COMMENT

THE VALUE OF REGULATING CLIMATE DISCLOSURES

BY
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Climate change poses great physical, transitional, and legal risks to the capital market. Current U.S. Securities and Exchange Commission (SEC) disclosures do not adequately consider market exposure to such climate risk, especially in the long-term. The SEC's latest analysis of how climate-related disclosures fit into the agency's existing disclosure regulations, found in its 2010 Guidance Document, is outdated given developments in regulations, market conditions, and climate science. Moreover, SEC registrants have discretion over reporting climate-related information to the agency, and generally avoid fully disclosing such information. As capital market participants become increasingly aware of climate risks, however, they are increasingly asking SEC registrants to disclose climate-related information and the SEC to provide greater guidance and specific SEC regulation on climate matters. The SEC's recent March 2022 Proposed Rule suggests the SEC will soon take action to reduce registrants' discretion over climate-related disclosures by creating a specific duty for publicly held companies to disclose climate-related matters aligned with broadly accepted climate disclosure frameworks. This will give the SEC power to enforce climate-related disclosures and will provide market participants with more consistent, comparable, and reliable climate-related

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information to help them make informed investment and business decisions. This Note argues that the SEC is the appropriate agency to take such action. It suggests that either the SEC already has the implied authority to promulgate such disclosure rules, or Congress may soon give it this authority explicitly. This Note argues that the SEC should both update its 2010 Guidance Document and should adopt a final version of its March 2022 Proposed Rule. Ultimately, the SEC has a responsibility, or at least the opportunity, to help address the systemic and catastrophic risks of climate change to the capital market. The SEC should act accordingly.

I. INTRODUCTION

Climate change poses great physical, transitional, and legal risks to the capital market.[1] Current U.S. Securities and Exchange Commission

[1] The occurrence of anthropogenic climate change is no longer hotly debated. *Scientific Consensus: Earth's Climate Is Warming*, NAT'L AERONAUTICS & SPACE ADMIN., https://perma.cc/74SJ-UB9S (last updated Nov. 22, 2022). Leaders around the world recognize the severity of the risks of allowing the global average temperature to increase

(SEC) disclosure regulations for publicly held companies do not adequately consider this climate risk to the capital market, especially in the long-term. Capital market participants are increasingly requesting SEC registrants to disclose climate-related information as they become more aware of climate risks.[2] Capital market participants are also increasingly requesting that the SEC update its disclosure guidance and regulations related to climate matters.[3] These requests, combined with the limited enforcement power of the SEC indicate that existing climate-related disclosures are inadequate to produce the effective climate-related disclosures that the capital market needs.[4]

Currently, registrants have great discretion over their level of climate-related reporting to the SEC.[5] Such discretion is proving ineffective at producing climate-related disclosures that are decision-useful for market participants. Registrants are using this discretion to publicly report climate-related information through various, unregulated voluntary reporting mechanisms rather than through regulated SEC processes.[6] Voluntary reporting mechanisms tend to provide more

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above 1.5 degrees Celsius. *See generally* Richard P. Allan et al., *Summary for Policymakers*, *in* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 3–32 (Valérie Masson-Delomotte et al. eds., 2021), [hereinafter IPCC AR] (presenting key findings from the Working Group's contribution to the current state of the climate). Physical risks include "operational impacts of extreme weather events [and] supply shortages." Michela Coppola et al., *Feeling the Heat? Companies are Under Pressure on Climate Change and Need to do More*, DELOITTE INSIGHT 3 (Dec. 12, 2019), https://perma.cc/842C-2AVG. Transitional risks "arise from society's response to climate change, such as changes in technologies, markets[,] and regulation that can increase business costs, undermine the viability of existing products or services, or affect asset values." *Id.* Legal risks include "liability for emitting greenhouse gases." *Id.*

2 Investors are increasingly requesting companies publicly report climate-related information because "they recognize that climate risks can pose significant financial risks to companies, and [they] need reliable information about climate risks to make informed investment decisions." Statement, Gary Gensler, Statement on Proposed Mandatory Climate Risk Disclosures (Mar. 21, 2022), https://perma.cc/VV9G-ZQJG. *See also* Coppola et al., *supra* note 1, at 2 (explaining that market participants are becoming more concerned about climate change given "mounting public awareness, fanned by widespread perception that extreme weather events are becoming more frequent, and . . . growing . . . scientific evidence [of] changing weather patterns") (internal citation omitted).

3 *See* Matthew Goldstein & Peter Eavis, *The S.E.C. Moves Closer to Enacting a Sweeping Climate Disclosure Rule.*, N.Y. TIMES (Mar. 21, 2022), https://perma.cc/KWP5-D79W (suggesting that at least some participants will "welcome the proposed rule because they believe standardized climate disclosures will make it easier to compare the environmental efforts of companies.").

4 New climate-related risk disclosures are necessary to help manage and mitigate physical and transitional climate change risks, avoid "catastrophic tipping points," and seize "economic opportunities associated with the transition to a carbon-neutral economy." Heather Boushey et al., *New Tools Needed to Assess Climate-Related Financial Risk*, THE WHITE HOUSE (Nov. 3, 2021), https://perma.cc/AP3U-4CU2.

5 *Cf.* Press Release, U.S. SEC. & Exch. Comm'n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), [hereinafter SEC Press Release], https://perma.cc/KAK4-RSZF (explaining that the March 2022 Proposed Rule would require certain climate-related disclosures in SEC filings).

6 *See, e.g.*, Gensler, *supra* note 2 (providing that 90% of the largest 500 companies in the Russel 1000 Index published sustainability reports, including climate-related information, through a variety of third-party standards).

guidance than the SEC and other U.S. regulatory bodies on how to disclose climate-related matters.[7] Reporting through voluntary mechanisms may also protect registrants from exposure to potential liability that may arise if they disclosed through SEC filings instead.[8] Additionally, although the market seems to consider climate issues material matters, there is no SEC duty to disclose climate-related information.[9] No duty gives registrants discretion over their reporting,[10] meaning that the SEC has limited power to enforce its disclosure requirements upon reported climate information.[11] SEC enforcement is

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[7] Numerous voluntary environmental, social, and governance (ESG) reporting frameworks have made substantial contributions to the development of ESG disclosures and best practices. ORG. FOR ECON. COOP. & DEV., ESG INVESTING: PRACTICES, PROGRESS AND CHALLENGES 20 (2020), https://perma.cc/EJC9-BMNY. Frameworks include the Sustainability Accounting Standards Board (SASB) which focuses on financial materiality, the Global Reporting Initiative (GRI), and International Integrated Reporting Council (IIRC). Providers of frameworks specific to climate risks include the Taskforce on Climate-related Financial Disclosures (TCFD) and the Climate Disclosures Standards Board (CDSB), "which reflect financial and environmental materiality to varying degrees." *Id.* The SEC only provides guidance on how its existing disclosure requirements may implicate climate disclosures. *See generally* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241) [hereinafter 2010 Guidance]. Note also that the United States appears to be behind other countries which have begun adopting climate-related disclosure rules and guidance which mostly align with the TCFD framework. Gensler, *supra* note 2.

[8] The courts have inconsistently determined whether investors have a cause of action based on their reliance on various company climate reports for their investment decisions. Virginia Milstead, *Takeaways: Climate-Related Securities Suits May Increase with New SEC Standards*, SKADDEN (Jan. 19, 2022), https://perma.cc/CX98-GCMW. For example, in *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2017 WL 3058563, at *5–7 (N.D. Cal. July 19, 2017), the court found that plaintiffs' reliance on Volkswagen's corporate social responsibility (CSR) and sustainability reports which indicated certain "vehicles were environmentally friendly 'clean diesel' vehicles" was unjustified. Milstead, *supra* note 8. Reliance was not justified because a reasonable investor would not conclude from these reports that Volkswagen "was committed to emissions-reducing technology" and thus, that these reports were not misleading such that Volkswagen and its officers were shielded from securities fraud liability based on these reports. *Id.* (citing *In re Volkswagen*, 2017 WL 3058563 at *7). In contrast, in *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832, 839–40, 846, 859 (N.D. Tex. 2018), the court found that Exxon's statements regarding the company's proxy carbon costs in its Energy and Carbon – Managing the Risks report "sufficiently allege[d] material misrepresentations," subjecting the company and certain officers to liability for violations of Section 10(b), Rule 10b-5, and Section 20(a) of the Exchange Act. Milstead, *supra* note 8 (citing *Ramirez*, 334 F.Supp.3d at 846).

[9] *Cf.* SEC Press Release, *supra* note 5 (announcing proposed rule changes that would require certain climate-related disclosures, inferring that there is currently no duty to disclose).

[10] Commissioner Allison Herren Lee, Keynote Address at 2021 ESG Disclosure Priorities Event: Living in a Material World: Myths and Misconceptions about "Materiality" (May 24, 2021), https://perma.cc/5FWK-CA69 (expressing in her keynote speech that "[t]here is no general requirement under the securities laws to reveal all material information.").

[11] *See, e.g.*, Anthony Alden et al., *Climate Change SEC Financial Disclosures: Will New Rules Come with a New President?*, MARTEN L., https://perma.cc/6YW8-EFMF (last visited Dec. 20, 2022) (indicating that SEC enforcement regarding climate-related disclosures has

thus largely restricted to issuing comment letters.[12] Comment letters have minimal impact because they do not subject the recipient to any significant SEC penalties other than the time it takes to respond and complete the review process.[13] Registrants thus have little incentive to disclose climate-related information to the SEC. This lack of incentive unfortunately causes registrants to report climate-related information through a variety of voluntary climate reporting frameworks that are not sufficiently comprehensive to provide market participants with decision-useful information.[14]

The multitude of voluntary climate reporting methodologies, with varying yet overlapping focuses,[15] has created inconsistencies and gaps within and between climate reporting mechanisms.[16] The voluntary nature of these reporting mechanisms has resulted in a lack of appropriate oversight of climate reporting.[17] Poor oversight has created risk of greenwashing, whereby companies overstate or make

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been lacking and noting, as an example, that the SEC dropped a 2018 investigation into ExxonMobil's climate risk disclosures).

[12] *Filing Review Process*, U.S. SEC. & EXCH. COMM'N (Sept. 27, 2019), https://perma.cc/4S4A-N3SW.

[13] *Id.*

[14] *See* Lois Guthrie, *The Case for Consistency in Corporate Climate Change-related Reporting*, CLIMATE DISCLOSURE STANDARDS BD. 12–13 (Jan. 1, 2012), https://perma.cc/K436-FPUF (explaining a 2010–2011 study found that quality and quantity differences in climate-related information between 10-K filings and voluntary filings, with the voluntary filings being more complete and comprehensive regarding risk exposure and that 39% of the companies studied only minimally addressed ESG risks in SEC financial filings).

[15] *Id.* at 5–6. Climate reporting frameworks "provide principles-based guidance on how information is structured, how it is prepared, and what broad topics are covered." *SASB Standards & Other ESG Frameworks*, SUSTAINABILITY ACCT. STANDARDS BD. (2022), [hereinafter *SASB Standards*], https://perma.cc/KJ2U-CGSM. The TCFD, for example, provides a framework of recommendations specifically for public companies to develop "clear, comparable[,] and consistent" disclosures of climate-related risks and opportunities. TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, FINAL REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES i (June 2017), https://perma.cc/QDJ8-PYFK. The GRI provides a framework for ESG reporting by "companies, cities, government agencies, universities, hospitals, [and non-governmental organizations]." *The Top 5 Sustainability Reporting Frameworks You Should Know*, MEASURABL (Aug. 3, 2020), [hereinafter *Top 5 Sustainability Frameworks*], https://perma.cc/LXX9-A9NV. Climate reporting standards implement such frameworks to "provide specific, detailed, and replicable requirements for what should be reported for each topic, including metrics," to ensure climate disclosures are consistent, comparable, and reliable. *SASB Standards*, *supra* note 15. For example, SASB provides industry specific standards focused on the financial materiality for business and investment decisions. *Top 5 Sustainability Frameworks*, *supra* note 15. The CDP focuses on GHG emissions as well as governance and business strategies for cities and companies to "mitigate climate change and deforestation and promote water security." *Id.*

[16] Guthrie, *supra* note 14, at 9–15.

[17] *See id.* at 5, 7 (stating "regulatory and corporate approaches to non-financial reporting are still under development" and can vary in their objectives and approaches towards climate change reporting).

unsubstantiated climate-related claims.[18] Such claims indicate companies are allocating resources to prepare numerous climate reports that are not necessarily decision-useful for investors. Since climate-related data and assertions are not transparent, reliable, or comparable,[19] the numerous available climate reporting mechanisms are thus inadequate to ensure consistent, comparable, and reliable reporting of climate-related information.

Market participants have additional concerns. Management is concerned about their potential personal liability for improper climate-related disclosures.[20] Investors are concerned that they are not properly informed about the ever-evolving climate change risks to the public businesses in which they are investing.[21] To address management's concerns over their potential liability and investors' concerns over the lack of decision-useful information, capital market participants want the SEC to evolve its guidance and rules to better regulate climate-related information.[22] The hope is that this will help market participants make more informed investment and business decisions.[23] Participants want the SEC to at least provide improved guidance on how publicly held companies should consider climate-related information within the bounds of existing SEC disclosure requirements.[24] The SEC released an interpretive guidance document in 2010, titled Commission Guidance Regarding Disclosure Related to Climate Change (2010 Guidance Document or Guidance), on how the agency's existing rules may implicate climate-related disclosures.[25] The Guidance is now outdated and does not reflect current regulations, market studies, or climate science.[26] The Guidance should be updated for a few reasons: (1) to signal to the market

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[18] *Are You Concerned About Greenwashing?*, S&P GLOB., https://perma.cc/84KB-56GC (last visited Dec. 29, 2022).

[19] Guthrie, *supra* note 14, at 21, 27.

[20] Chris Flood, *Asset Managers Told to Clean up Greenwashing and Net Zero Claims*, FINANCIAL TIMES (June 19, 2022), https://perma.cc/NA8Y-2YM9.

[21] Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (July 28, 2021), https://perma.cc/B7UK-9WUF.

[22] *Id.*

[23] *Id.*

[24] *Id.*; *see also* Commissioner Hester M. Perice, Statement: We are not the Securities and Environment Commission - At Least Not Yet (Mar. 21, 2022), https://perma.cc/ZF7C-9997 (discussing the existing disclosure requirements and rules, and how the proposed climate disclosures departs from mandatory disclosures).

[25] 2010 Guidance, 75 Fed. Reg. 6,290 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241). Whether the SEC should update its Guidance on how existing SEC rules may require disclosures about climate-related risks in addition to or in lieu of the proposed rule is one of the over 200 questions posed by the SEC in its Proposed Rule's requests for comments. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,348–49 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) [hereinafter March 2022 Proposed Rule].

[26] Gensler, *supra* note 21.

that climate reporting is becoming increasingly material;[27] (2) to help improve consistency, comparability, and reliability within climate reporting and across other business reporting;[28] and (3) to develop participants' understanding of climate risks in the context of existing reporting structures.[29] The Guidance, though, does not create a specific duty to disclose climate-related information since it is an interpretive release.[30] Therefore, the Guidance merely provides the SEC's interpretation of federal securities laws and SEC regulations.[31] Updating the Guidance will not oblige registrants to report or subject registrants to SEC enforcement for disclosure violations, thus updating the Guidance will likely have limited overall effect.

Some participants want the SEC to go even further than simply updating its climate-related disclosure guidance and specifically regulate such disclosures.[32] On March 21, 2022, the SEC proposed a new rule (March 2022 Proposed Rule or Proposed Rule) "that would require registrants to provide certain climate-related information in their registration statements and annual reports."[33] Adopting a final version of such a rule will create a specific duty to disclose climate-related information.[34] A specific climate-related disclosure rule will help market participants make climate-informed investment and business decisions by improving climate report consistency, comparability, and reliability.[35] Creating a specific duty to disclose by requiring specific SEC climate-related disclosures will also provide the SEC with the power to enforce its disclosure regulations for climate-related matters. Market participants' desire for more guidance and structure surrounding climate reporting—as well as the SEC's own enforcement limitations from the lack of any specific duty to disclose climate-related information—suggest that existing climate-related disclosures do not effectively support capital market needs.[36]

This Note addresses the SEC and its role in regulating climate-related disclosures. Part II provides the relevant legal context. It focuses

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27 Jennifer Laidlaw et al., *More Companies Calling Climate Change a 'Material Issue' as Stress Testing Gains Traction*, S&P GLOB. SUSTAINABLE (Feb. 1, 2022), https://perma.cc/U6W8-ZW5Q.

28 Guthrie, *supra* note 14, at 1.

29 SEC Press Release, *supra* note 5.

30 *SEC Interpretive Releases Archive: 2010*, U.S. SEC. & EXCH. COMM'N (Sept. 3, 2015), https://perma.cc/66D8-A4FJ (showing the climate change guidance, and two others, that were released by the SEC).

31 *Id.*

32 Gensler, *supra* note 21 ("When it comes to climate risk disclosures, investors are raising their hands and asking regulators for more.").

33 March 2022 Proposed Rule, 87 Fed. Reg. 21,334, 21,334 (Apr. 11, 2022).

34 SEC Press Release, *supra* note 5.

35 *Id.*

36 *See* Boushey et al., *supra* note 4 (describing how new climate-related risk disclosures are necessary to help manage and mitigate physical and transitional climate change risks, to avoid "catastrophic tipping points," and seize "economic opportunities associated with the transition to a carbon-neutral economy.").

on why the SEC was established and how climate change threatens the SEC's purpose to provide long-term integrity for the capital market. It also explains the notion of materiality and introduces how it relates to climate change. Part III argues that the SEC should regulate climate-related disclosures. It begins by explaining that the SEC is the appropriate agency to create a duty to disclose climate-related matters. Not only is the SEC designed to regulate long-term disclosures such as those related to climate, but the SEC also has the authority to provide guidance on climate-related disclosures and likely has the authority to adopt rules specifically mandating such disclosures. If the SEC does not already have the authority to mandate climate-related disclosures, recent legislative and regulatory actions suggest that Congress will soon provide the SEC with this authority.[37] Finally, the analysis concludes with a discussion of how the SEC should address increasingly material climate risk and impacts on the capital market. First, it argues that the SEC should update its 2010 Guidance Document on how existing SEC disclosure regulations implicate climate matters. The Guidance is outdated in light of significant changes to SEC regulations, progress in the market, and advancement in climate science. Second, and most importantly, it argues that the SEC should adopt a final version of its March 2022 Proposed Rule that creates a sufficiently specific duty to disclose climate-related information aligned with broadly accepted climate disclosure frameworks like the Task Force on Climate-related Financial Disclosures (TCFD) and the Greenhouse Gas (GHG) Protocol.[38]

In sum, this Note argues that the SEC should (1) update its guidance to reflect current regulations, market conditions, and climate science and (2) adopt a final rule that creates a sufficiently specific duty to disclose climate-related information that is aligned with broadly accepted climate disclosure frameworks.

II. LEGAL CONTEXT

Congress established the SEC on June 6, 1934,[39] in the midst of an unprecedented global capital market collapse known as the Great Depression.[40] The Great Depression continued through 1939,[41] with U.S. gross domestic product (GDP) falling almost 55% by 1933.[42] Congress

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[37] While a thorough analysis of the Inflation Reduction Act of 2022 has not been conducted for this Comment, it is possible that this Act may influence the SEC's authority to mandate climate-related disclosures. H.R. 5376, 117th Cong. (2022).

[38] March 2022 Proposed Rule, 87 Fed. Reg. at 21,343.

[39] *SEC: Securities and Exchange Commission*, HISTORY.COM (Dec. 6, 2019), [hereinafter *SEC: Securities and Exchange Commission*], https://perma.cc/Z3CZ-RFMJ.

[40] *Id.*

[41] *Great Depression History*, HISTORY.COM, (Nov. 3, 2022), [hereinafter *Great Depression History*], https://perma.cc/33T3-FYK6.

[42] *See* Kimberly Amadeo, *The Great Depression: What Happened, What Caused It, and How It Ended*, BALANCE (Apr. 5, 2022), https://perma.cc/MHA8-QTR6. U.S. GDP fell from

established the SEC to avoid another major market collapse.[43] Congress thus structured the SEC to promote long-term stability and to support public confidence in the capital market while maintaining enough flexibility to adapt to evolving market needs.[44] For this purpose, the SEC began administering and enforcing violations of federal securities laws which regulate public company disclosures.[45] SEC disclosure regulations are constantly adjusting to reflect changing market conditions but have historically ignored climate-related matters.[46] The market's interest in climate-related disclosures and the SEC's aim to protect the long-term integrity of the capital market, which is threatened by climate change, indicate that the SEC should stop ignoring climate-related matters and evolve to address the climate risk to the capital market. The concept of materiality is key to understanding SEC disclosures generally and is important as it pertains to climate-related reporting specifically. The concept of materiality is discussed below.

A. Protecting the Long-Term Integrity of the Capital Market Amid Climate Threats

Establishing the SEC was a federal response to the Great Depression. Prior to the Great Depression, there was minimal federal regulation of securities in the capital market.[47] As the stock market crashed in October 1929, however, the public lost confidence in the capital market.[48] In response, Congress passed two federal laws with several purposes.[49] First, Congress sought to ensure that publicly trading companies provide truthful information about their securities to the

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$104.6 billion in 1929 to $57.2 billion in 1933. *Id.* Note that 1933 represented the all-time low of the market collapse. *Great Depression History*, *supra* note 41. In addition to the significant drop in GDP, wages also fell 42.5% and unemployment reached nearly 25%. *Great Depression Facts*, FDR LIBR. & MUSEUM, https://perma.cc/U7R9-D3CU (last visited Jan. 5, 2023).

43 *SEC: Securities and Exchange Commission*, *supra* note 39 (explaining that the SEC was developed "as one of President Franklin Roosevelt's New Deal programs to help fight the devastating economic effects of the Great Depression and prevent any future market calamities.").

44 *Id.*

45 *Id.*

46 *See* Gensler, *supra* note 21 (explaining that investors are demanding disclosure regulations around climate change risk).

47 U.S. SEC. & EXCH. COMM'N, FISCAL YEAR 2021: AGENCY FINANCIAL REPORT 6 (2021), [hereinafter SEC 2021 FINANCIAL REPORT], https://perma.cc/LC5Y-9CBZ.

48 *Id.*

49 *See id.* (describing how Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934 to "provide investors and markets with reliable information, clear rules for honest dealing, and specifically ensure the following: [a] company that publicly offers securities for investment dollars is forthcoming and transparent about its business, the securities it is selling, and the risks involved with investing; and [a] person who sells and trades securities does so in a fair and honest manner.").

market.[50] Second, Congress aimed to require such companies treat their investors fairly and honestly.[51] The laws required companies to disclose information about their business operations for potential investors.[52] They also required disclosures about the securities the companies sold as well as the risks involved in investing in those securities.[53] The Securities Act of 1933 (Securities Act)[54] was the first federal law that Congress passed to regulate the issuance of securities.[55] The Securities Act regulates public companies' registration of securities.[56] Congress passed the Securities Exchange Act of 1934 (Exchange Act)[57] next.[58] The Exchange Act created the SEC to "regulate and enforce [securities] legislation."[59] Essentially, Congress established the SEC to regulate the capital market with the intent of avoiding another market collapse like the Great Depression.[60]

Congress intended the SEC's structure to provide long-term stability to and to build public confidence in the capital market. The SEC is an independent federal agency headed by five bipartisan commission members who serve staggered five-year terms.[61] Its mission is to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[62] The agency's vision indicates that it aims to promote a capital market which "inspire[s] public confidence and provide[s] a diverse array of financial opportunities to retail and institutional investors, entrepreneurs, public companies[,] and other market participants."[63] In addition, the SEC's strategic goals focus on supporting the long-term interests of Main Street investors,[64] following capital

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50 *Id.*; *The Role of the SEC*, U.S. SEC. & EXCH. COMM'N, [hereinafter *Role of the SEC*], https://perma.cc/T6EE-9PVP (last visited Jan. 5, 2023) (requiring disclosures about the securities the companies sold as well as the risks involved in investing in those securities).

51 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 6; *Role of the SEC*, *supra* note 50.

52 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 6; *Role of the SEC*, *supra* note 50.

53 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 6; *Role of the SEC*, *supra* note 50.

54 15 U.S.C. §§ 77a–77mm (2018).

55 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 6.

56 *Id.*

57 15 U.S.C. §§ 78a–78qq (2018).

58 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 6.

59 *Id.*

60 *Id.* (stating the Securities Act and the Exchange Act were the result of Congressional hearings that sought to understand and respond to the Great Depression).

61 *Id.* at 7.

62 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 4.

63 *Id.* Primary participants regulated by the SEC include "broker-dealers, investment companies, investment advisors, clearing agencies, transfer agents, credit rating agencies, and securities exchanges, as well as organizations such as the Financial Industry Regulatory Authority, Municipal Securities Rulemaking Board, and the Public Company Accounting Oversight Board." *Id.* at 6. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) expanded the SEC's jurisdiction "to include certain participants in the derivatives markets, private fund advisers, and municipal advisors." *Id.*; Pub. L. No. 111-203, 124 Stat. 1376 (2010).

64 Main Street investors represent $38 trillion worth in equities owned by American households which is over "59 percent of the U.S. equity market." *What We Do*, U.S. SEC. &

market developments and trends, and enhancing the SEC's analytical and human capital capabilities.[65] The agency applies its values of integrity, excellence, accountability, teamwork, fairness, and effectiveness as it works to achieve its mission, vision, and strategic goals.[66] The SEC's design strongly indicates the agency's goal is to protect the long-term integrity of the market and its participants. Climate change matters thus fall under the purview of the SEC because climate change threatens the long-term health of the capital market, which the SEC is structured to protect.[67]

To support capital market reliability in the long-term, the SEC has implemented federal securities laws regulating public disclosures.[68] The SEC defines disclosure as "[i]nformation about a company's financial condition, results of operations, and business that it makes public[]" which "[i]nvestors can use . . . to make informed investment decisions about the company's securities."[69] Any information, including climate-related information, that falls within this definition must be disclosed according to SEC disclosure rules.[70] Companies use SEC Forms,[71] such as the annual Form 10-K and quarterly Form 10-Q,[72] to file disclosures with

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EXCH. COMM'N (Nov. 22, 2021), [hereinafter SEC–*What We Do*], https://perma.cc/DT5V-YDQW.

65 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 4–5.

66 *Id.* at 4. The SEC defines its six values as follows: First, integrity means to "inspire public confidence and trust by adhering to the highest ethical standards." *Id.* Second, excellence means commitment "to excellence in pursuit of [the agency's] mission on behalf of the American public." *Id.* Third, accountability means to "embrace [the agency's] responsibilities and hold [the agency] accountable to the American public." *Id.* Fourth, teamwork means depending "on a skilled, diverse, coordinated team committed to the highest standards of trust, hard work, cooperation, and communication" for success. *Id.* Fifth, fairness means treating "investors, market participants, and others fairly and in accordance with the law." *Id.* Sixth, and finally, effectiveness means striving "for innovative, flexible, and pragmatic regulatory approaches that achieve [the agency's] goals and recognize[s] the ever-changing nature of capital markets." *Id.*

67 *See, e.g.*, Coral Davenport & Jeanna Smialek, *Federal Report Warns of Financial Havoc from Climate Change*, N.Y. TIMES (Sept. 8, 2020), https://perma.cc/8NHT-7H93 (referencing a report by the Commodity Futures Trading Commission which "concluded that climate change threatens U.S. financial markets, as the costs of wildfires, storms, droughts[,] and floods spread through insurance and mortgage markets, pension funds[,] and other financial institutions.").

68 SEC–*What We Do*, *supra* note 64.

69 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 173.

70 2010 Guidance, 75 Fed. Reg. 6,290, 6,295 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241). A key challenge is defining what information does fall under this definition. *See id.* ("Depending on the facts and circumstances of a particular registrant, each of the items discussed above may require disclosure regarding the impact of climate change.").

71 *How to Read a 10-K/10-Q*, U.S. SEC. & EXCH. COMM'N (Jan. 25, 2021), https://perma.cc/MQ82-M454. *See also Forms List*, U.S. SEC. & EXCH. COMM'N, https://https://perma.cc/V3XA-2FKA (providing links to all "SEC public forms and many of the rules, regulations, and schedules associated with these forms.").

72 *How to Read a 10-K/10-Q*, *supra* note 71. Form 10-K is filed annually and "governed by federal statutes." *SEC Disclosure Laws and Regulations*, INC. (Jan. 5, 2021), https://perma.cc/QDD2-P2E5. Form 10-Q is "filed after the first, second[,] and third fiscal

the SEC.[73] The SEC Forms that public companies file help provide investors with decision-useful information in a predictable format and on a regular schedule.[74] SEC regulation of disclosure content and timing—as well as the threat of SEC enforcement should public companies not comply with disclosure rules—helps to ensure that the information investors receive is reliable and comparable. SEC Forms, however, do not expressly require climate-related disclosures, at least not yet.[75]

SEC disclosure rules evolve with changing market conditions.[76] Initially, Regulation S-X, governing financial disclosures,[77] merely required companies to report their historical financial performance.[78] These narrow disclosures responded to a primary concern of the Great Depression, that is, the lack of insight into public company financials.[79] The SEC expanded the scope of its required disclosures beyond mere backward-looking financial information in response to investor demand when it started to require companies to disclose information of their leadership and management, including naming the executive team[80] and

quarter." *How to Read a 10-K/10-Q*, *supra* note 71. Both Forms provide details on the company's business, market risks, risk factors, operational and financial results, and more over the relevant period as well as management's perspective on these business results and their driving factors. *Id.* Notably, although foreign issuers disclosures are beyond the scope of this analysis, their disclosure requirements are largely like those discussed for domestic filings. 2010 Guidance, 75 Fed. Reg. at 6,295.

73 Exchange Act, 15 U.S.C. § 78o(d)(1) (2018).

74 *See id.* § 78m(a)(1)–(2) (showing SEC disclosure rules requiring companies to file "reasonably current" information and documents as necessary "for the proper protection of investors and to insure fair dealing").

75 *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,340 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249) ("[T]he current disclosure system is not eliciting consistent, comparable, and reliable information that enables investors both to assess accurately the potential impacts of climate-related risks on the nature of a registrant's business and to gauge how a registrant's board and management are assessing and addressing those impacts.") (internal citation omitted).

76 *See* U.S. Sec. & Exch. Comm'n., *The SEC & Climate Risk Disclosure: Office Hours with Gary Gensler*, YOUTUBE, at 1:02–1:19 (Jul. 28, 2021), [hereinafter SEC Chair Gensler Office Hours], https://perma.cc/G52N-8N4U (stating that investors want more information about climate risks and how they may affect stocks); Gensler, *supra* note 21.

77 *SEC Regulation S-X: Regulating Annual Reports & Financial Statements*, CFA INST., https://perma.cc/XDY6-SD8Q (last visited Dec. 28, 2022). It covers company financial statements and annual reports that explain the financial results of the company for the year and considers the company's future financial outlook. *Id.* Public company financial statements and annual reports must comply with Generally Accepted Accounting Principles (GAAP). *US GAAP: Generally Accepted Accounting Principles*, CFA INST., https://perma.cc/DW9M-5H5Z (last visited Dec. 28, 2022). GAAP is "a collection of commonly-followed accounting rules and standards for financial reporting[]" which aim to "ensure that financial reporting is transparent and consistent from one organization to another." *Id.*

78 For example, companies only need to report their revenues and profits from the previous year or latest quarter. SEC Chair Gensler Office Hours, *supra* note 76, at 0:56; *see also* Gensler, *supra* note 21 (explaining that the first financial disclosures required after the Great Depression "revolved around companies' financial performance.").

79 SEC Chair Gensler Office Hours, *supra* note 76, at 0:24.

80 *Id.* at 1:00; Gensler, *supra* note 21.

listing executive compensation.[81] By the 1960s, registrants, their counsel, and their accountants needed help preparing SEC disclosures and SEC staff needed to reduce their burden of preparing comment letters.[82] In response, in 1964, the SEC began to provide risk factor guidance.[83] Then, in 1968, the SEC started refining requirements for management to discuss and analyze the financial condition and operational results of their companies.[84] This led the SEC to adopt the management's discussion and analysis of financial condition and operations (MD&A) narrative requirement of Form 10-K in 1980.[85] Following this, in 1982,[86] the SEC released Regulation S-K to govern non-financial disclosures.[87] Over time, the SEC has updated these disclosure rules.[88] SEC disclosure rules have therefore developed from a narrow focus on past financial performance to a broader consideration of both financial and non-financial information alongside changes in the capital market.[89]

The developments that led to the current SEC disclosure requirements have largely ignored environmental matters, including climate change.[90] The only environmental-specific disclosure the SEC requires is that of the material financial impact of complying with environmental laws.[91] Even so, this single environmental disclosure requirement took the SEC twelve years to adopt as a rule after the SEC first provided a guidance document encouraging disclosure of such information in the 1970s.[92] Since the SEC released this first environmental disclosure requirement, the SEC has not implemented any disclosure regulations focused on climate matters.[93] The most substantial

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[81] SEC Chair Gensler Office Hours, *supra* note 76, at 1:07; Gensler, *supra* note 21.

[82] *See* U.S. SEC. & EXCH. COMM'N, 30TH ANNUAL REPORT 6 (1964), https://perma.cc/YAP3-QBLS (explaining the expected benefits of the Division of Corporate Finance's 1964 guide on corporate disclosure policies and practices).

[83] Gensler, *supra* note 21.

[84] 2010 Guidance, 75 Fed. Reg. 6,290, 6,292 (Feb. 8, 2010).

[85] Gensler, *supra* note 21; 17 C.F.R. § 229.303 (2021).

[86] BRENT A. OLSEN, CALIFORNIA BUSINESS LAW DESKBOOK § 40:7 (2021). Regulation S-K provides the "essential disclosure and reporting requirements" for the Securities Act and the Exchange Act, including those governing Forms 10-K and 10-Q. *Id.*

[87] Lillian Brown et al., *SEC Issues Groundbreaking Climate Disclosure Proposal*, JDSUPRA (Mar. 23, 2022), https://perma.cc/N2FS-MURB.

[88] For example, Regulation S-K was last amended on March 20, 2019, when the SEC adopted the FAST Act Modernization and Simplification of Regulation S-K, aiming to modernize and simplify the disclosure requirements in Regulation S-K, associated rules, and related forms. OLSEN, *supra* note 86.

[89] SEC–*What We Do*, *supra* note 64.

[90] *See* Brown et al., *supra* note 87 (indicating that the March 2022 proposed rule marks the "first time American businesses would be required to make . . . substantial [climate-related] disclosures in mandatory filings.").

[91] 2010 Guidance, 75 Fed. Reg. 6,290, 6,295–96 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241).

[92] The 1982 release of Regulation S-K required registrants to disclosure material financial impacts of complying with environmental laws. *Id.* at 6,292–93 (discussing the historical background of environmental disclosures).

[93] Brown et al., *supra* note 87 (indicating that the March 2022 proposed rule would be the first substantial climate-related mandatory SEC disclosure rule).

action the SEC has taken since the 1970s was releasing the 2010 Guidance Document, in which the SEC acknowledged its principles-based disclosure requirements may implicate climate-related matters.[94] Given the interpretive nature of the Guidance[95] and the subjectivity of principles-based disclosures,[96] however, the final decision to disclose climate-related information remains up to the registrants based on their analysis of the importance of the climate-related information in relation to their businesses and businesses' finances overall.[97] Climate disclosures are thus, as a matter of practicality, limited to what is voluntarily reported or mandated to be reported by states or the U.S. Environmental Protection Agency (EPA).[98]

Voluntary and state- or EPA-mandated climate disclosures are typically made public. Registrants tend to post their climate reports, as well as copies of their SEC-specific filings, on their company websites.[99] The SEC also makes all filings publicly available through its online Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system.[100] Publicly available SEC disclosures provide the basis for SEC regulation and enforcement.[101]

The SEC has robust regulatory and enforcement mechanisms governing disclosures.[102] The SEC reviews public filings for compliance

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94 *See generally* 2010 Guidance, 75 Fed. Reg. at 6,292–93 (discussing the SEC's history of environmental disclosures).

95 *See SEC Interpretive Releases Archive: 2010*, *supra* note 30 (explaining that interpretive releases are SEC interpretations of federal securities laws and SEC regulations).

96 Principles-based disclosures are subjective disclosures that "rely on a registrant's management to evaluate the significance of information in the context of the registrant's overall business and financial circumstances and to determine whether disclosure is necessary." Sanjay M. Shirodkar & Deborah R Meshulam, *SEC Proposes to Modernize Certain Rules: Transitioning from a Prescriptive to a Principles-based Approach?*, MONDAQ (Sept. 12, 2019), https://perma.cc/D2JC-4YC5 (quoting the SEC).

97 PRAC. L. CORP. & SEC., WHAT'S MARKET: RISK FACTORS: BANKING AND FINANCIAL SERVICES INDUSTRY, Westlaw (database updated Mar. 2015).

98 *See* 2010 Guidance, 75 Fed. Reg. at 6,292 (stating that some SEC filings reference GHG emissions and climate change but that such public disclosures are from "voluntary disclosure initiatives or other regulatory requirements."); *see also Considerations for Climate Change Disclosures in SEC Reports*, GIBSON, DUNN & CRUTCHER LLP (Mar. 1, 2021), https://perma.cc/J6MM-8VUJ (noting that only material climate change matters must be disclosed in a company's SEC filings and that voluntary and state- and EPA-mandated public company climate change disclosures have "increased the scope and quantity" over time).

99 *How to Read a 10-K/10-Q*, *supra* note 71.

100 *About EDGAR*, U.S. SEC. & EXCH. COMM'N (Oct. 6, 2022), https://perma.cc/673A-P98P; *See also EDGAR: Company Filings*, U.S. SEC. & EXCH. COMM'N (Jul. 21, 2022), https://perma.cc/2SWN-LWQF (providing the general public with the ability to look up the filings of any person or company).

101 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 6.

102 The SEC's more than 4,500 employees "oversee 28,000 registered entities, more than 3,700 broker-dealers, 24 national securities exchanges, and 7 clearing agencies. A record 67 million U.S. families held direct and indirect stock holdings in 2019." *Id.* at ii. Furthermore, the agency:

with its disclosure requirements and "may provide comments to a company where disclosures appear to be inconsistent with the . . . requirements or deficient in explanation or clarity."[103] Except for financial statement disclosures, which the SEC reviews for every public company at least every three years,[104] the SEC does not verify the accuracy of company disclosures.[105] Instead, both the reporting company's Chief Executive Officer (CEO) and Chief Financial Officer (CFO) must certify the accuracy of their reporting[106] and may be subject to liability for errors under other SEC mechanisms.[107] When disclosures violate securities laws, the SEC has broad statutory authority to bring "civil enforcement actions against individuals and companies."[108] By regulating disclosures and punishing violators, the SEC safeguards the long-term health of the U.S. capital market. This SEC authority to regulate and enforce disclosures covers climate-related disclosures that are triggered by SEC disclosure rules.[109]

B. Materiality and its Importance Regarding SEC Climate-Related Disclosures

An important concept to understand at the outset of any discussion about SEC disclosures is materiality. The U.S. Supreme Court set the modern-day materiality standard in the 1970s and 1980s.[110] Over time, the concept of materiality has become fundamental in securities laws as well as the capital market,[111] and is applicable throughout SEC disclosure regulations.[112] Determining what meets the principles-based standard of materiality, however, is challenging and registrants often get it wrong.[113]

> covers nearly every part of the $110 trillion capital markets. Those markets touch many Americans' lives, whether they're investing for their future, borrowing for a mortgage, taking out an auto loan, or taking a job with a company that's tapping our capital markets. [The SEC] engage[s] with companies raising money and with the key parties that sit in between companies and investors, including accountants, auditors, and investment managers.

Id. at i.

[103] *How to Read a 10-K/10-Q*, *supra* note 71.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] For example, § 304 of the Sarbanes-Oxley Act allows the SEC to claim monetary clawbacks against the CEO and CFO if company financials must be restated due to misconduct. John F. Savarese et al., *SEC Clawbacks of CEO and CFO Compensation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 15, 2016), https://perma.cc/YCG6-2PMT.

[108] SEC 2021 FINANCIAL REPORT, *supra* note 47, at 6.

[109] Gensler, *supra* note 21.

[110] 2010 Guidance, 75 Fed. Reg. 6,290, 6,292–93 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241).

[111] Lee, *supra* note 10.

[112] Hans Hoogervorst, *Making Sense of Materiality*, INT'L FED'N OF ACCT. (Sept. 25, 2017), https://perma.cc/HU9H-9WV2.

[113] Lee, *supra* note 10.

So, while the consistent use of the flexible standard of materiality provides baseline guidance to companies, the SEC, and investors about what SEC disclosure rules regulate—and may provide the SEC authority to regulate material climate-related disclosures—reliance on the principles-based standard of materiality is insufficient to elicit climate-related information that is material to reasonable investors.[114] Although the materiality standard does not elicit adequate climate-related disclosures, it is an important concept to understand in relation to such disclosures.

The U.S. Supreme Court articulated the current materiality standard in *TSC Industries, Inc. v. Northway, Inc.*[115] in 1976, and reiterated it in *Basic Inc. v. Levinson*[116] in 1988.[117] *TSC Industries* explains that information is material if there is a "substantial likelihood that a reasonable shareholder would consider [disclosure] important" to investors.[118] *Basic* adds a balancing test, weighing the likelihood that an event will occur against the expected magnitude of the event's impact on overall company activity.[119] These definitions form the standard applied today when SEC regulations reference materiality.

The materiality standard helps businesses, the SEC, and investors effectively utilize the disclosure process. An analysis of materiality helps companies manage risk in two ways. First, the concept of materiality considers the likelihood an event will occur so that companies can avoid premature and inaccurate disclosures.[120] Second, the concept of

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114 *Id.*

115 426 U.S. 438, 499 (1976).

116 485 U.S. 224, 231 (1988).

117 2010 Guidance, 75 Fed. Reg. 6,290, 6,292–93 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241).

118 *TSC Indus.*, 426 U.S. at 449. Put another way, material means that "there must be a substantial likelihood that [] disclosure . . . would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* This does not mean that all "fact[s] which a reasonable shareholder *might* consider important[]" must be disclosed. *Id*. (emphasis in original). Nor does it mean that it must "cause investors[] . . . to buy, sell, or hold securities" merely that it would "be a significant addition to whatever [the investors] already know." Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 BUS. L. 317, 323 (2007) (citing *TSC Indus. Inc.*, 426 U.S. at 449 (stating that, aligned with *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384 (1970), the materiality standard "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote[]" but instead contemplates "a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations by the reasonable shareholder.")). As the Court explained, this is because such a low standard may subject corporations and their management "to liability for insignificant omissions or misstatements . . . [or] cause [management] simply to bury the shareholders in an avalanche of trivial information" to reduce potential exposure to liability. *TSC Indus.*, 426 U.S. at 448.

119 *Basic Inc.*, 485 U.S. at 238–39. This balancing test does not apply to MD&A. 2010 Guidance, 75 Fed. Reg. at 6,290 n.6.

120 Sauer, *supra* note 118, at 318. For example, publicly held companies must disclose risk factors that "could have a material adverse impact on [their] business, financial

materiality permits a margin of error so that companies can avoid undertaking costly measurement of trivial or inherently subjective business activities.[121] The flexibility of the materiality analysis framework[122] also allows companies to adjust their SEC filings to address changes to business risks and opportunities.[123] Furthermore, the necessity for materiality helps businesses and the SEC distinguish between required and elective SEC disclosures.[124] The agency repeatedly acknowledges that the materiality standard controls its "regulatory initiatives and enforcement actions," which includes those regarding disclosures.[125] The concept of materiality also helps to ensure that investors have access to decision-useful information.[126] Materiality is thus a fundamental concept that helps the market appropriately adhere to SEC disclosure rules.[127] The fundamental nature of the materiality concept is furthered by how extensively it is used in SEC disclosure regulations.[128]

In terms of climate-related disclosures, the SEC may have authority to regulate such disclosures because, as explained earlier, the market increasingly considers climate change a material risk.[129] The impact of the concept of materiality on climate-related disclosures and on the SEC's authority to regulate such disclosures is discussed in detail below. Put simply, the concept of materiality does not create a sufficiently specific duty to disclose climate-related matters, resulting in climate-related disclosures that are not decision-useful for reasonable investors.[130]

To conclude this background discussion: Congress established the SEC during the Great Depression to protect the long-term integrity of the capital market. Climate change threatens the capital market's long-term integrity, and market participants are requesting that the SEC take appropriate action to address this threat. The concept of materiality helps

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condition[,] and results of operations." PRAC. L. CORP. & SEC., *supra* note 97. However, publicly held companies must not disclose materially false or misleading statements or omit material information necessary to avoid making a disclosure misleading. 17 C.F.R. § 240.10b-5(b) (2021).

121 Sauer, *supra* note 118, at 318.

122 *See id.* at 321 (calling the *TSC Industries* standard a framework rather than a formula because it does not provide "numeric thresholds" or "list [] presumptively material items.").

123 *See id.* at 321, n.24 ("[W]hat is material to the financial statements of a particular entity might change from one period to another.") (internal citation omitted).

124 *Id.* at 318.

125 *Id.* at 320–21 (internal citation omitted).

126 Hoogervorst, *supra* note 112.

127 Sauer, *supra* note 118, at 320–21.

128 *See* Hoogervorst, *supra* note 112 ("The concept of materiality is pervasive. It applies not only to the presentation and disclosure of information but also to decisions about recognition and measurement.").

129 *See* Sauer, *supra* note 118, at 318 (noting that SEC "prohibits public companies from selectively disclosing information to market professionals.") (internal citation omitted). For more information on why the market increasingly considers climate change a material risk, see *supra* Part I.

130 Lee, *supra* note 10. For more details on why the concept of materiality fails to produce adequate climate-related disclosures, see *infra* Part III.

to explain climate concerns in relation to this market interest and the SEC's responsibility to respond. Materiality alone, however, is not enough to ensure climate-related disclosures provide decision-useful information for reasonable investors.

III. LEGAL ARGUMENTS & ANALYSIS

SEC Chair, Gary Gensler, explains that public company filings evolve in response to capital market needs, including market participant desires.[131] The SEC has an opportunity to develop its climate-related disclosure requirements in response to current market needs. First, the SEC's design and authority make it the appropriate agency to develop climate-related disclosure requirements that will survive in the long-term. The capital market has evolved to need standardized climate-related disclosures regarding company performance to ensure such disclosures are consistent, comparable, and reliable.[132] This will help market participants make more climate-informed investment and business decisions.[133] Investors and registrants are requesting the SEC take the actions necessary to standardize climate-related disclosures.[134] Second, the SEC's 2010 Guidance Document, which explains how agency disclosure requirements may imply that public companies should disclose material climate-related information, is outdated.[135] The Guidance, which is an interpretive release, should be updated to be useful for registrants that wish to disclose climate-related information. SEC interpretive releases, however, do not create a specific duty to disclose climate-related information since they are only an agency interpretation of federal securities laws and SEC regulations.[136] A specific duty to disclose would be much more effective than guidance alone, as it would mandate publicly held companies to disclose climate-related information.[137] The SEC could create such a duty by adopting a final version of its March 2022 Proposed Rule on climate-related disclosures

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131 *See* Gensler, *supra* note 21 (analogizing the evolution of public disclosures to the evolution of the Olympics' scoring system which "brings comparability to evaluating the athletes" and changes to "reflect where sports are today[]" as fans ask for changes).

132 *Id.*

133 *Id.*

134 *Id.*

135 *See generally* 2010 Guidance, 75 Fed. Reg. 6,290, 6,290 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241) (discussing agency reporting requirements regarding climate change based on pre-2010 developments).

136 *SEC Interpretive Releases Archive: 2010*, *supra* note 30.

137 *See* Elisse B. Walter, Comm'r, Sec. & Exchange Comm'n, Opening Remarks Regarding Interpretive Guidance Regarding Climate Change (Jan 27. 2010), https://perma.cc/WQ3H-UPZX ("[M]any public companies are in fact providing disclosure about significant climate change related matters through mechanisms outside of the disclosure documents they file with the Commission." Furthermore, "all of the information provided voluntarily by companies through these mechanisms undoubtedly is not required to be disclosed under our rules").

which is aligned with broadly accepted climate disclosure frameworks.[138] To address capital market needs, the SEC should update its guidance on how its existing regulations implicate climate-related disclosures and create a specific duty to disclose climate-related information by mandating such disclosures.

A. The SEC is the Appropriate Agency to Regulate Climate-Related Disclosures

The SEC is the appropriate agency to update securities regulations to mandate climate-related disclosures and to create a duty to disclose climate-related information for publicly held companies. The SEC's independent structure and robust regulatory and enforcement tools will help safeguard the long-term integrity of any climate-related disclosure requirements it promulgates. The agency's mission, vision, goals, and values also support SEC regulation of climate-related disclosures. The SEC's authority to regulate climate-related disclosures is not explicit. Section 7 of the Securities Act may, however, imply that the SEC has such regulatory authority.[139] Even if the SEC does not have implied authority to regulate climate-related disclosures, Congress has indicated it may soon grant the SEC explicit authority to do so.[140] Nevertheless, the SEC's scope of authority does not limit its authority to provide updated guidance to help public companies effectively utilize existing disclosure requirements when disclosing climate-related information.

1. The SEC's Ability to Promulgate Long-Lasting Climate-Related Disclosure Rules

The SEC's independence, robust regulatory and enforcement mechanisms, objectives, and values make it an appropriate agency to promulgate climate-related disclosure rules that will survive in the long-term. As an independent agency, the SEC is protected from the polarization and politicization of the climate debate. This should shield climate-related regulations from any polarity and political shifts in the long-term. The SEC's regulatory and enforcement mechanisms also work to protect the long-term stability of the capital market by allowing the SEC to enforce disclosure violations.[141] Climate disclosure rules will thus work to protect the capital market from climate change in the long-term. The SEC's objectives and values are designed to provide an efficient, effective, and relatively stable market that investors can continuously rely upon, even as changes—including those related to climate change—

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138 March 2022 Proposed Rule, 87 Fed. Reg. 21,334, 21,334, 21,353–54 (Apr. 11, 2022).

139 Securities Act, 15 U.S.C. § 77g(a)(1) (2018) (allowing the Commission to add rules or regulations that are in the public interest).

140 Climate Risk Disclosure Act of 2021, H.R. 2570, 117th Cong. (2021).

141 *How Investigations Work*, U.S. SEC. AND EXCH. COMM'N (Jan. 27, 2017), https://perma.cc/329T-XDCY.

occur in the market. Therefore, the SEC is an effective agency to promulgate climate-related disclosures because its structure, tools, objectives, and values align with the market's needs regarding climate change.

The SEC is aptly structured and has strong regulatory and enforcement mechanisms which will help ensure the long-term integrity of any disclosure rules the agency promulgates. Despite clear scientific support that climate change poses significant long-term risks,[142] politicization and polarization of climate change threaten the reliability of climate actions in the long-term.[143] Since it is an independent agency, the SEC is shielded from direct presidential or executive branch control.[144] This structure therefore somewhat shelters the SEC's leaders and regulations from politics, which allows the agency to take a long-term perspective on matters such as those related to climate.[145] Climate-related disclosure requirements that fall under the SEC's purview are further protected because the SEC can utilize its robust regulatory and enforcement mechanisms to bring civil enforcement actions against violators of any SEC climate-related disclosure rules.[146] As explained earlier, these robust SEC mechanisms help provide the capital market—which climate change is currently threatening—with long-term stability.[147] The SEC's independence and robust mechanisms make the agency a strong candidate for promulgating climate regulations that will survive in the long-term.

Beyond the SEC's structure and mechanisms that protect climate-related disclosures in the long-term, the SEC's mission and vision also support the agency promulgating climate-related disclosures. Investor access to continuous, comparable, and reliable information on matters important to public investment decisions aligns with the SEC's mission of protecting investors, maintaining "fair, orderly, and efficient markets, and facilitating capital formation."[148] Climate change is becoming

[142] IPCC AR6, *supra* note 1, at 5.

[143] Climate change has become politically charged as Democrats are more likely to believe in anthropogenic climate change and support political actions to address it than Republicans. Sedona Chinn et al., *Politicization and Polarization in Climate Change News Content, 1985–2017*, 42 SCI. COMMC'N 112, 113 (2020). This has led to polarization of climate change in the news which has impacted public opinion on the matter. *Id.* at 113–14.

[144] *Independent Agencies*, JUSTIA (May 2022), https://perma.cc/TS29-FH86.

[145] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 795 (2013) (finding that independent agencies' stable membership structure "leads to the continuity of policies[]" and insulates agencies from political preferences).

[146] *See* SEC 2021 FINANCIAL REPORT, *supra* note 47, at 6 (highlighting the SEC's role regulating the securities market and bringing civil enforcement actions against those in violation of securities laws).

[147] *See* discussion *supra* Part II.A (discussing the SEC's role protecting "the long-term health of the U.S. Capital market" through regulating disclosures and climate change's threats to "the long-term health of the capital market"); *See also supra* note 102 and accompanying text ("The SEC has robust regulatory and enforcement mechanisms governing SEC disclosures.").

[148] SEC 2021 FINANCIAL REPORT, *supra* note 47, at 4.

increasingly important for investment decisions.[149] Yet, in conflict with the SEC's mission, existing climate disclosures are inconsistently reported, often incomparable, and may be misleading or even inaccurate due to the significant use of unregulated voluntary reports.[150] Market stability also aligns with the SEC's vision to promote a capital market that inspires public confidence and provides a variety of financial opportunities for market participants.[151] As climate change threatens long-term market stability, creating climate-related disclosures aligns with the SEC's vision.[152] Promulgating climate-related disclosures will therefore have many positive effects. Climate-related disclosures will protect investors, maintain a fair and efficient capital market, facilitate capital formation, inspire public confidence in the capital market, and create financial opportunities for participants.[153] The SEC should thus promulgate climate-related disclosures to support its mission and vision.

As well as supporting the SEC's mission and vision, SEC mandated climate-related disclosures align with the SEC's strategic goals. The SEC has three strategic goals that it breaks into multiple strategic initiatives.[154] Strategic goal one is to "[f]ocus on the long-term interests of [the SEC's] Main Street investors."[155] Strategic goal two is to "[r]ecognize significant developments and trends in [the SEC's] evolving capital market[] and adjust [the SEC's] efforts to ensure [the agency is] effectively allocating [its] resources."[156] Strategic goal three is to "[e]levate the SEC's performance by enhancing [the SEC's] analytical capabilities and human capital development."[157] Climate change is relevant to goal one because it is a long-term concern for Main Street investors.[158] Climate change will have catastrophic impacts on financial

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149 Jason Halper et al., *Investors and Regulators Turning up the Heat on Climate-Change Disclosures*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 4, 2021), https://perma.cc/BT4S-Y228.

150 *See, e.g.*, Gensler, *supra* note 2 (stating that "90 percent of the 500 largest companies in the [Russel 1000] Index published sustainability reports in 2019," including climate-related information using various third-party standards).

151 *See* discussion *supra* notes 61–67 and accompanying text (showing that the SEC's structure, including its vision, "was intended to provide long-term stability to and build public confidence in the capital market.").

152 DELOITTE, THINKING ALLOWED: CLIMATE-RELATED DISCLOSURE: INTEGRATING CLIMATE-RELATED INFORMATION IN THE ANNUAL REPORT 2 (2017), https://perma.cc/L5UE-8BTZ (describing the concern that climate change threatens the financial system as a whole).

153 *See, e.g.*, SEC 2021 FINANCIAL REPORT, *supra* note 47, at 4 (stating that the SEC's mission and vision is to protect and ensure public confidence in the market); Gensler, *supra* note 2 (noting that climate-related disclosures would align with the SEC's mission and vision).

154 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 4–5.

155 *Id.* at 4.

156 *Id.* at 5.

157 *Id.*

158 Nina Jaksic et al., *Climate Change and Artificial Intelligence Seen as Risks to Investment Asset Allocation, Finds New Report by BNY Mellon Investment Management and*

stability that "will be felt beyond the traditional horizons of most actors."[159] Desire for climate-related disclosures is trending in the market and, thus, implicates goal two regarding addressing market trends.[160] As previously explained, as the capital market evolves to need climate-related disclosures, market participants are requesting climate-related disclosures from companies, as well as greater guidance, and a specific climate-related disclosure rule from the SEC.[161] Aligned with goal three, SEC consideration of climate-related matters may streamline and improve comparability of climate-related disclosures. This may increase processing efficiency and effectiveness of the SEC's review of public company disclosures. Addressing climate change through climate-related SEC disclosures therefore aligns with the SEC's strategic goals.

Beyond aligning with the agency's goals, requiring SEC climate-related disclosures also aligns with the SEC's overarching values. The SEC's values are integrity, excellence, accountability, teamwork, fairness, and effectiveness.[162] Broadening the SEC's responsibility for public disclosures to incorporate climate-related disclosures will enable the SEC to develop and enforce specific climate-related disclosure regulatory controls.[163] This will improve the *integrity* and *accountability* of climate-related disclosures overall and will help the SEC strive towards *excellence*. Additionally, development of such climate-related disclosure regulations will require *teamwork* at least within the SEC and likely also with security market participants to ensure such regulations are *fair* to participants and sufficiently *effective* to address reporting and climate change issues.[164] The SEC's values therefore support the argument that SEC should be the agency to create climate-related disclosures.

The SEC is thus clearly well-designed to promulgate effective climate-related disclosure rules that have a chance to continue in the long-term.

2. The SEC's Authority to Provide Climate-Related Disclosure Guidance and to Mandate Climate-Related Disclosures

Either the SEC already has the implied authority to promulgate climate-related disclosures, or Congress may soon explicitly give it this authority. The SEC's statutory rulemaking authority comes from Section

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CREATE-Research, BLOOMBERG (Sept. 16, 2019), https://perma.cc/PW75-FUE7 (finding that 93% of investors, from Main Street to Wall Street, see climate change as an investment risk).

159 DELOITTE, *supra* note 152, at 4 (quoting a speech by the FSB Chair, Mark Carny).

160 Guthrie, *supra* note 14, at 4 (internal citation omitted).

161 Coppola et al., *supra* note 1 (discussing the "mounting public awareness" of the effects of climate change resulting in a "wide range of actors" considering climate change-related disclosures); Gensler, *supra* note 2 ("[I]nvestors . . . support climate-related disclosures" and "have requested that companies disclose their climate risks.") (internal citation omitted).

162 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 4.

163 *Id.* at 6 (explaining how the SEC can enforce violations of disclosure rules).

164 *Id.* at 4.

7 of the Securities Act.[165] Section 7 gives the SEC full rulemaking authority to promulgate disclosure rules that are "necessary or appropriate in the public interest or for the protection of investors."[166] This statutory language may imply the SEC has broad regulatory authority and the SEC would only need to prove that climate-related disclosures are in the public or investors' interest. The SEC argues that it has broad authority to promulgate a specific climate disclosure rule by creating a duty to disclose climate-related matters because climate-related disclosures are material and are thus in the interest of the public and investors.[167] However, if the argument for broad authority fails and the SEC is found to have narrower authority, Congress may soon give the SEC authority to regulate climate-related disclosures.[168] At the very least, the SEC can update its existing 2010 Guidance Document to provide more appropriate guidance on how its existing disclosure rules cover climate matters.

The current SEC Chair, Gary Gensler, argues that the SEC has the authority to promulgate a climate disclosure rule per the materiality standard.[169] As discussed above, *TSC Industries* defines information as material if there is a "substantial likelihood that a reasonable shareholder would consider [disclosure] important" for investment decisions.[170] SEC Chair Gensler argues that investor interest in climate-related disclosures rises to the level of materiality because the "level of demand for consistent, comparable [climate-related] information that may affect financial performance" indicates that reasonable investors consider climate-related information important for their investment decisions.[171] If climate-related information is material, then climate-related disclosures are in the interest of investors. Climate-related matters that reach the level of materiality would thus give the SEC the authority to create a duty to disclose climate-related matters by promulgating a mandatory climate-related disclosure rule.

Despite SEC Chair Gensler's belief that the SEC has the authority to mandate climate-related disclosures because they are material, there is no explicit statutory statement providing the SEC with the authority to specifically regulate climate-related disclosures.[172] The lack of an

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165 Securities Act, 15 U.S.C. § 77g(a)(1) (2018).

166 *Id.* ("Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.").

167 Ellen Meyers, *Legal Debate over SEC's Authority Clouds Climate Rule Proposal*, ROLL CALL (May 5, 2022), https://perma.cc/M35R-KKDG (quoting the SEC Chair Gary Gensler).

168 Climate Risk Disclosure Act of 2021, H.R. 2570, 117th Cong. (2021).

169 Meyers, *supra* note 167.

170 *TSC Indus.*, 426 U.S. 438, 449 (1976).

171 Meyers, *supra* note 167.

172 Section 7 of the Securities Act explains that the SEC has authority to regulate what is "necessary or appropriate in the public interest or for the protection of investors" but does not call out climate matters specifically. Securities Act, 15 U.S.C. § 77g(a)(1) (2018).

explicit statement has created uncertainty over whether the SEC has the implied authority to obligate disclosures beyond those currently required in SEC filings which would include climate-related disclosures.[173] The debate appears to be largely over whether the SEC has broad or narrow regulatory authority.

Those who believe the SEC has broad power argue that the SEC may adopt disclosure rules that are "necessary or appropriate in the public interest or for the protection of investors."[174] These supporters claim this is particularly true if the rules "will promote efficiency, competition, and capital formation."[175] If the SEC has broad disclosure authority, then in order for it to regulate climate-related disclosures, it will simply need to determine that climate-related disclosures will promote efficiency, competition, and capital formation in the public interest or protect investors.[176] Since climate change has such wide-ranging consequences, the SEC should be able to explain that climate-related disclosures are in the public interest.[177] Further, as climate-related disclosures are so varied and difficult to compare, the SEC could reason that regulating such disclosures through the SEC will create a single, consistent, and regulated governing standard through which publicly held companies must report climate information.[178] Such a standard may protect investors from climate-related risk because it should improve reporting transparency, reliability, and comparability of climate-related disclosures.[179] This improvement would provide market participants with decision-useful information which would help them make informed investment and business decisions.[180] Thus, if the SEC has broad regulatory authority, there is a strong potential that this authority covers regulation of climate-related disclosures.

On the other hand, opponents to broad SEC authority argue that the SEC has limited disclosure rulemaking power.[181] Due to the "facial appeal of the claim that more information is better for investors," opponents

173 Meyers, *supra* note 167; *See, e.g.*, Jill E. Fisch, *The SEC's Authority to Pursue Climate-Related Disclosure*, HARVARD LAW SCH. F. ON CORP. GOVERNANCE. (Jun. 20, 2022), https://perma.cc/HJS2-94LA (discussing how "[e]ven a narrow reading of the legislative history of the original securities laws supports the [SEC's] authority" to pass climate-related disclosure requirements); Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?*, MERCATUS CTR. (Aug. 19, 2021), https://perma.cc/7R69-YNM6.

174 15 U.S.C. § 77g(a)(1).

175 *Id.* § 77b(b).

176 Vollmer, *supra* note 173.

177 *See, e.g.*, Boushey et al., *supra* note 4 (explaining that "it is increasingly clear that the consequences [of climate change] touch virtually every corner of [the U.S.] economy.").

178 *See, e.g.*, Guthrie, *supra* note 14, at 7 (suggesting that a more consistent approach towards climate-related reporting should help address reporting issues).

179 *See generally id.* at 21 (stating that a uniform approach can help address common problems that consumers and companies face).

180 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 19.

181 Vollmer, *supra* note 173 (arguing that "[t]he SEC may not process to require climate-change disclosures without additional explicit legislative direction.").

argue that the SEC's disclosure power could become almost limitless if this power is interpreted broadly.[182] As reviewing courts are unlikely to support the argument that the SEC has near limitless authority, they would likely interpret SEC authority more narrowly.[183] Narrower authority would restrict SEC disclosure rulemaking power to core topics.[184] Core topics include "financial statements, core business information, directors and management, and a description of the securities being sold."[185] For the SEC to regulate disclosures outside of these core topics, Congress would either need to issue a Congressional mandate allowing the SEC to do so or give the SEC such statutory authority.[186] Therefore, if SEC regulatory authority is narrow, the SEC may not be able to regulate climate disclosures unless Congress explicitly provides it with the authority to do so.[187]

Support for a narrow interpretation is as follows. Read in context, the statutory language indicates the SEC's authority over disclosure rules is limited to financial and essential company information necessary or appropriate for investor protection.[188] This narrow interpretation suggests that the SEC is limited to mandating only climate-related disclosures that are either financial in nature or are essential company information. In addition, Congress, not the SEC, has historically expanded mandatory company disclosure topics beyond those covered already by the Securities Act and Exchange Act to align with public policy.[189] Congress could expand mandatory disclosures by providing the SEC with the authority to regulate climate-related disclosures in two ways. Congress could create specific statutory authority for the SEC to regulate climate-related disclosures, such as it did for corporate responsibility and governance disclosures.[190] Alternatively, Congress could mandate climate-related disclosures for the SEC to oversee and provide disclosure assurances for registrants and investors such as it did for conflict minerals disclosures.[191] In 2016, the SEC itself seems to have concluded that Congress would need to provide the SEC with specific authority for the agency to be allowed to "order disclosures relating to environmental, sustainability, or other matters of social concern."[192] As

182 *Id.*
183 *Id.*
184 *Id.* (stating that the SEC's rulemaking power would be limited to "specific types of information closely related to the disclosing company's value and prospects for financial success.").
185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.* The SEC determined this while working on a concept release regarding "modernizing certain business and financial disclosure requirements in Regulation S-K." LATHAM & WATKINS, CLIMATE DISCLOSURES AND THE SEC 4 (Oct. 8, 2021), https://perma.cc/VL27-4HRY.

such, the SEC's current regulatory authority may not extend to promulgating climate-related disclosure regulations.

However, a narrower interpretation of SEC authority does not rule out the possibility of the SEC regulating climate-related disclosures. Recent executive and legislative activity indicate that Congress may provide the SEC with such authority soon.[193] For example, on May 20, 2021, President Biden issued Executive Order 14030, calling on the "Federal government to measure, disclose, and mitigate climate risks to the U.S. economy and financial system as part of the Federal oversight function."[194] Additionally, on June 16, 2021, the House of Representatives passed the Climate Risk Disclosure Act of 2021.[195] This explained that requirements to disclose exposure to and management strategies for climate-related risk "will encourage a smoother transition to a clean and renewable energy, low-emissions economy[,] and guide capital allocation [for] mitigat[ion]."[196] The Act also explained that it will help the market "adapt to[] the effects of climate change" and to "limit damages associated with climate-related events and disasters."[197] Executive and legislative actions like these suggest that it is possible the SEC will be able to regulate climate-related disclosures soon, even under a narrow interpretation of the SEC's regulatory authority.

Whether the SEC ultimately has broad or narrow authority to establish specific climate-related disclosures, it has already established that it at least has the authority to issue guidance about how its existing disclosure rules implicate climate-related disclosures. The SEC made this clear when it released its 2010 Guidance Document. The Guidance passed by a 3-2 vote,[198] despite a dissenting commissioner's concerns that the document meant the SEC was "taking a position on climate change" and thus potentially exceeded the agency's authority which could "result in additional disclosures . . . unlikely to improve investor decision making."[199] The SEC found that increased public discussion about climate change by "[s]cientists, government leaders, legislators, regulators, businesses, . . . and the public at large" supported the issuance of the

193 Jonathan D. Brightbill & Madalyn Brown, *The Inflation Reduction Act Boosts EPA Funding to Enforce Climate-Related ESG Disclosure*, WINTSON & STRAWN LLP (Aug. 17, 2022), https://perma.cc/UHR3-T87S. The Inflation Reduction Act, Pub. L. 117–169 (2022) does not appear to influence the SEC's proposed climate-related disclosure rule. *Id.*

194 Boushey et al., *supra* note 4; Climate-Related Financial Risk, Exec. Order No. 14030, 86 Fed. Reg. 27,967 (May 25, 2021).

195 H.R. Res. 2570, 117th Cong. (2021); *see also* Press Release, Sean Casten, Casten's Climate Risk Disclosure Act Passes House (June 16, 2021), https://perma.cc/2F9N-22DD. As of the writing of this Comment, the Senate has not yet passed such a bill. *See* Vollmer, *supra* note 173.

196 Climate Risk Disclosure Act of 2021, H.R. Res. 2570, 117th Cong. (2021).

197 *Id.*

198 *SEC Issues Interpretive Guidance on Climate Change Disclosures*, GIBSON, DUNN & CRUTCHER LLP (Feb. 4, 2010), [hereinafter *SEC Issues*], https://perma.cc/3M6S-X8JC.

199 *Id.* (internal citations omitted).

Guidance.[200] The agency also pointed to the multitude of voluntary and state-mandated reporting mechanisms[201] necessitating increased awareness of potential regulatory, legislative, business, market, and physical climate-related impacts on public companies.[202] The agency indicated that recent developments in regulation and legislation,[203] plus the history of SEC environmental disclosures further supported the release of the Guidance.[204] Applying parallel reasoning, the SEC therefore has the authority to at least update its 2010 Guidance Document.

In sum, assuming broad SEC authority implies that the SEC has the power to create a duty to disclose climate-related information if it is both necessary to protect investors as well as appropriate in response to public interest. A narrower interpretation of SEC authority may indicate that the SEC requires explicit Congressional approval to create such a duty. If the SEC does not already have the authority to expand its disclosure regulations to cover climate matters, then recent legislative and executive activity suggests that Congress will provide the necessary authority soon.[205] At a minimum, however, the SEC has the authority to update its 2010 Guidance Document on how its existing disclosure requirements implicate climate-related disclosures. Merely updating the Guidance, however, is insufficient to address climate concerns because it is an interpretation and thus does not create a specific duty for registrants to disclose climate-related information to the SEC.[206] The next sub-Part discusses a few appropriate SEC actions regarding climate disclosures.

B. Updating SEC Climate Disclosure Guidance and Adopting a Related Rule

The SEC is already considering expanding its disclosure regulations to cover climate matters. The 2010 Guidance Document was the SEC's first and only real consideration of climate matters prior to its March 2022 Proposed Rule. As federal securities laws, the market, and climate science have progressed since 2010, the 2010 Guidance Document is now outdated and no longer useful to registrants for climate-related disclosures. At a minimum, the SEC needs to update its Guidance to be

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[200] 2010 Guidance, 75 Fed. Reg. 6,290, 6,290 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241).

[201] *Id.* at 6,291–92.

[202] *Id.* at 6,291, 6,296–97.

[203] *Id.* at 6,290–91. Developments referenced include contemplated state GHG emissions cap and trade systems, the national EPA's October 2009 mandatory GHG reporting rule, and international agreements such as the Kyoto Protocol and regulatory systems like the European Union Emissions Trading System (EU ETS) which were impacting U.S. companies doing business in international markets. *Id.*

[204] *Id.* at 6,292–93.

[205] *See, e.g.*, Casten, *supra* note 195 (describing recent actions taken by the House of Representatives, Senate, and the SEC to strengthen disclosure regulations).

[206] *SEC Interpretive Releases Archive: 2010*, *supra* note 30.

more specific and relevant as to how the SEC's principles-based disclosures implicate climate matters. As SEC interpretive releases are merely the agency's interpretation of federal securities laws and SEC regulations, however, updating the Guidance will not create a specific duty to disclose climate-related information.[207] Thus, merely updating the Guidance will not be fully effective in addressing market climate-related issues. The SEC should go further and create a specific duty to disclose climate-related matters by mandating climate-related disclosures aligned with broadly accepted climate disclosure frameworks, like in its March 2022 Proposed Rule. As the SEC can enforce violations of specific disclosure duties, this will help protect the capital market from climate change in the long-term.

1. The Minimum: Updating the 2010 Guidance Document

The SEC's 2010 Guidance Document's analysis of how climate-related disclosures fit into the agency's existing disclosure regulations is outdated given regulation, market condition, and climate science developments.[208] Thus, this Guidance should be updated to reflect such developments. Since interpretations only indirectly implicate SEC disclosure regulations, updating the 2010 Guidance Document will not be enough to ensure climate-related disclosures are effective because it will not create a disclosure duty.[209] Merely updating the Guidance will leave climate-related reporting at the discretion of registrants, which has proven to result in inadequate climate disclosures.[210] Updating its Guidance should at least signal to the market that the SEC sees climate-related reporting as material. An update should also help to improve climate reporting consistency, comparability, and reliability by developing registrants' understanding of climate risks and how climate information should be reported per existing disclosure requirements.

On January 27, 2010, the SEC voted to release its 2010 Guidance Document for public companies[211] explaining how the agency interprets

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[207] *Id.*

[208] 2010 Guidance, 75 Fed. Reg. 6,290, 6,290–91 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241) (referencing various studies and proposed legislation that are now over a decade old); *See also infra* notes 230–233 and accompanying text.

[209] *SEC Interpretive Releases Archive: 2010*, *supra* note 30 (explaining that interpretive releases are only SEC interpretations of "federal securities laws and SEC regulations."); GIBSON, DUNN & CRUTCHER LLP, *supra* note 98 (stating that the 2010 Guidance Document only clarified "how existing SEC disclosure rules may require public companies to describe climate change matters.") (internal citations omitted).

[210] *See Report on Promoting Climate-Relating Disclosures*, FIN. STABILITY BD. 17, 19 (July 7, 2021), https://perma.cc/7MCZ-V8DC ("[D]isclosure of the potential financial impact of climate change on . . . businesses, strategies, and financial planning remains low. . . . [D]isclosures have increased . . . but not fast enough and continuing progress is needed.").

[211] Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change (Jan. 27, 2010), https://perma.cc/Y7SF-QNQH.

its principles-based disclosure rules in the context of climate change.[212] This Guidance became effective on February 8, 2010, and remains relevant today.[213] It reminds registrants to "consider climate change and its consequences" when preparing their SEC disclosures under the federal securities laws and regulations.[214] In particular, the Guidance explains how domestic SEC filing companies should use Regulation S-K disclosure duties to address the following climate-related topics: (1) climate change legislation and regulation; (2) international climate accords; (3) indirect climate change regulation and business trends; and (4) physical climate change impacts.[215] It indicates that materiality of climate matters within these topics may support disclosure.[216] It also specifically references the Regulation S-K disclosure duties of Item 101 requiring a business description,[217] Item 103 on legal proceedings,[218] Item 503(c) (currently Item 105) covering risk factors,[219] and Item 303 regarding MD&A.[220] The 2010 Guidance Document thus illustrates that material climate-related business impacts may implicate the SEC's principles-based disclosure regulations.[221]

Although the 2010 Guidance Document initially had a large impact on disclosures, this momentum soon stagnated. The number of Form 10-K responses by Standard and Poor's 500 (S&P 500) companies that

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212 *Ten Thoughts on the SEC's Proposed Climate Disclosure Rules*, ROPES & GRAY (Apr. 12, 2022), https://perma.cc/EZ2K-DJCX (stating the 2010 Guidance Document "focused on ways in which the SEC's existing principles-based disclosure requirements elicit climate-related information.").

213 2010 Guidance, 75 Fed. Reg. at 6,290; Statement by Commissioner Allison Herren Lee, Statement on the Review of Climate-Related Disclosure (Feb. 24, 2021), https://perma.cc/TT4C-NZNR (stating SEC staff will "work to begin updating the 2010 guidance to take into account developments in the last decade.").

214 2010 Guidance, 75 Fed. Reg. at 6,297.

215 *Id.* at 6,295–97; GIBSON, DUNN & CRUTCHER LLP, *supra* note 98. Foreign private issuer requirements covered under this 2010 Guidance Document are beyond the scope of this analysis; however, they too are subject to similar, though less prescriptive, disclosure requirements. 2010 Guidance, 75 Fed. Reg. at 6,295.

216 *See generally* 2010 Guidance, 75 Fed. Reg. at 6,291–96 (discussing how the standard of materiality in disclosure requirements may include impacts of climate change because of the potential effects of climate change on business operations).

217 17 C.F.R. § 229.101(a) (2021); 2010 Guidance, 75 Fed. Reg. at 6,293. Item 101 requires the filing company include a description of "the general development of the business of the registrant, its subsidiaries, and any predecessor(s)." 17 C.F.R. § 229.101(a).

218 *Id.* § 229.103; 2010 Guidance, 75 Fed. Reg. at 6,293. Item 103 requires the filing company briefly describe "any material pending legal proceedings, other than ordinary routine litigation incidental to the business," regarding its own business, its subsidiaries' business, or associated property. 17 C.F.R. § 229.103. Item 103 also requires disclosure of material legal proceedings "contemplated by governmental authorities." *Id.*

219 *Id.* § 229.105(a); 2010 Guidance, 75 Fed. Reg. at 6,294. Item 503(c), now Item 105, requires disclosure of risk factors. 17 C.F.R. § 229.503(c) (2010); *Id.* § 229.105 (2021). Risk factors must be disclosed near the front of a company's disclosures either immediately after the cover page, summary section, or initial pricing information. 17 C.F.R. § 229.105.

220 *Id.* § 229.303 (2021); 2010 Guidance, 75 Fed. Reg. at 6,294.

221 *SEC Issues*, *supra* note 198 (stating the 2010 Guidance Document indicates "companies should consider actual and potential indirect consequences of climate change-related regulation and business trends.").

referenced climate change and/or GHGs roughly doubled the year after the Guidance was released.[222] SEC staff comment letters to registrants, however, soon indicated a lack of focus on climate change and letters that did address climate change often ignored the 2010 Guidance Document.[223] The 2010 Guidance Document, therefore has had limited influence on registrants' disclosures of climate-related information.

In addition to its minimal influence, the 2010 Guidance Document is outdated because it is based on the federal securities laws, market studies, and climate science that existed at the time of its release and that have since developed significantly.[224] The SEC recently modernized its federal securities laws. On August 26, 2020, the SEC announced amendments to Items 101, 103, and 105.[225] Prior to this announcement, these disclosure requirements had not been significantly revised in over thirty years.[226] Additional amendments to Item 303 were announced on November 19, 2020.[227] In addition to altering prescriptive disclosure requirements, these amendments expanded the SEC's principles-based disclosure requirements aiming to enable registrants to tailor their disclosures to address material information on their particularized businesses and financial conditions.[228] They also aimed to lessen "irrelevant, outdated, and immaterial" disclosures.[229] As the risks from climate change increase, the potential that climate change may have a material impact on public companies' financials and operations—such that disclosure is required under these expanded principles-based disclosures—also increases. Additionally, the 2010 Guidance Document based its analysis on old market studies and obsolete climate science.[230]

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222 GIBSON, DUNN & CRUTCHER LLP, *supra* note 98 (internal citation omitted).

223 *Id*. Between January 1, 2014, and August 11, 2017, the SEC only issued fourteen climate-related disclosure letters out of a total of over 41,000 letters. *Id.*

224 *See infra* notes 225–226, 232 and accompanying text.

225 John K. Wilson et al., *SEC Amends Regulations S-K to Modernize Business, Legal Proceedings and Risk Factor Disclosures*, FOLEY & LARDNER LLP (Sept. 11, 2020), https://perma.cc/N2DD-SMNF.

226 *Id.*

227 Hillary Holmes et. al., *Summary Chart and Comparative Blackline Reflecting Recent Amendments to MD&A Requirements Now Available*, GIBSON, DUNN & CRUTCHER LLP (Dec. 11, 2020), https://perma.cc/5RAN-BWK2; *see also SEC Modernizes Reg S-K Financial and MD&A Disclosure Rules*, PERKINS COIE LLP (Jan. 19, 2021), https://perma.cc/2Z43-SVD6 (discussing the Item 303 amendments).

228 Sanjay M. Shirodkar & Deborah R. Meshulam, *SEC Proposes to Modernize Certain Rules: Transitioning From a Prescriptive to a Principles-based Approach?*, DLA PIPER (Sept. 10, 2019), https://perma.cc/2M3J-B99F (explaining prescriptive disclosures are objective disclosures that "do not rely on management's judgement to determine whether disclosure is required under certain circumstances," and principles-based disclosures are subjective disclosures that "rely on a registrant's management to evaluate the significance of information in the context of the registrant's overall business and financial circumstances and to determine whether disclosure is necessary.") (quoting the SEC).

229 *Id.* (quoting SEC Chair Jay Clayton).

230 2010 Guidance, 75 Fed. Reg. 6,290, 6,296–97 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, and 241). For example, the 2010 Guidance Document references a 2007 Government Accountability Office report regarding the physical impacts of climate change. *Id*. at 6,297 n.75.

For example, the 2010 Guidance Document referenced the 2007 Fourth Assessment Report (AR4)–the most recent Intergovernmental Panel on Climate Change (IPCC) scientific report available at the time.[231] Since then, however, the IPCC has released the Fifth Assessment Report (AR5) and Sixth Assessment Report (AR6).[232] Each report has progressively heightened warnings of climate crisis at a planetary scale over tighter timelines.[233] These amendments, and the latest market studies and science, are not reflected in the 2010 Guidance Document, meaning that the Guidance is of limited use to registrants today and should be updated.

Simply updating the 2010 Guidance Document will, however, not ensure that climate-related disclosures provide decision-useful information to effectively address market needs. The Guidance does not create a sufficiently specific duty to disclose climate-related information because it is only an SEC interpretation of federal securities laws and SEC regulations.[234] Instead, the Guidance relies on the notion of materiality.[235] A consideration of materiality alone, however, does not produce adequate disclosures to address climate-related issues in the market.[236] First, the mere existence of a material fact does not mandate its disclosure absent a duty to disclose.[237] Instead, as *Basic* made clear,[238] only a specific duty to disclose will trigger a requirement to disclose.[239] As there is no specific duty to disclose climate-related matters, the concept of materiality alone does not mandate climate-related disclosures.[240] Thus, reporting companies maintain practical discretion over climate-

[231] *See Reports*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, https://perma.cc/2REX-MUKB (last visited Jan. 12, 2023) (showing the year that each AR4 was published).

[232] *Id.* AR6 was released in April 2022. IPCC AR6, *supra* note 1.

[233] *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS (2007), [hereinafter IPCC AR4], https://perma.cc/4SQ3-AP6G (exploring how human actions and natural occurrences are causing global increase of carbon dioxide, and other harmful GHGs); *see generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS (2013), [hereinafter IPCC AR5] (exploring how the scientific understanding of climate change has changed since the last report in 2007 and warning about the potential of increased drastic weather patterns); *see generally* IPCC AR6, *supra* note 1 (discussing the working group's better understanding of climate change as an established certainty and providing more certain risk assessments for predicted occurrences).

[234] Elisse B. Walter, Commissioner, U.S. Sec. & Exch. Comm'n, Opening Remarks Regarding Interpretive Guidance Regarding Climate Change (Jan. 27, 2010), https://perma.cc/CJ75-9ZYB; *SEC Interpretive Releases Archive: 2010*, *supra* note 30.

[235] *See generally* 2010 Guidance, 75 Fed. Reg. at 6,294; *see supra* note 216 and accompanying text (describing how materiality supports disclosure).

[236] Lee, *supra* note 10, at 2.

[237] *Id.*

[238] *Basic, Inc.*, 485 U.S. 224, 239 n.17 (1988) (recognizing omissions are not actionable without a duty to disclose).

[239] Lee, *supra* note 10 ("*Basic* . . . acknowledged the fundamental principle that . . . an omission of information–even material information–is not actionable absent a duty to disclose.").

[240] *Id.*

related disclosures.[241] As discussed earlier, registrants use this discretion to report climate-related information through unregulated voluntary measures rather than through regulated SEC requirements, causing inconsistencies and gaps in climate reporting.[242]

Second, climate-related disclosures are not necessarily effective even when there is a duty to disclose because materiality is not always assessed correctly.[243] The SEC's principles-based standard presupposes that those in charge of reporting to the SEC are correctly assessing materiality.[244] Management, however, is typically more optimistic than investors about the business and its prospects.[245] While management may view circumstances as temporary deviations or even positive progress that do not require disclosure, investors may believe the same circumstances necessitate disclosure.[246] Lawyers and auditors—who act as a check and balance on management—typically also have incentives to agree with management, which may lead them to spend more resources to support, instead of independently analyze, management decisions.[247] Consequently, in addition to a duty to disclose, SEC disclosures need to be sufficiently specific to avoid falling short of eliciting information that is material to reasonable investors.[248] Without a sufficiently specific duty to disclose, reporting of climate-related information remains at the registrant's discretion. Thus far, the level of discretion afforded to registrants has not been enough to produce sound climate-related reporting.

The SEC must therefore do more than update its 2010 Guidance Document to adequately address current and future capital market needs in relation to climate change. Updating the Guidance, however, will serve to improve the applicability and relevance of the Guidance, given developments since it was released in 2010. It should also signal that climate-related information is material to the capital market which may bolster SEC authority over such reporting and improve the comparability and consistency of reported climate-related information. This should further help investors and businesses make climate-informed investment and business decisions.

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[241] *Id.*

[242] Guthrie, *supra* note 14, at 9, 13, 15.

[243] Lee, *supra* note 10.

[244] *Id.*

[245] *Id.* Academic reports suggest that preparers and auditors give materiality a higher threshold than investors do. *Id.* The SEC also constantly brings a multitude of cases for negligence in materiality assessments. *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.*

2. Adopting a Climate-Related Disclosure Rule that Creates a Specific Duty to Disclose Climate Information Aligned with Broadly Accepted Climate Disclosure Frameworks

The SEC's recent March 2022 Proposed Rule suggests it may soon reduce registrants' discretion over climate-related disclosures by creating a specific duty to disclose climate-related matters. Currently, registrants have little incentive to report such information because penalties are minimal for poor climate reporting.[249] The SEC's Climate and Environmental, Social, and Governance (ESG) Task Force in the Division of Enforcement (Task Force), established in 2021, suggests that the SEC is preparing to enforce such a disclosure duty.[250] Market participants seem prepared for a new duty, which could help the capital market address its long-term climate concerns. To address current and future market needs, the SEC should embrace this opportunity to further evolve its disclosure regulations and to create a sufficiently specific duty to disclose climate-related information.

Since 2021, the SEC has taken significant steps towards mandating climate-related disclosures which will reduce the discretionary element of climate-reporting. On February 24, 2021, Acting SEC Chair, Allison Herren Lee, issued a Statement of Review directing SEC staff to review existing public filings on climate-related disclosures.[251] A few days later, Acting Chair Lee created a Task Force to assess under-reporting of climate risk given existing SEC rules.[252] Less than two weeks later, she also released a public statement welcoming public input on the evolution of climate change disclosures[253] "to assist the SEC staff in evaluating the SEC's 'disclosure rules with an eye toward facilitating the disclosure of consistent, comparable, and reliable information on climate change.'"[254] Then, in September 2021, the SEC released a sample comment letter concerning company climate change disclosures or absence of such disclosures.[255] The SEC has already issued five comment letters related to this sample letter.[256] Most recently, on March 21, 2022, the SEC

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[249] Alden et al., *supra* note 11.

[250] LATHAM & WATKINS, *supra* note 192, at 5.

[251] *Id.*

[252] *Id.* The SEC created the Task Force on March 4, 2021. *Id.* Its goal is to "identify any material gaps or misstatements in disclosures of climate risks under existing rules." *Id.*

[253] Statement, Allison Herren Lee, Commissioner, U.S. Sec. & Exch Comm'n, Public Input Welcomed on Climate Change Disclosures, (Mar. 15, 2021), https://perma.cc/KLC2-4HPE.

[254] LATHAM & WATKINS, *supra* note 192, at 1–2 (quoting SEC Commissioner Lee).

[255] *Sample Letter to Companies Regarding Climate Change Disclosures*, U.S. SEC. & EXCH. COMM'N (Sept. 22, 2021), https://perma.cc/TX8G-KMVE. The letter refers to the 2010 Guidance Document and highlights that general, risk factor, and MD&A disclosures are areas the agency plans to consider when issuing letters tailored to specific companies. *Id.*

[256] Jacob H. Hupart, *SEC Begins to Issue Comment Letters on Climate Disclosures*, NAT. L. REV. (Feb. 23, 2022), https://perma.cc/9EQZ-3ECB (indicating that apparently only the following five companies have received such letters: Allbirds, Inc.; Warby Parker; Olaplex Holdings, Inc.; Cintas Corporation; and Palo Alto Networks, Inc.).

released the Proposed Rule "to [e]hance and [s]tandardize [c]limate-[r]elated [d]isclosures for [i]nvestors."[257] All these actions suggest that the SEC intends to limit registrants' discretion over their climate-related reporting by mandating, or at least significantly strengthening, the agency's climate-related reporting requirements. They also suggest that the SEC intends to enforce these requirements.

The public seems significantly, and largely positively, interested in these recent SEC actions. As investors become increasingly aware of the systemic risks of climate change,[258] they increasingly want businesses to formally assess and disclose their climate-related financial risk and expected operational impacts.[259] Investors hope that this information will help them make informed investment decisions by improving comparability of and consistency among climate reports.[260] As early as 2016, the public has indicated that it supports SEC sustainability- and climate-related disclosures.[261] Specifically regarding the SEC's March 2021 statement, although the comment period ended on June 14, 2021,[262] the SEC continues to receive comments.[263] By July 2021, the SEC had received over 550 unique comment letters from various entities of which three quarters supported mandatory disclosure rules.[264] As of May 23,

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[257] SEC Press Release, *supra* note 5.

[258] Boushey et al., *supra* note 4. Scientists urge warming be kept within 1.5 degrees Celsius, warning warming over two degrees means "[c]hanges in several climatic impact-drivers would be more widespread at [two degrees Celsius] compared to [1.5 degrees Celsius]." IPCC AR6, *supra* note 1, at 24. Since 1850, the Earth has warmed about 1.1 degrees Celsius, which is causing increasingly adverse effects such as increased frequency and intensity of storms, sea level rise, heat waves, droughts, floods, and wildfires. *See generally id.* at 5, 20 (summarizing the current state of the climate and how it is changing due to human influence). Thus, climate change has the potential to cause "cascading damages and unprecedented systemic risk to globally interconnected economic systems." Boushey et al., *supra* note 4.

[259] Halper et al., *supra* note 149.

[260] *Id.*

[261] LATHAM & WATKINS, *supra* note 192, at 4. The SEC requested public comments in response to its concept release regarding "modernizing certain business and financial disclosure requirements in Regulation S-K." *Id.* Even though only a few release questions regarded the topic of climate-related disclosures, most of the thousands of comment letters received by the SEC addressed sustainability disclosures. Statement, Allison Herren Lee & Caroline A. Crenshaw, Commissioners, U.S. Sec. & Exch. Comm'n, Joint Statement on Amendments to Regulation S-K: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, (Nov. 19, 2020), https://perma.cc/B23U-XW7C. In fact, 80% of the public comment letters addressing sustainability favored improving sustainability disclosures in SEC filings. *Id.*

[262] LATHAM & WATKINS, *supra* note 192, at 5.

[263] *Comments on Climate Change Disclosures*, U.S. SEC. & EXCH. COMM'N, [hereinafter *Comments on Climate Change Disclosures*], https://perma.cc/PM77-3HPV (last visited Jan. 12, 2023) (listing ongoing comments into 2022).

[264] Gensler, *supra* note 21. Comments supporting mandating climate-related disclosures typically agree on three items: (1) climate-related disclosures which are operationally material, and which would influence a rational investor's investment decision should be required; (2) at least scope 1 and scope 2 GHG emissions should be mandated to be quantified and reported; and (3) emissions metrics should align with existing frameworks

2022, almost a year after the comment period ended, the SEC had received over 5,800 letters supporting SEC action to consider climate-related disclosures at various levels.[265] Regarding the March 2022 Proposed Rule, although the comment period was supposed to end on May 20, 2022, the SEC extended this to June 17, 2022,[266] and then again to November 1, 2022.[267] Letters continue to be submitted.[268] As of May 23, 2022, the SEC had received over 8,100 letters supporting adoption of the Proposed Rule.[269]

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such as the Task Force on Climate-related Financial Disclosures, Sustainability Accounting Standards Board, and Climate Disclosure Standards Board. LATHAM & WATKINS, *supra* note 192, at 2.

265 *See Comments on Climate Change Disclosures*, *supra* note 263 (noting a sum total of over 5,800 comments which are broken into four different types of letters—Type A, B, C, and D letters). Type A letters, of which the fewest number of comments were received (nineteen total), requested streamlining the disclosure requirements to align with scientific methods that reduce climate impact for consistency and simplicity. *Letter Type A*, U.S. SEC. & EXCH. COMM'N (Mar. 29, 2021), https://perma.cc/PXA9-K5ST. Type B letters, of which the most comments were received (2,281 comments total), supported long-term planning transparency. *Letter Type B*, U.S. SEC. & EXCH. COMM'N (Mar. 29, 2021), https://perma.cc/5DEA-CLR7. These comments focused on creating a "just, green future" where companies honestly explain how they are addressing the climate crisis and other ESG concerns through a "clear, standardized, and trustworthy" SEC process. *Id.* Type C letters, a close second in terms of number of comments received (2,070 comments), highlighted the urgency for mandatory climate and ESG disclosures particularly for the fossil fuel and agro-commodities industries. *Letter Type C*, U.S. SEC. & EXCH. COMM'N (Jun. 8, 2021), https://perma.cc/7ELF-8D8R. These comments also specified elements the SEC should require in such disclosures including qualitative and quantitative TCFD information; physical, transition, societal, natural environment, financial systems, and investor risks; and Scopes 1, 2, and 3 GHG emissions. *Id.* These comments also suggested climate disclosures should be machine-readable, audited, and follow the annual and quarterly SEC reporting schedule. *Id.* Finally, Type D letter, of which many comments were also received (1,506 comments), focused on the SEC's responsibility to stop corporate greenwashing, and require meaningful disclosure about a company's "climate risks, contribution to climate change . . . , and other sustainability issues." *Letter Type D*, U.S. SEC. & EXCH. COMM'N (Jun. 9, 2021), https://perma.cc/2KML-F85D. The SEC has also received 692 unique comments, but a full analysis of the unique comment letters was not completed for this Comment. *Comments on Climate Change Disclosures*, *supra* note 263.

266 Press Release, U.S. Sec. & Exch. Comm'n, SEC Extends Comment Period for Proposed Rules on Climate-Related Disclosures, Reopens Comment Periods for Proposed Rules Regarding Private Fund Advisers and Regulation ATS (May 9, 2022), https://perma.cc/7C8R-26RQ.

267 Jeffrey Berg et al., *SEC Reopens Comment Period for Certain Comments Submitted Between June 2021 and August 2022, Including on Climate-Related Disclosure*, JDSUPRA (Oct. 20, 2022), https://perma.cc/MPJ9-8X8X (last visited Jan. 15, 2023).

268 *Comments for The Enhancement and Standardization of Climate-Related Disclosures for Investors*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/729F-R97N (last visited Jan. 12, 2023).

269 *Id.* Type A letters, of which thirty were received, support the Proposed Rule "because publicly-traded companies should be held accountable for the promises they make regarding emissions reduction." *Letter Type A*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/GQQ6-6JUX (last visited Jan. 12, 2023). Type B, of which the fewest letters, tied with Type G, were received (twenty-four letters), support the Proposed Rule for transparency reasons. *Letter Type B*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/ZJ9C-UUCQ (last visited Jan. 12, 2023). Type C letters, of which the most letters were received (6,254 letters), support the

The sheer volume of responses indicates that public interest in climate-related disclosures is strong. The number of letters supporting SEC involvement in climate disclosures also indicates that the public desires at least some SEC action to address climate risk, and improve transparency, comparability, and reliability of climate information.

The SEC can respond to this immense public support and capital market need by creating a duty to disclose climate-related information. The SEC approved its March 2022 Proposed Rule by a 3-1 vote.[270] The SEC appears on track to adopt a final version of this comprehensive Proposed Rule, which mandates climate-related disclosures and is aligned with broadly accepted climate disclosure frameworks like the TCFD and GHG Protocol.[271] The SEC intends such a final rule will ensure investors receive full, accurate, and consistent climate-related information to help them make informed investment decisions.[272]

Specifically, the rule proposes adding a subpart to Regulation S-K and an article to Regulation S-X.[273] The new Regulation S-K subpart

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Proposed Rule because "[c]limate change stands to create significant instability and disruption in our financial and economic systems[]" which, historically, corporations ignore and are sometimes deceptive about their climate issues such that a strong climate disclosure rule is necessary. *Letter Type C*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/F5VC-538Y (last visited Jan. 12, 2023). Type D letters (503 received) are from field experts who support a science-based final rule that "mandate[s] and standardize[s] disclosure by publicly listed companies of ALL heat-trapping emissions" to protect the financial system from climate change. *Letter Type D*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/M7EW-6FLX (last visited Jan. 12, 2023). Type E letters (thirty-seven received) support the Proposed Rule "to protect investors and promote a market environment worthy of the public's trust." *Letter Type E*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/95RZ-SXJM (last visited Jan. 12, 2023). Type F letters, of which the second most letters were received (1,208 letters), are from residents concerned about climate change and its economic impact, but who still support the Proposed Rule. *Letter Type F*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/4J7B-XPCN (last visited Jan. 12, 2023). Type G letters, of which the fewest letters tied, with Type B, were received (twenty-four letters), are from Virginians concerned about the impact of climate change on their utilities but still support the Proposed Rule. *Letter Type G*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/6BZM-ZEN3 (last visited Jan. 12, 2023). Finally, Type H letters (twenty-seven received) support the Proposed Rule, including Scope 3 emissions reporting, "to help businesses and individuals make fully informed decisions and achieve transparent climate goals and targets." *Letter Type H*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/66CH-MN6R (last visited Jan. 12, 2023). The SEC continues to receive thousands of unique comments, but again a full analysis of the unique comment letters was not completed for this Comment. *Comments for the Enhancement and Standardization of Climate-Related Disclosure for Investors*, *supra* note 268.

270 LATHAM & WATKINS, SEC PROPOSES EXTENSIVE CLIMATE CHANGE DISCLOSURE REGULATIONS 1 (Mar. 22, 2022), https://perma.cc/3GTH-WEFR.

271 U.S. SEC. & EXCH. COMM'N, FACT SHEET: ENHANCEMENT AND STANDARDIZATION OF CLIMATE-RELATED DISCLOSURES 1 (2022), [hereinafter Proposed Rule Fact Sheet], https://perma.cc/NG4T-EHYK; *See also* March 2022 Proposed Rule, 87 Fed. Reg. 21,334, 21,343 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (proposing a rule that would require disclosures of, among other things, climate-related risks, greenhouse gas emissions, and climate-related financial metrics).

272 Rachel B. Goldman et al., *Litigation and Enforcement Impact of the SEC's Proposed Rules on Climate-Related Disclosure*, NAT. L. REV (Apr. 28, 2022), https://perma.cc/CZ7G-ZEAD.

273 March 2022 Proposed Rule, 87 Fed. Reg. at 21,345.

would "require a registrant to disclose certain climate-related information, including information about its climate-related risks that are reasonably likely to have material impacts on its business or consolidated financial statements, and GHG emissions metrics that could help investors assess those risks."[274] This new subpart would also allow a registrant to disclose its climate related opportunities.[275] The new Regulation S-X article "would require certain climate-related financial statement metrics and related disclosure[s] . . . be included in a note to a registrant's audited financial statements[]" and would subject financial statement metrics "to audit by an independent registered public accounting firm[] and come within the scope of the registrant's internal control over financial reporting."[276] These new Regulation S-K and S-X elements are based on broadly accepted climate disclosure frameworks such as the TCFD and GHG Protocol.[277] Adopting these elements would create a mandatory duty for registrants to disclose the climate-related information specified in the rule.[278] This would reduce registrants' discretion over their climate reporting to the SEC because it would give the SEC the power to enforce disclosure violations.[279] It would also align climate-related disclosures with internationally accepted, broadly utilized climate disclosure frameworks like the TCFD and GHG Protocol.

Failure to adhere to these disclosure obligations will thus violate a specific duty to disclose, which triggers the SEC's enforcement mechanism.[280] The SEC's recent actions suggest that the SEC is preparing to use the full extent of its enforcement powers under the securities laws to take action against non-compliance and misleading or false climate-related disclosures.[281] For example, over the past year, the SEC's Task Force has already led the SEC to open investigations into a variety of ESG matters and initiate communication with multiple publicly traded companies regarding details about business impacts from climate-related matters, as well as differences between climate-related disclosures in SEC filings and voluntary reports.[282] A mandatory climate-related disclosure rule will therefore give the SEC access to its full enforcement powers. The SEC's Task Force suggests the SEC is preparing to use these powers to the full extent possible once such a rule is promulgated.

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274 *Id.* (internal citation omitted).

275 *Id.*

276 *Id.* (internal citation omitted).

277 PROPOSED RULE FACT SHEET, *supra* note 271, at 1.

278 March 2022 Proposed Rule, 87 Fed. Reg. at 21,345.

279 *Id.* at 21,346 (indicating that adoption of the Proposed Rule would mandate climate-related disclosures under Regulation S-K and Regulation S-X).

280 SEC 2021 FINANCIAL REPORT, *supra* note 47, at 6 (explaining the SEC can enforce disclosure violations).

281 Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://perma.cc/LZR2-ZUYU.

282 Goldman et al., *supra* note 272.

Creating a sufficiently specific duty to disclose climate-related information by directly mandating climate-related disclosures is an appropriate next step for the SEC. Existing non-SEC disclosure options, registrants' discretion regarding climate-related reporting, and the SEC's inability to penalize registrants who provide inadequate climate-related disclosures are insufficient to address the capital market's increasing concerns over material climate issues.[283] The market seems ready to embrace SEC-regulated climate-related disclosures. The SEC also appears ready to enforce such regulations. Just as the SEC's disclosure rules have evolved with market developments in the past, the SEC should continue to evolve its securities disclosure regulations to reflect current and future market needs.[284] Reflecting current and future market needs means considering climate-related matters. Adopting a final version of the SEC's March 2022 Proposed Rule aligns with these market needs because it will create a sufficiently specific duty to disclose climate-related matters. Such a duty will reduce registrants' reporting discretion by mandating SEC reporting and increasing the SEC's enforcement power over climate-related disclosures. A duty to disclose climate-related information would therefore help provide the capital market with long-term protection from climate change.

IV. CONCLUSION

Climate change poses a long-term risk to the capital market. The significant discretion afforded to registrants regarding climate-related disclosures and the SEC's reliance on the notion of materiality to generate decision-useful climate disclosures has proven insufficient. As a result, market participants are requesting that the SEC regulate climate-related disclosures to help make climate disclosures more consistent, comparable, and reliable.[285] This will help participants make informed investment and business decisions and protect the capital market in the long-term. The SEC is the appropriate agency to develop mandatory climate-related disclosures. Not only can the SEC's structure protect the long-term integrity of climate-related disclosures, but the agency's objectives and values also align with developing such disclosures.[286] The SEC also has robust regulatory and enforcement mechanisms that can be utilized to oversee and provide assurance for mandatory climate-related disclosures.[287] Furthermore, the SEC likely already has, or will soon be

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[283] New climate-related risk disclosures are necessary to help manage and mitigate physical and transitional climate change risks, avoid "catastrophic tipping points," and seize "economic opportunities associated with the transition to a carbon-neutral economy." Boushey et al., *supra* note 4.

[284] *See* Gensler, *supra* note 21 (discussing SEC responsiveness to investor disclosure demands).

[285] *Id.*

[286] *See supra* notes 66–67 and accompanying text.

[287] SEC 2021 FINANCIAL REPORT, *supra* note 47, at ii, 6.

granted, the authority to mandate climate-related disclosures.[288] The SEC should therefore update its guidance on how existing SEC disclosure requirements implicate climate-related matters and adopt a sufficiently specific duty to disclose climate-related information aligned with broadly accepted climate disclosure frameworks. Ultimately, the SEC has a responsibility—or at least the opportunity—to help address the systemic and catastrophic risks of climate change to the capital market. The SEC should act accordingly.

288 Meyers, *supra* note 167.