disclosure are motivated more by concerns for climate change than a legitimate interest in assessing the financial value of companies.[132] Regarding the SEC's authority, Commissioner Peirce states that this proposed rule lies outside the subject-matter boundaries Congress imposed on it, and the SEC cannot promulgate these rules even if they promote the public interest or protection of investors.[133] A majority of Commissioner Peirce's other criticisms also stem from the GHG emissions, arguing that their required disclosure stretches materiality definitions.[134] Criticisms aimed at the SEC's authority over GHG emissions disclosures may have merit, and modifying that aspect of the rule would greatly assuage critics that otherwise lump GHG emissions information with the less controversial climate-related risk disclosures.[135]

Another major criticism for the proposed rule has been aimed at ESG investing generally.[136] Prominently, SEC Commissioner Uyeda spoke out

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Climate-Related Disclosures for Investors, SEC (Mar. 21, 2022), https://www.sec.gov/news/statement/crenshaw-climate-statement-032122.

128. *See infra* notes 136–141 and accompanying text.

129. Letter from J.W. Verret, Assoc. Professor, Geo. Mason Univ. Antonin Scalia L. Sch., to Vanessa Countryman, Sec'y, SEC (June 1, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130713-299599.pdf.

130. *Id.* (arguing that "[t]his proposal is an effort to regulate corporate behavior to reduce carbon emissions" and "therefore exceeds the statutory authority granted to the Commission").

131. Commissioner Peirce's statement is the most comprehensive summary of all the issues taken up by critics of the rule, only some of which are addressed here. *See* Peirce, *supra* note 3.

132. *Id.*

133. *Id.* ("The further afield we are from financial materiality, the more probable it is that we have exceeded our statutory authority.").

134. *Id.* ("The reporting company's long-term financial value is only tenuously at best connected to such third party emissions. Hence, the Commission's distorted materiality analysis for Scope 3 disclosures departs significantly from the 'reasonable investor' contemplated by Justice Marshall.").

135. *See infra* Section II.C.

136. *See, e.g.*, Mahoney, *supra* note 66, at 841–43 (framing and criticizing the proposed rule as mandatory ESG disclosures); MICHAEL FAULKENDER, AM. FIRST POL'Y INST., THE PERILS OF ESG INVESTING 4–5, 6 (2022), https://assets.americafirstpolicy.com/assets/uploads/files/Perils_of_ESG_Investing_V1.pdf (describing ESG investing as "another attempt by progressives to realize their socialist agenda" and the proposed rule as "[b]uttressing the ESG movement").

against the proposed rule and the Investment Advisor rule,[137] another proposed rule that would provide standards for labeling funds that market themselves as ESG friendly.[138] Commissioner Uyeda argued that these two proposed rules require the SEC to create "murk[y]" value judgements pertaining to ESG ratings systems[139] and make materiality a valueless concept subject to the whims of the SEC over time.[140] Commissioner Uyeda's comments employ a common tactic by opponents of the proposed rule—conflating climate-related risks and GHG disclosures with ESG disclosures generally.[141] Particularly, Commissioner Uyeda argued that ESG and other qualitative disclosures require the SEC to make judgements as to which ESG values are most important to disclose, making the concept of materiality "a more outcome-driven approach based on their perspective of the public good."[142] This criticism might have merit if the proposed rule was requiring disclosure of any and all ESG concepts that could affect a company.[143] However, Commissioner Uyeda's remarks mention only briefly that the proposed rule only requires disclosure of climate-related risks and GHG emissions disclosure, which is far more focused than ESG and does not have the same "murkiness" or "subjectivity" issues with comparing values of one qualitative risk to another.[144]

When evaluating criticisms of the proposed rule, it is important to understand what specifically the criticism is assessing.[145] Many critics fail to honestly address the merits of the proposed rule as a whole by either imputing problematic aspects of one part as applying to all of it,[146] or by

137. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36,654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279). For remarks from an SEC Commissioner in favor of the Investment Advisor Rule, see Caroline A. Crenshaw, *Statement on Proposed Rule Requiring Enhanced Disclosure by Certain Investment Advisers and Investment Companies on ESG Investment Practices*, SEC (May 25, 2022), https://www.sec.gov/news/statement/crenshaw-statement-esg-investment-practices-052522.

138. Uyeda, *supra* note 12.

139. *Id.* ("Adding to the murkiness is the subjectivity of how investors and issuers consider ESG. . . . If past is prologue, then investor and third-party views of what ESG disclosure is important—and what the E, S, and G mean—will likely shift over time. . . . Prescriptive Commission rulemaking may not be sufficiently nimble or effective with respect to these types of disclosures.").

140. Some of this criticism was more aimed at the Investment Advisor Rule, which is not the subject of this Comment. *Id.*

141. *See supra* note 136.

142. Uyeda, *supra* note 1212.

143. *Id.*

144. *Id.*

145. *See supra* notes 127, 141–143 and accompanying text.

146. *See supra* notes 129–134 and accompanying text.

mischaracterizing climate-related risk and GHG emissions as a much larger movement that does not reflect the effect or goals of the proposed rule.[147]

II. ANALYSIS

The SEC proposed a new rule that would require: (1) standardization of climate-related risks based on the TCFD and GHG protocol frameworks,[148] (2) disclosure of material climate-related risks,[149] and (3) GHG emissions.[150] The proposed rule's standardization of information based on TCFD and GHG Protocols and disclosure of climate-related risks are consistent with the SEC's statutory authority and mission[151] as shown by past practice, rule makings, and legislative history.[152] However, the mandatory GHG emissions disclosures likely do not fall under current SEC statutory authority.[153] This aspect of the rule may require an express delegation of authority by Congress or disclosure on a more voluntary comply-or-explain basis to fall under the SEC's authority.[154]

A. Standardization of Climate-Related Disclosures Based on the TCFD and GHG Protocol Protects Investors and Improves the Fairness of Markets

The proposed rule requires that companies disclose climate-related information based on the TCFD framework and GHG Protocol.[155] This is similar to the SEC's past practice and rulemaking requiring that companies disclose traditional financial information based on Generally Accepted Accounting Principles.[156] GAAP tells companies how, where, and when to

147. *See supra* notes 141–144 and accompanying text.

148. *See infra* Section II.A.

149. *See infra* Section II.B.

150. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,345–47 (proposed Mar. 21, 2022); *see infra* Section II.C.

151. *See supra* Section I.B.1.

152. *See infra* Sections II.A, II.B. The SEC's authority to require use of the TCFD framework and GHG Protocols is based on past practice as well as the need to enhance reliability and consistency of information. *See infra* Section II.A. This is different from the argument for the SEC's authority to require disclosure of climate-related risks themselves, which is based on the broad scope of the SEC's rulemaking power, materiality of climate-related risks, and past practice to protect investors and the public. *See infra* Section II.B.

153. *See infra* Sections II.C.1–2.

154. *See infra* Section II.C.

155. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,343–45.

156. 17 C.F.R. § 244.101(b) (2023); *see also* Jason Fernando, *GAAP: Understanding it and the 10 Key Principles*, INVESTOPEDIA (June 28, 2022), https://www.investopedia.com/terms/g/gaap.asp.

disclose financial information in their SEC filings and financial statements.[157] The GAAP, TCFD, and GHG Protocol frameworks contribute to the SEC's mission of protecting investors and ensuring fairness in markets by making information reliable and consistent among public companies.[158] This Section examines how the TCFD framework and GHG Protocol developed similarly to GAAP and helps the SEC increase reliability and consistency of information.[159]

1. The Historical Development of GAAP Is Similar to the TCFD and GHG Protocol Frameworks

The SEC has a history of responding to fraud in the marketplace by adopting accounting standards developed in the private sector to increase transparency, comparability, and accuracy in disclosures.[160] The Securities Act of 1933[161] and Securities Exchange Act of 1934[162] were created as a response to the stock market collapse that led to the Great Depression.[163] The collapse was a result of fraudulent and deceitful practices on behalf of corporations seeking to increase short-term profits.[164] Part of the reason these deceitful practices were possible was because accounting standards were self-regulated.[165] Senate hearings after the 1929 stock market crash revealed instances where companies used distorted accounting methods that concealed losses from investors, reported excessive earnings, and transferred semi-worthless assets to subsidiaries.[166] Intercompany accounting records were "incomprehensible to the average investor" and made it impossible for investors to assess a company's securities.[167] Companies were able to publish misleading sales literature and did not have to disclose audited financial statements unless shareholders filed lawsuits.[168]

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157. Malori M. McGill, *Accounting for Environmental Standards*, 95 WASH. L. REV. ONLINE 57, 67 (2020).

158. *Id.* at 82 ("Reliable and consistent financial statements, in turn, support the SEC's overall mission of protecting investors and ensuring fairness in financial markets.").

159. *See infra* Sections II.A.1–2.

160. McGill, *supra* note 157, at 63.

161. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74.

162. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881.

163. Williams, *supra* note 14, at 1223.

164. *Id.* at 1224–26.

165. Omar Ochoa, *Accounting for FASB: Why Administrative Law Should Apply to the Financial Accounting Standards Board*, 15 TEX. REV. L. & POL. 489, 498 (2011).

166. *See* DUNCAN U. FLETCHER, STOCK EXCHANGE PRACTICES, S. REP. NO. 1455 (1934); *see also* Williams, *supra* note 14, at 1223 n.142 (explaining the significance of the Fletcher Report in interpreting the Securities Exchange Act).

167. S. REP. NO. 1455, at 384.

168. Steven A. Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 LOY. U. CHI. L.J. 669, 677–78 (2014).

As part of its response to fraudulent accounting in the market, Congress directed the SEC to determine the form and content of financial statements.[169] For several years, the SEC tried to decide on the best practices for companies to report financial statements before it delegated the development of accounting standards to the American Institute of Accountants ("AIA") in 1938.[170] This private group set accounting standards until 1973 when the Financial Accounting Standards Board ("FASB") took over as the standard setter.[171] The FASB created the GAAP, the standard by which public companies disclose financial information today.[172] GAAP remedied fraud by requiring companies to use specific accounting measures and disclose them with the SEC in financial statements.[173] By standardizing uniform criteria for accounting principles, the SEC increased transparency and investor confidence in the marketplace.[174]

At the beginning of the 21st century, major corporate fraud scandals[175] revealed a hole in securities regulations that allowed bad actors to commit fraud by purposefully maintaining poor accounting practices.[176] For years, corporations like Enron were able to gain massive profits by deceiving investors with a lack of quality information.[177] In 2002, Congress responded to this problem with the passage of the Sarbanes-Oxley Act of 2002 ("SOX").[178] For the purposes of protecting investors and the public,[179] SOX required that public companies undergo audits and established enhanced financial disclosures that included assessments over internal accounting controls.[180] Again, the SEC tapped the FASB to develop specific internal

169. Ochoa, *supra* note 165, at 498; *see also* Securities Exchange Act of 1934, Pub. L. No. 73-291, § 12(b), 48 Stat. 881, 892–93 (1934).

170. Ochoa, *supra* note 165, at 498; McGill, *supra* note 157, at 67.

171. Ochoa, *supra* note 165, at 499; McGill, *supra* note 157, at 68.

172. McGill, *supra* note 157, at 71.

173. 17 C.F.R. § 210.4–01 (2023) (requiring financial statements to be filed in accordance with GAAP).

174. McGill, *supra* note 157, at 63 ("Accounting standards reflect the public's interest in limiting fraud and otherwise manipulated financial results.").

175. The most infamous was the Enron scandal. *See* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 13–17 (2002) (providing a brief summary of Enron's fraudulent accounting mechanisms).

176. McGill, *supra* note 157, at 71.

177. Rhode & Paton, *supra* note 175, at 9 (observing that Enron was "once the seventh largest corporation in America with revenue over $100 billion.").

178. Sarbanes–Oxley Act of 2002Pub. L. No. 107-204, 116 Stat. 745; McGill, *supra* note 157, at 71.

179. Sarbanes-Oxley Act of 2002 § 3(a), 116 Stat. at 749 (codified at 15 U.S.C. § 7202).

180. *Id.* §§ 401–404, 116 Stat. at 785–89.

accounting control standards—in accordance with SOX—for public companies to follow.[181]

2. The TCFD and GHG Protocol Are Similar in Purpose to GAAP

Today, investors seeking information on a public company's climate-related risks have similar difficulty knowing whether the information provided is complete and accurate, just as investors lacked proper information in the lead-up to the Great Depression and Enron Scandal.[182] The TCFD framework and GHG Protocol's creation mirrors that of GAAP in that it is a response to fraud in the marketplace.[183] The lack of uniformity for disclosing environmental information has exacerbated the green washing problem,[184] and made it difficult for investors to compare climate risks and opportunities across public companies.[185] These are similar to issues investors had leading up to the great depression with companies hiding losses and inflating assets using their own accounting methods.[186] Like the SEC's adoption of private standards from the AIA and FASB, the TCFD framework and GHG Protocol were developed by the Financial Stability Board ("FSB"), an entity created by the international Group of 20 Finance Ministers ("G20").[187]

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181. McGill, *supra* note 157, at 72–73. SOX also created the Public Company Accounting Oversight Board, a non-profit public entity responsible for maintaining oversight of the accounting profession. Sarbanes-Oxley Act of 2002 § 101, 116 Stat. at 750–53 (codified at 15 U.S.C. § 7211).

182. *See supra* notes 164, 175–177 and accompanying text (discussing how investors' lack of information contributed to the Great Depression and Enron scandal); *see also* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,341–43 (proposed Mar. 21, 2022) (discussing how investors today complain they cannot obtain "consistent, comparable, and material" climate risk information because of a rise in multiple third-party data providers and inconsistent voluntary disclosures by companies).

183. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,341–43 (explaining that using multiple disclosure frameworks lead to a lack of transparency and standardization where companies provide partial disclosures or choose not to participate every year).

184. Fischer, *supra* note 46, at 316–17 (describing green washing as deceptive marketing practices where companies promote a product as natural, organic, or environmentally sustainable when in reality it has minimal or no environmental benefit).

185. Christina E. Bannier, Yannick Boffinger & Björn Rock, *Doing Safe by Doing Good: Risk and Return of ESG Investing in the U.S. and Europe* 3–4 (Ctr. for Fin. Stud. Working Paper, Paper No. 621, 2019), https://ideas.repec.org/p/zbw/cfswop/621.html (observing that disparities among studies assessing the return of ESG funds may be chiefly due to the lack of uniform standards on measuring ESG criteria).

186. *See* Ramirez, *supra* note 168, at 677 (noting that prior to the 1930s, the shortcomings of state law enabled publicly traded firms to refrain from disclosing "essential information such as audited financial statements" to shareholders).

187. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,343.

While the SEC's use of private standard-setters is historical,[188] the agency's reasoning for continuing the practice is because it cuts cost, gains input from industry experts, and ensures uniform standards across an industry.[189] In fact, the TCFD framework and GHG Protocol were created to be integrated with GAAP accounting, where applicable, thus making it easier for public companies to comply.[190] Other international entities, including the European Union ("EU"), are also developing standards largely in accordance with the TCFD framework, thus the SEC's adoption may increase comparability with foreign security markets as well.[191]

Adoption of the TCFD framework and GHG Protocol follows the SEC's historical use of private standard setters to increase transparency and accuracy in reporting information that is important to investors' understanding of a security.[192] Thus, the proposed adoption of the TCFD and GHG Protocol falls within the SEC's statutory authority to protect investors and the public by enhancing reliability of information.[193]

B. Mandated Disclosures of Material Climate-Related Risks Are Within the SEC's Authority to Protect Investors and the Public

The proposed rule would require disclosure of material climate-related risks that affect a public company's operations.[194] These disclosures are within the SEC's broad authority and mission to protect the public and investors as shown by the legislative history of the Securities Acts,[195] court decisions regarding environmental disclosures,[196] and prior SEC rulemakings requiring disclosure of qualitative information without congressional authority.[197]

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188. McGill, *supra* note 157, at 64–65 (explaining that as early as the 1910s, the federal government has used private entities to gap fill government responses to certain events).

189. *Id.* at 82 ("In the case of FASB, for example, the SEC was able to draw upon the experience, knowledge, and expertise of a well-established and widely-recognized private body by simply issuing a policy statement recognizing FASB as the authoritative private entity under SOX.").

190. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,384.

191. Council Regulation 2020/852 of June 18, 2020, Establishment of a Framework to Facilitate Sustainable Investment, 2020 O.J. (L198) 13.

192. McGill, *supra* note 157, at 63.

193. *See supra* Section I.B.1.

194. Specifically, it requires disclosure of climate-related risks to strategy, business, model, and outlook; governance disclosures; processes for identifying, assessing, and managing climate-related risks; risk management disclosures; financial metrics, impacts, expenditures, and estimates of costs. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,359–73.

195. *See infra* Section II.B.1.

196. *See infra* Section II.B.2.

197. *See infra* Section II.B.3.

1. The Legislative History of the Securities Acts Shows the SEC Has Broad Disclosure Power

The legislative history of the Securities Acts[198] shows the SEC was originally meant to have broad disclosure power that could encompass qualitative information related to a company's economic performance.[199] The Committee on Interstate and Foreign Commerce explains in its introductory statements that one of President Roosevelt's principal purposes for enacting the Securities Act of 1933 was "[a]n insistence that there should be *full disclosure of every essentially important element* attending the issue of a new security."[200] One reason for the broad disclosure powers was to provide investors with a holistic understanding of securities they were trading or voting on.[201] Congress recognized that securities markets touch on many fields beyond the narrow economic concerns of Wall Street investors, and the SEC needed broad powers to make sure regular investors were fully informed on all aspects of a business that impacted their decisions.[202] While the SEC's disclosure authority was meant to be broad enough to include qualitative information, it must also be noted there are several statements in the legislative history suggesting the information should have some bearing on the economic nature of the security.[203]

The SEC's public interest power was also meant to help the public and shareholders get broader information like corporate policies and goals for proxy votes.[204] As previously discussed, the Securities Exchange Act makes numerous references to the SEC's public interest powers.[205] The legislative history discussing section 14(a)[206] shows a recurring point of concern was

198. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933); Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934).

199. H.R. REP. No. 73-85, at 2 (1933) ("The purpose of the legislation I suggest is to protect the public with the least possible interference to honest business. This is but one step in our broad purpose of protecting investors and depositors.").

200. *Id.* at 3 (emphasis added).

201. *Id.* at 4 ("They are . . . adequate to bring into the full glare of publicity those elements of real and unreal values which may lie behind a security.").

202. H.R. REP. NO. 73-1383, at 6 (1934) ("A bill seeking effectively to control and regulate the securities markets therefore necessarily covers a wide field—necessarily touches more than a few willful speculators of Wall Street, necessarily calls for the cooperation of the widespread economic interests which the securities market affects.").

203. *See* James D. Redwood, *Qualitative Materiality Under the SEC Proxy Rules and the Fifth Amendment: A Disclosure Accident Waiting to Happen or Two Ships Passing in the Night?*, 1992 WIS. L. REV. 315, 323–24 (showing several examples in the Securities Acts' legislative history where disclosed information should be related to economic well-being).

204. Williams, *supra* note 14, at 1239.

205. *See supra* notes 57–63 and accompanying text.

206. Section 14(a) gives SEC the ability to promulgate proxy disclosure regulations. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 14(a), 48 Stat. 881, 895 (1934) (codified at 15 U.S.C. § 78n).

that a few executive officers controlled shares of many investors who were not properly informed as to where their money was going.[207] Senators believed this could be remedied if shareholders had a better understanding "not only as to the financial condition of the corporation, but also as to the major questions of policy."[208] Regulations were particularly important to compel these disclosures of policy because securities exchanges touched on a broad scope of activities that implicated the entire national economy, and senators recognized that corporate interests conflicted with the public interest such that stock exchanges could not be trusted to regulate themselves.[209]

2. *The Court's Broad Reading of Materiality Can Encompass Environmental Information*

The proposed rule's required climate-related disclosures are limited to risks that are material.[210] The Supreme Court has broadly defined information to be material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[211] Courts have not formally adopted the position that material information must be purely economic or related to financial performance.[212]

In the 1970s, the District of Columbia courts discussed whether environmental risks can be material to investors following a challenge to SEC's lack of rulemaking on corporate environmental disclosures.[213] The Natural Resources Defense Council filed a Rulemaking Petition with the SEC in 1971 requesting a rule requiring corporations to disclose "(1) the nature

207. Williams, *supra* note 14, at 1237.

208. S. REP. NO. 73-792, at 12 (1934).

209. *Id.* at 4 (explaining that stock exchanges' attempts to regulate themselves have been inadequate to "furnish more adequate information for the benefit of investors" and that "the interests with which they are connected frequently conflict with the public interest").

210. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,351 (proposed Mar. 21, 2022). See Section II.C for aspects of the rule with no materiality qualifier.

211. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988) (stating that Congress was concerned that "a minimal standard" for materiality might encompass too much information).

212. *See* Williams, *supra* note 14, at 1264 (clarifying that although material information need not be financial in nature, it still must ultimately bear on a company's financial performance).

213. *See* Nat. Res. Def. Council, Inc. v. SEC (*NRDC I*), 389 F. Supp. 689 (D.D.C. 1974); Nat. Res. Def. Council, Inc. v. SEC (*NRDC II*), 432 F. Supp. 1190 (D.D.C. 1977); Nat. Res. Def. Council, Inc. v. SEC (*NRDC III*), 606 F.2d 1031 (D.C. Cir. 1979). These court decisions are significant because the United States District Court for the District of Columbia and the D.C. Court of Appeals have jurisdiction to review decisions by administrative agencies. *See* D.C. CODE § 2-510(a) (2023). The D.C. Court of Appeals is the highest court in the District of Columbia, and its decisions are highly influential (besides the United States Supreme Court) in deciding the legality and scope of agency actions. *More About the Court of Appeals*, D.C. CTS., https://www.dccourts.gov/court-of-appeals/learn-more (last visited Dec. 20, 2022).

and extent . . . of the resulting pollution or injury to natural areas and resources, and (2) the feasibility of, and plans for, correcting the same" and whether the company "changed company products, projects, production methods, policies, investments or advertising to advance environmental values."[214] When the SEC declined to create a rule with as expansive of disclosure as the NRDC wanted,[215] the NRDC sued under the Administrative Procedure Act, and the court issued a remand requiring the SEC to provide grounds for denial of the rulemaking.[216] After the same result on remand, the D.C. Circuit Court took the SEC's appeal and found that it articulated enough reasons to reject the NRDC's rulemaking proposal.[217]

Although it ultimately upheld the SEC's decision not to promulgate stricter environmental disclosure rules, the court made several statements acknowledging that environmental information could be material.[218] The district court stated that the Securities Act of 1933 gives SEC broad rulemaking authority pursuant to its investor and public protection powers.[219] That broad authority could encompass environmental information, which could be material because sensitivity to those issues can be viewed as a mark of intelligent management.[220] The court was also "not prepared to say that a corporation's adverse impact on the environment . . . may not directly lead to an unfortunate financial condition in the near future."[221] In resolving this series of cases, the D.C. Circuit did not disagree with any of the district court findings on SEC's broad scope, rather it simply held that the SEC's reasoning[222] was sufficient to support its denial of further rulemaking.[223] In these cases, the court also noted that, at the time, the SEC viewed its

214. *NRDC I*, 389 F. Supp. at 694. The NRDC also wanted a rule to be promulgated on disclosure of equal employment practices. *Id.*

215. The SEC did adopt parts of a proposed amendment requiring disclosure of compliance with environmental laws and regulations. *See id.* at 694 (noting that "the amendments would require disclosure of the effects on reporting corporations of their compliance with environmental laws and regulations").

216. *Id.* at 702.

217. *NRDC III*, 606 F.2d at 1062 ("[W]e conclude that the Commission was wholly justified in rejecting the proposed rules and choosing, for the present, to rely on the existing materiality disclosure standard.").

218. *NRDC I*, 389 F. Supp. at 695.

219. *Id.*

220. *Id.* at 700.

221. *Id.*

222. The SEC reasoned that specific environmental disclosure rules were unnecessary because the existing materiality disclosure rules were sufficient to make sure material environmental risks are disclosed, and the SEC could bring an administrative action if this was not done. *NRDC III*, 606 F.2d at 1061.

223. The court also noted that the SEC could continually reevaluate its need for new disclosure requirements in the future. *Id.* at 1062.

disclosure power as being limited to information that is "economically significant."[224]

The discussion in these cases reflects courts' recognition that environmental information can be material under SEC's broad disclosure authority,[225] especially when that information has economic significance.[226] Thus, courts following the NRDC decisions now would likely uphold the SEC's new attitude regarding climate-related risk disclosures considering that its reasoning is based on extensive evidence that there is investor demand[227] and such risks can lead to an "unfortunate financial condition."[228] Furthermore, the current proposed rule's climate-related risk disclosures would likely even fit within the SEC's previously narrow "economically significant" materiality interpretation because climate-related risks affecting the business are more likely to be considered economically significant to investors[229] than the NRDC's proposed rule petition in 1971 for disclosure of business activities that affect the environment.[230] This is because corporate activities that harm the environment are unlikely to hurt the business's economic outlook.[231] In fact, corporate activities that harm the environment

224. Nat. Res. Def. Council, Inc. v. SEC (*NRDC II*), 432 F. Supp. 1190, 1200 (D.D.C. 1977) (quoting Environmental and Social Disclosure, 40 Fed. Reg. 51656, 51658 (proposed Nov. 6, 1975) (codified at 17 C.F.R. pts. 239–40, 249)).

225. *See supra* notes 220–221 and accompanying text.

226. *See supra* notes 202–203 and accompanying text (discussing Congress's belief that securities markets touch on many fields beyond narrow economic concerns but that disclosed information should be related to economic wellbeing).

227. *See NRDC III*, 606 F.2d at 1058 (upholding SEC's view that investors were not interested in environmental information); *see also* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,340–41 (proposed Mar. 21, 2022) (discussing evidence of the financial industry's substantial interest in climate-related risk disclosures).

228. Nat. Res. Def. Council, Inc. v. SEC (*NRDC I*), 389 F. Supp. 689, 700 (D.D.C. 1974); *see, e.g.*, John Armour, Luca Enriques & Thom Wetzer, *Mandatory Corporate Climate Disclosures: Now, But How?*, 2021 COLUM. BUS. L. REV. 1085, 1096–99 (describing physical and transition risks of climate change, and how they can impact businesses).

229. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,340–41 (describing investor demand for climate-related impact reporting); *See also* Letter from Mindy S. Lubber, CEO & President, Ceres, Inc., to Vanessa A. Countryman, Sec'y, SEC 5–6 (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132097-302580.pdf (stating that the economic impacts of increased drought and extreme weather include billions of dollars in damage since the 1980s); JOSEPH DAVIS ET AL., VANGUARD, THE ECONOMICS OF CLIMATE CHANGE 4–6 (2022), https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/the-economics-of-climate-change.pdf (analyzing the impact of global warming, stricter environmental policies, and greater investment in climate change mitigation on major world economies' GDP to 2050).

230. *See supra* note 214 and accompanying text (citing the NRDC's petitioned rule to require disclosure of injuries to natural areas and resources, and the company's advancement of environmental values).

231. If it does, it will likely be in the form of environmental lawsuits or regulation, which must already be disclosed by SEC regulations. 17 C.F.R. § 229.103(c)(3). Reputational risks from environmentally damaging activities can also be disclosed under market risks. *Id.* § 229.305(b).

will more often help the company economically, so—from a purely economic standpoint—reasonable shareholders would not likely consider them material.[232] However, climate-related risks to the business such as rising temperatures, rising sea levels, increased number of extreme weather events, and disruptions to food and water supplies can have a direct effect on the purely economic performance of companies across multiple industries.[233] Therefore, it is highly likely that reviewing courts will be accepting of the SEC's new decision to require disclosure of climate-related risks because the courts have previously recognized the SEC's public interest power to require environmental disclosures,[234] and climate-related risk disclosures provide economically significant information.[235]

3. *Climate-related Risk Disclosures Are Consistent with the SEC's Past Qualitative Disclosure Regulations Without Congressional Approval*

One of the first times the SEC mandated the disclosure of qualitative information was when it required disclosure of management corruption and practices in the 1970s.[236] This controversial move sparked conversations regarding the SEC's ability to mandate qualitative disclosures that can help

232. As an example, Nestlé is an international beverage company infamous for profiting from the depletion of water resources around the United States. *See, e.g.*, Jacey Fortin, *Facing Droughts, California Challenges Nestlé Over Water Use*, N.Y. TIMES (Apr. 30, 2021), https://www.nytimes.com/2021/04/29/us/nestle-water-california.html (noting that Nestlé, "the world's largest food company," has depleted an already limited water supply in California for years); Sean McBrearty, *Nestle Wins and Our Great Lakes Lose*, CLEAN WATER ACTION (Apr. 9, 2018), https://cleanwater.org/2018/04/09/nestle-wins-and-our-great-lakes-lose (explaining how Nestle was allowed to "double the amount of water they pump for next to nothing and sell [it] back to us"); Caroline Winter, *Nestlé Makes Billions Bottling Water It Pays Nearly Nothing For*, BLOOMBERG (Sept. 22, 2017 5:04 PM), https://www.bloomberg.com/news/features/2017-09-21/nestl-makes-billions-bottling-water-it-pays-nearly-nothing-for?leadSource=uverify%20wall.
This certainly causes damage to the environment and local communities, but there is no reason—from a purely "economically significant" materiality perspective—that Nestlé needs to disclose exactly how it harms these natural resources because activities that do not hurt the company economically would not be relevant to the reasonable investor. *See* Nat. Res. Def. Council, Inc. v. SEC (*NRDC II*), 432 F. Supp. 1190, 1200 (D.D.C. 1977) (describing the SEC's view of materiality as information that is economically significant); Nat. Res. Def. Council, Inc. v. SEC (*NRDC III*), 606 F.2d at 1039–40, 1058 (D.C. Cir. 1979) (upholding deference to the SEC's view that required disclosures of the nature and extent of pollution and harm to natural resources was not important to investors but was financially burdensome to regulated companies).

233. Nicholas Duva, *7 Industries at Greatest Risk from Climate Change*, CNBC (Oct. 22, 2014, 6:00 AM), https://www.cnbc.com/2014/10/22/7-industries-at-greatest-risk-from-climate-change.html (explaining that an increase in insurance premiums, food prices, and water shortages are examples of how climate change will negatively impact major industries economically).

234. *See supra* notes 220–221 and accompanying text.

235. *See supra* notes 229–230 and accompanying text.

236. Redwood, *supra* note 203, at 338.

explain why the SEC has the authority to require disclosure of climate-related risks.[237]

The SEC first announced its willingness to find fraud violations for management of a public company's illegal activities in the adjudication of *In re Franchard Corporation*,[238] where corporate officers were found to be stealing money from a public company.[239] In that case, the SEC stated that part of the reason corporate theft is material is because it provides a way for investors to assess executives' business skill and personal integrity.[240] Additionally, corporate theft has a direct effect on the finances of the company.[241] The issue of illegal corporate activities arose again when investigations following the 1972 Watergate Scandal revealed corporations were engaged in illegal campaign contributions in the US and overseas.[242] This resulted in the SEC conducting investigations revealing hundreds of firms admitting to engaging in bribery using off-book accounts.[243] These investigations then brought public attention to corporate corruption issues.[244] In response, the SEC's Division of Corporate Finance released guidance in 1974 taking the position that management of a public company's engagement in illegal activities was always material as it relates to the evaluation of the management's integrity and use of corporate funds.[245] Eventually, the SEC issued regulations requiring the disclosure of illegal management activities.[246] In 1980, the SEC Staff also published a report on corporate accountability explaining the need for such regulations under its public interest power [247] After 1981,[248] the SEC's Division of Enforcement came

237. *Id.*

238. Franchard Corp., 42 SEC Docket 163, Securities Act Release No. 4710, 1964 WL 67454, at *3 (July 31, 1964).

239. Redwood, *supra* note 203, at 338 ("The SEC's first foray into the sticky area of required disclosure of facts relating to management competence and integrity came in the *Franchard* case.").

240. *Franchard*, 1964 WL 67454, at *6–7.

241. *Id.*

242. Williams, *supra* note 14, at 1258.

243. *Id.*

244. *Id.*

245. Division of Corporation Finance's Views and Comments on Disclosures Relating to the Making of Illegal Campaign Contributions by Public Companies and/or Their Officers and Directors, 3 SEC Docket 648, Securities Act Release No. 5466, 1974 WL 161685 (Mar. 8, 1974).

246. 17 C.F.R. § 229.401 (2023).

247. U.S. GOV'T ACCOUNTABILITY OFF., GAO-67-920, STAFF REPORT ON CORPORATE ACCOUNTABILITY: A RE-EXAMINATION OF RULES RELATING TO SHAREHOLDER COMMUNICATIONS SHAREHOLDER PARTICIPATION IN THE CORPORATE ELECTORAL PROCESS AND CORPORATE GOVERNANCE GENERALLY 259 (1980) [hereinafter STAFF REPORT ON CORPORATE ACCOUNTABILITY].

248. Commentators have noted that a major reason for the SEC's acceptance of qualitative disclosures in the 1970s came from the leadership of Stanley Sporkin, the Division of Enforcement's Director from 1973 to 1981. Redwood, *supra* note 203, at 340. He championed the doctrine of qualitative materiality, especially for management competence and integrity. *Id.*

under new leadership and pulled back from its stance that illegal management practices were always material.[249] The new Division of Enforcement Director, John Fedders, believed that qualitative information did not have ascertainable standards, whereas quantitative information could always be tied to its effect on corporate economic conduct.[250] However, the SEC did have later points in its history where it recognized that other qualitative information should be disclosed.[251]

The SEC's reasons to promulgate disclosure rules for certain qualitative information while rejecting others at different periods of time sheds light on when the SEC may exercise its authority to require disclosure of qualitative information without congressional approval.[252] First, there must be a strong demand by investors for the information, and a lack of it being disclosed voluntarily.[253] The SEC exercised its disclosure authority after incidents eliciting great public outrage that created public demand for information that companies were not disclosing.[254] For example, in explaining its decisions to promulgate regulations on illegal corporate activity, the SEC's 1980 *Staff Report on Corporate Accountability* indicated that—contrary to the beliefs of corporate commentators[255]—shareholders expressed great interest in

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249. *Id.* at 345–46.

250. *Id.* However, Fedders did admit that qualitative information could be easier to justify in the proxy solicitation context. *Id.*

251. For example, in 1992 the SEC required disclosure of executive compensation in response to public outrage over large executive salaries. Williams, *supra* note 14, at 1266; Executive Compensation Disclosure, 52 SEC Docket 1961, SEC Release No. 6962, 1992 WL 301259 (Oct. 16, 1992). In 1999, a Staff Accounting Bulletin said that auditors must consider qualitative and quantitative aspects of materiality. SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150–51, (Aug. 19, 1999). In 2010, the Staff released an interpretive statement explaining the materiality of climate change information. Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6293 (Feb. 8, 2010).

252. In particular, the Staff Report on Corporate Accountability provides a side-by-side discussion of why the SEC chose to promulgate disclosure rules for management practices but not other "socially significant" information. *See* STAFF REPORT ON CORPORATE ACCOUNTABILITY, *supra* note 247, at 277 ("It is important . . . that socially significant information be disclosed where material either to a voting decision or because of its present or potential economic effect. Corporate practices which carry the reasonable possibility of causing material, long-term economic effects should be disclosed.").

253. *Id.* at 35 (discussing how the SEC was prompted to re-examine its social disclosures because shareholders did not feel they had adequate information to participate in corporate electoral process and shareholders expressed interest in this information).

254. *See supra* notes 163, 175–178 and accompanying text.

255. The *Staff Report on Corporate Accountability* noted that corporate commentators believed shareholders have little interest in corporate governance issues. STAFF REPORT ON CORPORATE ACCOUNTABILITY, *supra* note 247, at 35. This rings a familiar bell of pro-corporate commentators claiming that investors are not really interested in climate-related risks. *See, e.g.*, David Blanchett, *Investors Aren't Adding ESG to Their 401(k)s—Even When They Have the Option*, WALL ST. J. (Nov. 1, 2022, 11:38 AM), https://www.wsj.com/articles/esg-investments-401k-plan-11667255051?mod=Searchresults_pos1&page=1.

management structures and practices.[256] The report found that shareholders felt frustration and powerlessness to engage in voting because they did not have enough information about corporate management.[257] Meanwhile, disclosure of environmental and other social information did not yet garner the same demand from shareholders and investors at the time.[258]

Second, the information must be demanded for the purpose of informing a voting decision or evaluating the company's present or future economic performance.[259] The *Staff Report on Corporate Accountability* engaged in an analysis of what commenters believed was the relationship between "socially significant" information and economic materiality.[260] The SEC Staff's analysis concluded that commenters believe socially significant information becomes material when it affects economic performance over time.[261] Further, social consequences are negligible when its economic impact is too long range.[262] The need for a nexus between socially significant information and economic relevance is also reflected in court decisions,[263] statements from SEC leaders,[264] and comments to the SEC.[265]

In discussing the materiality of environmental information specifically, the *Staff Report on Corporate Accountability* sifted through comments from shareholders discussing what environmental information is important.[266] In the voting context, the *Staff Report on Corporate Accountability* highlighted that shareholders make decisions largely based on past corporate performance and expected future performance.[267] Shareholders may vote for new corporate management based on their evaluation of management's past pollution control record and environmental impact, and thereby speak on how corporate stewardship should run in the future.[268] However, the *Staff Report on Corporate Accountability* expressed worry that too much environmental

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256. STAFF REPORT ON CORPORATE ACCOUNTABILITY, *supra* note 247, at 35.

257. *Id.*

258. *Id.* at 266–77 ("[T]here does not appear to be a sufficient level of shareholder interest to warrant considering . . . mandatory disclosure requirements regarding socially significant information generally.").

259. *Id.* at 277.

260. *Id.* at 262–76.

261. *Id.* at 262–63.

262. *Id.* at 262–68.

263. *See supra* note 224 and accompanying text (showing the court recognized the SEC's view of its disclosure power being limited to economically significant information).

264. *See supra* note 250 and accompanying text (discussing how a former SEC Division of Enforcement director believed qualitative information did not have ascertainable standards).

265. *See supra* note 259 and accompanying text (explaining how commenters viewed the relationship between socially significant information and economic materiality).

266. STAFF REPORT ON CORPORATE ACCOUNTABILITY, *supra* note 247, at 278–86.

267. *Id.* at 281.

268. *Id.* at 280–89.

information might burden those uninterested in it, confuse investors who may misinterpret minor environmental transgressions, and hide the truly significant information.[269] Given the balancing act between too much or too little information, the *Staff Report on Corporate Accountability* acknowledged that focused disclosure could be beneficial to investors and shareholders, but decided more action was not yet warranted.[270]

The past practice of mandating disclosure of qualitative information following a finding of investor demand and economic significance explains why climate-related risks are within the SEC's disclosure authority today, regardless of congressional approval.[271] Even in the 1970s, it was recognized that environmental information can be economically material, but the SEC decided not to exercise its authority because there was not a strong demand for more information than what was being provided under current disclosure rules.[272] Now, there is certainly demand for climate-related risk information that companies do not share or only partially disclose.[273] The proposed rule cites multiple initiatives by groups of institutional investors who have demanded more data to assess climate-related risks, including a 2019 *Global Investor Statement to Governments on Climate Change*,[274] the UN Principles for Responsible Investment,[275] and the Climate Action 100+.[276] The use of the most popular environmental disclosure reporting frameworks has also continued to rise in response to demand.[277] Even the Business Roundtable,

269. *Id.* at 284–86.

270. *Id.* at 286.

271. *See supra* notes 253, 259–261 and accompanying text.

272. At the time, companies had to disclose any environmental litigation pursuant to the recently enacted National Environmental Policy Act ("NEPA") mandates. STAFF REPORT ON CORPORATE ACCOUNTABILITY, *supra* note 247, at 278–79.

273. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,340 (proposed Mar. 21, 2022) (stating, for example, that the UN Principle for Responsible Investment has "acquired over 4,000 signatories").

274. *Id.* A statement signed by 630 investors managing over 37 trillion dollars urging governments to require climate-related risk disclosures. *Id.* This grew to 733 investors for the Investor Agenda's *2021 Global Investor Statement to Governments on the Climate Crisis* with more than 52 trillion dollars in assets managed among that group. *Id.* (citing INV AGENDA, 2021 GLOBAL INVESTOR STATEMENT TO GOVERNMENTS ON THE CLIMATE CRISIS (2021), https://theinvestoragenda.org/wp-content/uploads/2021/09/2021-Global-Investor-Statement-to-Governments-on-the-Climate-Crisis.pdf)).

275. This included 4000 signatures with 120 trillion dollars under their collective management. *Id.*

276. An initiative with 617 investors managing 60 trillion dollars in assets. *Id.* at 21,341.

277. For instance, the TCFD 2022 Status Report indicated that 70% of companies implementing the TCFD recommendations disclosed climate-related information in financial filings or annual reports while only 45% did in 2017. TCFD, FIN. STABILITY BD., 2022 STATUS REPORT 5 (2022), https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf. The Global Reporting Initiative indicates that KPMG sustainability reporting surveys show that 96% of the world's biggest 250 companies by revenue and 79% of the top 100 businesses in 58 countries report on sustainability or ESG. *Four-in-Five Largest Global Companies Report with GRI*, GLOB.

which filed a comment criticizing some aspects of the proposed rule, noted that many of its members have already been responding to investor demand by disclosing climate risks, Scope 1, Scope 2, and some Scope 3 GHG emissions.[278] Despite the increase in outward acceptance and voluntary reporting of climate-related risk, mandatory reporting rules are still necessary to meet investors' demands for accurate and full disclosure.[279] Indeed, studies show that institutional investors still do not have information they need to factor the cost of climate-related risks into their assessments.[280]

Climate-related risks also provide information significant to a public company's economic health.[281] It is widely accepted that climate change is leading to sea-level rise, increased temperatures, extreme weather events, and other hazards.[282] These translate into a myriad of potential economic risks for public companies.[283] Concern for how these events can impact a business's supply chain, business outlook, expenditures, and whether the company has processes for identifying material risks are information essential for investors to evaluate any company's economic future.[284] It seems that—far from requiring climate-related risk disclosure to influence corporate behavior for the benefit of climate activists[285]—this disclosure is tailored by the SEC's historic concerns of balancing the need for relevant information for investors

REPORTING INITIATIVE (Oct. 31, 2022), https://www.globalreporting.org/news/news-center/four-in-five-largest-global-companies-report-with-gri/; *see also supra* note 35 and accompanying text (noting that private groups like the Coalition for Environmentally Responsible Economies were founded to create principles for responsible environmental behavior).

278. Letter from Maria Ghazal, Senior Vice President & Couns., Bus. Roundtable, to Vanessa A. Countryman, Sec'y, SEC 2 (June 17, 2022), https://s3.amazonaws.com/brt.org/2022.06.17-BRT.Countryman.TheEnhancementandStandardizationofClimate-RelatedDisclosuresforInvestors3.pdf.

279. *See supra* notes 43–47 and accompanying text (discussing greenwashing issues caused by multiple, non-uniform climate disclosure frameworks and investor demands for mandatory rules to increase reliability, comparability, and consistency of information).

280. Emirhan Ilhan et al., *Climate Risk Disclosure and Institutional Investors*, REV. FIN. STUD., Jan. 9, 2023, at 1, 10–12, https://doi.org/10.1093/rfs/hhad002 (showing survey data that seventy-nine percent of institutional investors participating in the study globally believed climate risk disclosure to be at least as important as financial disclosure and seventy-three percent agreed or strongly agreed that standardized and mandatory climate risk reporting is necessary).

281. *See supra* notes 229, 259 and accompanying text (citing evidence that climate risks affect economic performance).

282. *See* Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 499 (2007) (recognizing the strong scientific consensus that global warming threatens a rise in sea levels, changes to natural ecosystems, increases in the spread of disease, and direct economic consequences).

283. *See* Richard Mattison, *Accounting for Climate: The Next Frontier in ESG*, S&P GLOB. (Oct. 1, 2019), https://www.spglobal.com/en/research-insights/featured/special-editorial/accounting-for-climate-the-next-frontier-in-esg ("[Eighty] percent of the world's largest companies are reporting exposure to physical or market transition risks associated with climate change . . . .").

284. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,353–73 (proposed Mar. 21, 2022).

285. *See supra* note 132 and accompanying text.

without requiring environmental data that is unduly cumbersome to investors.[286] The proposed rule's balanced approach is particularly evident when considering that the SEC could have required disclosure of information related to public company's activities that are harming the planet, as is the case with some foreign countries.[287] However, the SEC likely recognizes that a public company's actions affecting the environment generally do not inform investors or shareholders on the economic condition of the company,[288] something that has been traditionally important in American securities laws.[289]

The proposed rule's climate-related risk disclosures fall within the SEC's statutory authority and mission as shown by its consistency with past practice in promulgating rules for disclosure of qualitative information.[290] Like other qualitative disclosures in the past,[291] the SEC has recognized that demand for climate-related disclosures to assess a company's economic performance has finally reached the point where mandatory disclosure is necessary.[292]

C. Disclosure of GHG Emissions May Only Fall Under the SEC's Scope and Authority if It Is Expressly Allowed by Congress or on a Comply-or-Explain Basis

The proposed rule would require the disclosure of Scope 3 GHG emissions if they are material to the business.[293] Scope 1 and 2 emissions,

286. *See supra* notes 71, 78 and accompanying text (citing the Supreme Court's conclusion that disclosures should balance investors' need for information without burying investors and overburdening companies).

287. For example, the European Union uses a "double materiality" standard whereby environmental information is considered material if it affects the company's performance or if the company's activities impact people or the environment. *See EU Proposal Regarding Corporate Sustainability Reporting*, *supra* note 110, at 1.

288. *See supra* notes 231–233 and accompanying text (explaining how a company's harm to the environment does not hurt it economically, but climate-related risks to the company can hurt it economically).

289. *See supra* notes 259–262 and accompanying text (examining when investors find socially significant information important in evaluating a company's economic performance).

290. *See supra* notes 271–289 and accompanying text (explaining why climate-related risks are consistent with the SEC's past practice for requiring disclosure of socially significant information without congressional approval).

291. *See supra* notes 236–246 and accompanying text (explaining the events prompting the SEC to require disclosure of management corruption and practices).

292. *See supra* notes 272–280 and accompanying text (explaining that the SEC did not require disclosure of environmental information in the 1970s partly due to low demand, but evidence shows that investors today have a high demand for climate-related risk disclosure).

293. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,373–81 (proposed Mar. 21, 2022).

however, will be required whether they are material or not.[294] Scope 1, 2, and 3 emissions would likely fall under the SEC's statutory authority only with an express delegation of authority from Congress or by changing the GHG emissions disclosures to be on a less stringent comply-or-explain basis.[295]

1. Why GHG Emissions May Not Fall Under SEC's Statutory Authority and Mission Without Congressional Approval

Without an express delegation from Congress, GHG emission disclosures may be beyond the SEC's statutory authority.[296] This is because the SEC does not currently have the power to facilitate a nationwide shift toward a low carbon economy,[297] and GHG emissions are qualitative information that does not help an investor or shareholder evaluate a company's economic performance.[298]

The proposed rule says that GHG emissions information is important to investment decisions because it is useful in assessing risks of transitioning to a lower carbon economy,[299] and GHG emissions are quantifiable and comparable across industries.[300] It seems circular to rely on transitioning to a lower carbon economy as justification for requiring GHG emissions because it is premised on the idea that the government is moving the economy toward low carbon (even though Congress has not expressly authorized or implemented a low carbon transition), and the purpose for requiring disclosure of GHG emissions would be that it is an attempt to implement that very transition.[301] This reasoning will likely bear scrutiny from courts, as evidenced by the recent decision *West Virginia v. Environmental Protection*

294. *Id.*

295. *See infra* Sections II.C.1–2.

296. *See infra* Sections II.C.1–2.

297. Congress recently passed the Inflation Reduction Act ("IRA"). Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022). Under Subtitle D, the IRA provides tax credits and incentives for businesses and individuals that switch to clean energy and use clean fuels. *Id.* §§ 13101–13501, 136 Stat. at 1906–81. Although this signals a desire to lower carbon emissions, the IRA does not make any grants of rulemaking power to federal agencies, therefore it will be assumed for the sake of this argument that Congress still has not delegated power to the SEC to promulgate regulations for the purpose of transitioning to a low carbon economy. *Id.*

298. See *supra* Section II.B.3 for a discussion of why disclosures of qualitative information likely need to have investor demand and a nexus to economic performance to fall under current SEC authority.

299. The proposed rule's other justifications were related to transition risks, explaining that GHG emissions data will help investors "evaluate the progress in meeting net-zero commitments and assess[] any associated risks," and could impact voting decisions because GHG "could impact the company's access to financing, as well as its ability to reduce its carbon footprint in the face of regulatory, policy, and market constraints." The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,373–74 (proposed Mar. 21, 2022).

300. *Id.* at 21,376.

301. *Id.* at 21,375–77.

Agency.[302] In that case, the Supreme Court struck down the Environmental Protection Agency's ("EPA") cap-and-trade rule because it had the purpose and effect of attempting to transition the nation's electricity generation to low GHG emissions.[303] The Court said that the EPA exceeded its statutory authority because Congress had not delegated to it the authority to shift the American energy grid toward low carbon emitting sources.[304] Likewise, it seems unlikely that the Court would find the SEC has the authority to make rules that are based on an assumed nationwide effort to transition to a low carbon economy when Congress has not passed an act directing executive agencies to do so.[305] While transitioning to a low carbon economy is a laudable goal,[306] the Court will not likely agree the SEC has such power without an act from Congress.[307]

Besides transitioning to a low carbon economy, the proposed rule does not provide further reasons why GHG emissions would be per se material to investors.[308] There is likely a demand for GHG emissions disclosure;[309] however, the SEC's past practice requiring disclosures of qualitative data usually also requires the information be used to inform an investor or shareholder about the company's present or future economic condition.[310] It is hard to see how GHG emissions help evaluate a company's economic condition because the causal connection between GHG emissions and

302. 142 S. Ct. 2587 (2022).

303. *Id.* at 2611–13.

304. *Id.* at 2612.

305. *Id.* at 2609 ("[B]oth separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. . . . The agency instead must point to 'clear congressional authorization' for the power it claims." (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

306. Leaders in the private sector are already making the case for a low carbon economy transition without the help of the government, hopefully Congress will follow suit in the near future. Team of BlackRock, *The Transition to a Low Carbon Economy*, VETTAFI ADVISOR PERSPS. (Apr. 29, 2022), https://www.advisorperspectives.com/commentaries/2022/04/29/the-transition-to-a-low-carbon-economy.

307. *West Virginia*, 142 S. Ct. at 2609.

308. The proposed rule mentions that GHG emissions could also help investors evaluate climate-related risks, but it does not say how and appears to still be referring to transition risks which are included under climate-related risks generally. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,375 (proposed Mar. 21, 2022) ("[T]he data provides insight into a registrant's exposure to climate-related risks, and transition risks in particular—risks that have implications for a registrant's financial condition and results of operations.").

309. The proposed rule indicated that some commenters are even paying third parties for GHG emissions data or contacting the companies directly. *Id.*

310. *See supra* note 253 and accompanying text (explaining that the SEC requires disclosure of qualitative information when it informs a voting decision or evaluates future economic performance).

climate risks to the company are difficult to establish.[311] An argument could be made that GHG emissions contribute to global warming, which increases climate risks like extreme weather, and those risks directly impact a company's performance.[312] However, the GHG emissions would likely need a more proximate causal relationship to direct harm for it to be used by investors as a proxy measurement for climate risk.[313]

2. Congress Can Require Disclosure of Information for Ethical Reasons

Congress has previously given the SEC authority to require disclosures of qualitative information, like GHG emissions, for purely ethical reasons pursuant to its public interest power.[314] In the Dodd-Frank Wall Street Reform and Consumer Protection Act,[315] Congress specifically mandated disclosure of several kinds of qualitative information,[316] including a company's involvement with conflict minerals and extractive resources in the Democratic Republic of the Congo.[317]

The legislative history reveals there were economic reasons for requiring disclosure of conflict minerals, but senators spent most of the time discussing ethical reasons for the amendment.[318] The legislation had a large scope as it was part of a "broader international effort to combat corruption, poverty, hunger, and disease throughout Africa, Asia and Central America."[319] Senator Durbin even spoke about a recent trip he took to the Congo, and the horrendous conditions that were a result of activities funded

311. The issue of causation and material risk disclosures is beyond the scope of this Comment, but it is certainly necessary to show causation between omitted disclosures and harm to the investor in many securities contexts such as fraud and proxy disclosure litigation. 4 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12:91, Westlaw (database updated Dec. 2022).

312. *See* Nicholas Duva, *7 Industries at Greatest Risk from Climate Change*, CNBC (Oct. 22, 2014, 6:01 AM), https://www.cnbc.com/2014/10/22/7-industries-at-greatest-risk-from-climate-change.html.

313. *See supra* note 311 and accompanying text.

314. *See supra* Section I.B.1.

315. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

316. The Act also required public companies disclose information related to mine safety, *id.* § 1503, 124 Stat. at 2218 (codified at 15 U.S.C. § 78m-2) and resources extraction issuers, *id.* § 1504, 124 Stat. at 2220 (codified at 15 U.S.C. § 78m(q)).

317. *Id.* § 1502 (codified at 15 U.S.C. § 78m(p)); *see also* Williams & Nagy, *supra* note 64, at 1460–61 (describing the need for conflict mineral disclosures and its legal challenges).

318. 156 CONG. REC. S8317 (daily ed. May 17, 2010) (statement of Sen. Benjamin Cardin) (discussing that the amendment could preserve jobs by improving mine conditions and reduce companies' exposure to tax and reputational risk).

319. *Id.* at S8319 (daily ed. May 17, 2010) (statement of Sen. Christopher Dodd).

by extractive mining operations.[320] Senators believed the conflict mineral disclosure was a necessary response to a lack of information provided to investors and to an over-reliance on the judgements of ratings agencies that do not properly disclose ethical information on their own.[321] Senators indicated conflict mineral disclosures would be important to "socially responsible investors" given the connection between war, corruption, poverty, and the extraction of these minerals.[322] The legislative history of this amendment is evidence that Congress recognizes the SEC can require disclosure of information for purely ethical reasons to protect the public and implement broad goals.[323] GHG emission disclosures could also fall within the SEC's power to protect the public if Congress gave its express authorization.[324]

In July 2021, a bill passed the House of Representatives that would require disclosure of a company's views about the link between ESG metrics and its long-term business strategy.[325] This legislation does not require disclosure of GHG emissions, but it would be a further acknowledgement of the SEC's expansive authority to require qualitative information.[326]

3. A Comply-or-Explain Model for GHG Emissions May Offer a Permissible Disclosure Method Under Current SEC Authority

Comply-or-explain disclosure for GHG emissions may be more allowable under current SEC statutory authority because it is essentially voluntary in nature and does not conflict with the SEC's past practice of mandating disclosure information that is related to a company's economic performance.[327] Comply-or-explain refers to a disclosure method where the regulated company would have to comply with the GHG disclosures, or it must explain in their SEC filings why it did not need to include that information.[328] Studies in the U.S. and European markets have found that comply-or-explain models are good at offering flexibility to regulated

320. *Id.* at S8318 (daily ed. May 17, 2010) (statement of Sen. Richard Durbin) ("[M]ost people probably don't realize the products we use every day . . . may use one of these minerals from this area of conflict . . . and that there is a possibility it was mined from an area of great violence.").

321. *Id.* at S8318 (daily ed. May 17, 2010) (statement of Sen. Richard Lugar).

322. *Id.*

323. *Id.* at S8317 (daily ed. May 17, 2010) (statement of Sen. Benjamin Cardin) ("[T]ransparency in natural resources development is key to holding government leaders accountable for the needs of their citizens.").

324. *Id.*

325. ESG Disclosure Simplification Act of 2021, H.R. 1187, 117th Cong. (2021).

326. *Id.*

327. *See* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 304–05 (2022) (discussing former SEC Commissioner's concerns with "mission creep" from ESG rule makings by the SEC).

328. Ho, *supra* note 93, at 329.

entities, motivating compliance, and enhancing reliability and comparability of ESG reporting for investors.[329] In the United States specifically, a study found that after the SEC used explain-or-comply models for ethics disclosures and pay ratio rules, a majority of firms adopted an ethics code.[330]

The drawbacks of comply-or-explain are similar to that of voluntary disclosure frameworks,[331] which is why mandatory compliance would still be preferred for as many climate-related risk disclosures as possible.[332] However, requiring GHG emissions on a comply-or-explain basis rather than making them per se material could provide the SEC with a middle ground approach that increases disclosure without waiting for Congress to act or going outside its statutory boundaries.[333]

CONCLUSION

The SEC's proposed rule is a major step in providing the public, investors, and shareholders with reliable and consistent information about the effects climate change has on public companies.[334] Still, pro-industry critics insist that any information not strictly financial or economic in character is beyond SEC's disclosure authority.[335] These critics ignore the historical development of SEC practices, legislative intent of the Securities Acts, and evolving SEC regulations that clearly point to its constitutional authority to require disclosures of material climate-related risks.[336] The climate-related risk disclosures are tailored to even the most restrictive interpretations of materiality in American securities law[337] and fill a demand in securities

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329. *Id.* at 331–35.

330. *Id.* at 334–35.

331. *Id.* at 331–32 (listing potential weaknesses as companies giving boilerplate explanations and refusing to adopt the disclosure framework's best practices).

332. As an example of this, the European Union has required environmental information on a comply-or-explain basis since 2017, however it is now enacting mandatory disclosure rules citing a lack of compliance as an issue with the comply-or-explain model. *See EU Proposal Regarding Corporate Sustainability Reporting*, *supra* note 110110, at 1 ("In accordance with the NFRD, in 2017 the Commission published non-binding reporting guidelines for companies. . . . These guidelines have not sufficiently improved the quality of information companies disclose pursuant to the NFRD.").

333. Ho, *supra* note 93, at 346–47 (discussing how comply-or-explain will allow the SEC to work toward its disclosure goals without running into constitutional challenges).

334. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,334 (proposed Mar. 21, 2022).

335. *See supra* Section I.C.4.

336. *See supra* Part II.

337. *See supra* notes 224, 250 and accompanying text (showing examples from periods in SEC history where it narrowly construed materiality as being limited to strictly economic and financial information).

markets that is currently occupied by fraud and deception.[338] At the same time, the SEC should not put these benefits in harm's way with an attempt at regulating GHG emissions that will almost certainly not survive legal challenges.[339]

In 1933 and 1934, the SEC was given broad authority to protect the public, investors, and maintain fair capital markets.[340] In 2022, the SEC is proposing to use that power for what it was intended—to provide investors with reliable and consistent information about how climate change's destructive forces will impact the public companies that control Americans' economic destinies.[341]

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338. *See supra* notes 44–46 and accompanying text (describing how companies choose overly broad disclosure frameworks or not disclose information to appear environmentally friendly).

339. *See supra* Section II.C.1.

340. *See* Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933); Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934).

341. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,334 (proposed Mar. 21, 2022).