Environmental (Non)disclosure and the SEC's Proposed Solution

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INTRODUCTION

Investment funds purporting to focus on environmental, social, and governance (ESG) factors have experienced substantial growth in recent years.[1] The financial sector is increasingly recognizing the importance of climate change within corporate risk management, disclosure, and investment decisions.[2] However, the United States does not currently explicitly regulate information regarding ESG or climate-risk. Although a growing number of companies seek to address environmental considerations through voluntary reporting, this information is often inconsistent and fragmented.[3]

While environmental disclosures have long been voluntary, there is a growing global movement of mandatory climate-related disclosures.[4] Nearly a decade ago, the U.S. Securities and Exchange Commission (SEC) began a comprehensive effort to "modernize and simplify" the disclosure rules that apply to public companies.[5] In that period, investor demand for the SEC to standardize how companies disclose climate-related risk and other ESG information has steadily increased.[6] In March

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1. *See* Mark T. Uyeda, Comm'r, U.S. Sec. & Exch. Comm'n, *ESG: Everything Everywhere All at Once* (Jan. 27, 2023), https://www.sec.gov/news/speech/uyeda-remarks-california-40-acts-group [https://perma.cc/49MP-2BB4] ("[G]lobal ESG assets are expected to exceed $50 trillion by 2025, which would represent more than one-third of total projected global assets. To put this in perspective, ESG assets only crossed the $35 trillion threshold in 2020. In 2021, assets invested in ESG-themed mutual funds and exchange-traded funds rose to $2.7 trillion globally."). This Note will focus exclusively on the 'E' of ESG, particularly climate-related information and disclosures.

2. *See, e.g.,* Mark Carney, Governor, Bank of Eng., Chairman Fin. Stability Bd., Address at Lloyd's of London: Breaking the Tragedy of the Horizon – Climate Change and Financial Stability 12–13 (Sept. 29, 2015) (stating that climate change would threaten the world's financial stability resulting in the "tragedy of the horizon").

3. *See infra* Part I(A).

4. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://bit.ly/3PMXpb4 [https://perma.cc/G95F-P53E].

5. Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 279 (2022).

6. *Id.*; Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, *Statement on Proposed Climate Risk Disclosures* (Mar. 21, 2022), https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321 [https://perma.cc/C3VK-EEUE] ("Investors representing literally tens of trillions of dollars support climate-related disclosures because they recognize that climate risks can pose significant financial risks to companies, and investors need reliable information about climate risks to make informed investment decisions.").

2022, the SEC released its long anticipated proposed rule titled *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (the Proposed Rule).[7] If finalized, the Proposed Rule would put in place an information-generating framework to help capital markets and its participants respond to the climate-related economic challenges ahead.[8]

This Note will analyze how stakeholders are responding to the Proposed Rule, whether the proposed regulations will be feasible and effective, and how The American Bar Association's *Model Rules of Professional Conduct* are implicated. Part I will discuss the rapid growth of ESG in the United States, its recent politicization, and the problems associated with the current informational framework. Part II will outline the current structures and organizations impacting how companies are disclosing their climate-related information. Part III will provide an overview of the SEC Proposed Rule. Finally, Part IV will discuss prominent legal, technological, economic, political, and ethical issues implicated by the Proposed Rule.

I. BACKGROUND

A. THE EVOLUTION OF ESG AND ENVIRONMENTAL CONSIDERATIONS IN THE MARKET

The concept of ESG was first popularized almost two decades ago with the idea that investors should consider environmental, social and corporate governance risks in their financial calculations.[9] Today, roughly $35 trillion is invested in ESG-related products, and that number is projected to grow to $50 trillion by 2025.[10] SEC Commissioner Allison Lee described its ubiquity, stating "ESG investing is no longer just a matter of personal choice."[11]

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7. The Enhancement and Standardization of Climate-Related Disclosures for Investors, SEC Release No. 33-11042 (Mar. 21, 2022) [hereinafter Proposed Rule].

8. George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 RUTGERS L. REV. 101, 101 (2022).

9. Dan Byrne, *What is the History of ESG?*, CORP. GOVERNANCE INST. (Oct. 21, 2022), https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-is-the-history-of-esg/ [https://perma.cc/GGQ8-VSHS] (detailing the evolution of ESG from the 2004 UN Global Compact's report *Who Cares Wins* until present day).

10. Saijel Kishan, *ESG by the Numbers: Sustainable Inv. Set Records in 2021*, BL (Feb. 3, 2022), https://www.bloomberg.com/news/articles/2022-02-03/esg-by-the-numbers-sustainable-investing-set-records-in-2021#xj4y7vzkg [https://perma.cc/SG6L-SUCK]; *see* Letter from Letitia James, New York Attorney General & Other State Attorneys General (August 16, 2022), https://oag.ca.gov/system/files/attachments/press-docs/NYAG%20comment%20letter%20%28S7-17-22%29.pdf [https://perma.cc/A6FF-DW5T] (describing the observable growth in ESG).

11. Allison H. Lee, Comm'r, U.S. Sec. & Exch. Comm'n, *Regulation S-K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26#_ftnref13 [https://perma.cc/LRV3-66D4] ("A broad swath of investors find ESG risks to be as or more important in their decision-making process than financial statements, surpassing traditional metrics such as return on equity and earnings volatility.").

As ESG has grown, so too has its opposition. In recent years, ESG has evolved from a purely financial consideration to a politicized issue. Critics, primarily in the Republican party, have dismissed ESG as "woke capitalism" and claim it forces companies to shy away from their maximum potential.[12] As a result, many state-level government entities are cutting off opportunities in their states for investment managers that are perceived as boycotting investments in companies associated with fossil fuels.[13] While speaking about energy policy in Texas, former Vice President Pence said he wanted to "rein in" ESG efforts and argued that to follow socially conscious investing principles would elevate "left-wing" goals over the interests of business.[14] The rise of the anti-ESG movement can be seen in local, state, and federal branches of government.[15]

The political divergence centers around different conceptions of the corporation. At the SEC, in Congress, and beyond, many Republicans boast a "Milton-Friedman-esque model" focused on immediate profits, and frame Democrats as pushing a broader stakeholder capitalism approach.[16] However, this argument may conflate ESG with impact investing which aims to make money by investing in companies that are trying to achieve certain social or environmental outcomes.[17] Supporters of ESG argue that climate-risk considerations are essential to long-term shareholder profits, and thus remain within the traditional theory of shareholder primacy.[18] Nevertheless, the anti-ESG movement frames these investments as a Democratic-led effort to prioritize climate change and other social issues at the expense of the fossil fuel industry.[19] Despite the increasing

12. Saigel Kishan & Danielle Moran, *Republicans Prepare to Ramp Up Their Anti-ESG Campaign in 2023*, BL (Dec. 29, 2022), https://news.bloomberglaw.com/environment-and-energy/republicans-prepare-to-ramp-up-their-anti-esg-campaign-in-2023 [https://perma.cc/N9AR-GK5D].

13. *See, e.g.*, Adam Aton, *Inside Texas' Attempt to Turn ESG Upside Down*, E&E NEWS (Sept. 6, 2022), https://www.eenews.net/articles/inside-texas-attempt-to-turn-esg-upside-down/#:~:text=Texas%20is%20turning%20parts%20of,growing%20field%20of%20ESG%20investing [https://perma.cc/6QDM-ZGCE] (explaining the recent anti-ESG movement in Texas).

14. Mark Niquette, *Pence Rips Socially Minded Investing, Wants to 'Rein in' ESG*, BL (May 10, 2022), https://news.bloomberglaw.com/environment-and-energy/pence-rips-socially-conscious-investing-wants-to-rein-in-esg?utm_source=rss&utm_medium=NEVE&utm_campaign=00000180-af69-d12e-a5cf-ef6f71a50003 [https://perma.cc/CJ9E-M6XW].

15. *See, e.g.*, Kishan & Moran, *supra* note 12 (detailing anti-ESG efforts in Republican states including a Florida proposal to prohibit money managers from considering ESG factors when investing funds and a Texas proposal that would prohibit financial institutions from using "value-based criteria" in their business practices).

16. Andrew Ross Sorkin et. al., *The Pushback on E.S.G. Investing*, N.Y. TIMES (May 11, 2022), https://www.nytimes.com/2022/05/11/business/dealbook/esg-investing-pushback.html?searchResultPosition=4 [https://perma.cc/S4TR-HJW3].

17. Michael Copley, How ESG Investing Got Tangled Up in American's Culture Wars, NPR (Sept. 12, 2022), https://www.npr.org/2022/09/12/1121976216/esg-explained [https://perma.cc/9Z7Z-NSXV].

18. *Id.*; *see* Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/Z7HK-AH38] (detailing how this model of corporate governance focuses on maximizing the value of shareholders before considering the interests of other stakeholders).

19. Kishan & Moran, *supra* note 12.

outspoken political commentary, the anti-ESG movement is largely limited to political rather than economic arguments.[20]

B. ESG REPORTING: THE PROBLEM OF NONDISCLOSURE

In their letter to the SEC, Democratic state attorneys general articulated the problem: "Industry ESG offerings are evolving to meet increased demand with no clear framework for disclosure of the scope and extent to which the funds and advisers utilize ESG considerations in investment strategies."[21] The growing prevalence of ESG investments combined with inconsistency and gaps in information leave potential for fraud, hinder comparability between companies, and may lead to mispriced risk and inefficient allocation of capital.[22] Who should hold corporations accountable for broader considerations of ESG?[23]

Current reporting on ESG and climate-risk is inadequate.[24] Despite increased voluntary efforts, the current disclosure landscape is hampered by inconsistent frameworks across and within industries and jurisdictions.[25] A report by the Governmental Accountability Office (GAO) found significant inconsistencies in climate disclosures including variations among definitions, metrics, and methodologies.[26] The U.S. Chamber of Commerce acknowledged the need for greater standardization, noting that a "lack of a universally accepted set of standards remains a major challenge [for businesses when it comes] to effective ESG

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20. *See* Michael Copley, How ESG Investing Got Tangled Up in America's Culture Wars, NPR (Sept. 12, 2022), https://www.npr.org/2022/09/12/1121976216/esg-explained [https://perma.cc/89DK-QFSR] ("Now, we can argue about how we do it and who does it well and who does it poorly. That's a legitimate argument. [But] the idea that ESG is ideological and not economics is a political argument.") (citing Witold Henisz, Wharton School); Kishan & Moran, *supra* note 12 (noting that "some pension officials and banking groups in Republican-dominated states have over the past year begun to question GOP claims that ESG is bad for investors."); Kishan & Moran, *supra* note 12 (providing examples of financial pushback including John Broussard, the assistant state treasurer and chief investment officer for Louisiana, a state that heavily relies on the fossil-fuel industry, disputing the idea that BlackRock, one of the world's biggest shareholders of fossil-fuel companies, puts sustainability above profits).

21. James, *supra* note 10, at 3 ("To protect investors, this industry requires, foremost, a regulatory regime for funds and advisers that mandates comprehensive, consistent, and meaningful disclosures to help investors better evaluate products and services").

22. Ho, *supra* note 5, at 292.

23. *See* Kirsten Sullivan, Amy Silverstein & Leeann Galezio Arthur, *ESG and Corporate Purpose in a Disrupted World*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 10, 2020).

24. *See infra* Part II(B).

25. Sara Dewey, *What to Know About the SEC's Proposed Climate Risk Disclosure Rule,* HARV. ENV'T. & ENERGY L. PROGRAM, (Apr. 27, 2022), https://eelp.law.harvard.edu/2022/04/what-to-know-about-the-sec-proposed-climate-risk-disclosure-rule/ [https://perma.cc/96ET-JGFN]; *see* Proposed Rule, *supra* note 7, at 21 ("Since 2010, disclosures related to climate change have generally increased, but there is considerable variation in the content, detail, and location (*i.e.*, in reports filed with the Commission, in sustainability reports posted on registrant websites, or elsewhere) of climate related disclosures.").

26. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 16, 42 (2020), [hereinafter GAO Public Companies Disclosure Report] (discussing the challenges of inconsistent and incomparable ESG data).

reporting."[27] A recent study by the G20's Financial Stability Board showed that current available climate risk data and corporate disclosures do not allow markets to accurately price climate risk.[28]

The lack of standards, terminology, or guidelines leads to a problem known as "greenwashing."[29] Given the rise in investor demand for ESG and sustainable investment products, a potential conflict exists where asset managers may publicly signal pro-sustainability principles to drive capital flows, yet fail to follow through in their actions and continue to engage in unsustainable practices.[30] Consequently, it is increasingly common for companies to misrepresent themselves – both to investors and to consumers.[31]

Investors are demanding more reliable ESG and climate risk information.[32] In addition to investor rulemaking petitions to the SEC on ESG disclosure reform, shareholder proposals on ESG matters continue to rise, with more proposals attracting majority support or being resolved without a vote. This increasing demand for accurate ESG information is due in part to support for ESG in the voting guidelines of the major proxy advisory firms and commitments to ESG by the largest institutional investors in U.S. capital markets, all of which have signaled their support for shareholder proposals seeking information on climate-related risk, greenhouse gas (GHG) emissions, and other ESG matters.[33] The growing

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27. U.S. CHAMBER OF COM. FOUND. & THE CHAMBER'S CTR. FOR CAP. MKTS. COMPETITIVENESS (CCMG), CORPORATE SUSTAINABILITY REPORTING: PAST, PRESENT, FUTURE 28–32 (2018), https://www.uschamberfoundation.org/sites/default/files/Corporate%20Sustainability%20Reporting%20Past%20Present%20Future.pdf [https://perma.cc/9J6R-2CP8] (citing company "survey fatigue" and the costs of shareholder engagement).

28. Ho, *supra* note 5, at 298 (citing COMMODITY FUTURES TRADING COMM'N (CFTC), MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM 26 (2020)).

29. *See, e.g.*, Caroline A. Crenshaw, Comm'r, U.S. Sec. & Exch. Comm'n, *Statement on Proposed Rule Requiring Enhanced Disclosure by Certain Investment Advisers and Investment Companies on ESG Investment Practices Public Input Welcomed on Climate Change Disclosures* (May 25, 2021), https://www.sec.gov/news/statement/crenshaw-statement-esg-investment-practices-052522 [https://perma.cc/TVQ2-5PKX] (arguing that funds may be "incentivized to overemphasize the role that ESG factors play in their portfolio management decisions" such that "managers may use 'ESG,' and loosely defined terms such as "sustainable" and "green" as more marketing tool than investment thesis.").

30. Ryan Clements, *Why Comparability is a Greater Problem than Greenwashing in ESG ETFs*, 13 WM. & MARY L. REV. 441, 457 (2022).

31. *See* Proposed Rule, *supra* note 7, at 335 (noting increased prevalence of 'greenwashing' through manipulation of information on corporate websites and sustainability reports to gain higher ESG ratings).

32. *See, e.g.*, Letter from BlackRock (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906794-244146.pdf [https://perma.cc/72ZV-Z97Y]; Letter from State Street Global Advisors (June 14, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8914407-244702.pdf [https://perma.cc/767K-JYRL] ("Investors are calling for standardized reporting requirements to enhance the comparability, reliability, and transparency of this information.").

33. Ho, *supra* note 5, at 287; Dewey, *supra* note 25 (noting that over 4,000 investment firms managing over $120 trillion in assets support the United Nations-sponsored Principles for Responsible Investment which commits to incorporate ESG issues, including climate risk, into investment analyses and seek disclosure from the companies in which they invest. Further, more than 700 investors, managing a collective $68 trillion in assets, comprise the Climate Action 100+ initiative which urges large GHG emitters to improve climate governance, strengthen climate-related disclosures and prepare the financial system for losses caused by climate change).

demand may also be in response to concerns over the effect of systemic climate-related financial risk to the economy at large.[34]

II. CURRENT U.S. CLIMATE DISCLOSURE REGIME

There is currently no explicit mandatory disclosure of climate risk or ESG considerations in the United States. In response to pressure from investors, the public, and foreign bodies, there are increasing efforts to regulate this space through voluntary initiatives, congressional action, and through other administrative bodies. Although there are several potential actors regulating this space, the SEC has emerged as the organization with the requisite disclosure and anti-fraud mechanisms to implement and enforce standardized climate disclosures.[35]

First, this section will detail the independent frameworks that companies are voluntarily using to provide the relevant climate information. Second, this section will discuss legislative efforts to intervene and regulate corporate climate information. The third section will outline the roles of other administrative agencies to regulate and enforce informational standards. The failure or inability of these structures to effectively modulate climate information leads to the fourth section, the role of the SEC.

A. INDEPENDENT FRAMEWORKS FOR DISCLOSURE

"In the context of public company disclosures to investors, the conversation has moved beyond *whether* to disclose to *how* to disclose."[36] Many standard-setting bodies have emerged to provide frameworks for companies looking to voluntarily disclose ESG information so as to improve investors' ability to compare information among companies.[37] Of the frameworks available for reporting, including the Global Reporting Initiative, the Climate Change Reporting Framework, and the Sustainable Accounting Standards Board, the Task Force on Climate-Related Disclosures (TCFD) is the most relevant in the United States. The SEC stated, "although the reporting landscape is crowded with voluntary standards that seek different information in different formats, the TCFD framework has been widely endorsed by U.S. companies and regulators and standard-setters around the world."[38]

The TCFD was established by the Financial Stability Board in 2015 to make recommendations for improving principles and practices for voluntary climate change disclosure.[39] Many proponents of mandatory disclosures point to the TCFD to demonstrate feasibility. In 2017, the TCFD released a climate-related

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34. Ho, *supra* note 5, at 287.

35. *Infra* Part II(D).

36. Hana V. Vizcarra, *Entering a New Era in Climate-Related Disclosure and Financial Risk Management in the U.S.*, AMERICAN LAW INSTITUTE (February 17, 2021).

37. GAO Public Companies Disclosure Report, *supra* note 26.

38. Proposed Rule, *supra* note 7, at 37.

39. Proposed Rule, *supra* note 7.

risk disclosure framework to evaluate material climate-related risks and opportunities through an assessment of their projected financial impacts on a company.[40] The framework is intended to help companies consider and report on risks associated with climate change, such as physical, liability, and transition risks that could have a financial impact on a company in the future.[41] The TCFD is based on the view that "transparency reduces misallocations of financial resources in the market that contribute to climate-related financial risks."[42] The framework focuses on both an analysis of risks and opportunities of climate change and their application to known accounting and corporate reporting. The TCFD highlights three principal benefits of better disclosure: 1) risk assessment, 2) capital allocation, and 3) strategic planning.[43] The Task Force is supported by more than 2,600 organizations globally, with a total market capitalization of $25 trillion.[44]

Although voluntary reporting is less prevalent among smaller public companies, 90% of public companies in the S&P 500 produce corporate sustainability reports.[45] However, voluntary sustainability reporting may be based on any number of reporting standards and frameworks and companies can pick and choose which standards to follow.[46]

B. LEGISLATIVE EFFORTS TO ENFORCE DISCLOSURE

Congressional intervention in corporate ESG and climate reporting has been unsuccessful. As highlighted in Part I, there is an increasing anti-ESG movement that further politicizes climate considerations and makes congressional intervention unlikely.[47] In April 2021, Congressional Democrats reintroduced the Climate Risk Disclosure Act which would have required companies to document their financial exposure to climate risks.[48] In June 2021, the House passed the ESG Disclosure Simplification Act which would have required public companies at shareholder meetings to disclose (1) a clear description of the company's reviews about the links between ESG metrics and long-term business strategy, and (2) a description of any process the company uses to determine the impact of

40. Proposed Rule, *supra* note 7, at 35.

41. GAO Public Companies Disclosure Report, *supra* note 26.

42. Andreas Hösli & Rolf H. Weber, *Climate Change Reporting and Due Diligence: Frontiers of Corporate Climate Responsibility*, DE GRUYTER (Mar. 16, 2022), https://www.degruyter.com/document/doi/10.1515/ecfr-2021-0035/html.

43. Task Force on Climate-Related Financial Disclosures, https://www.fsb-tcfd.org/ [https://perma.cc/5VV3-7LF2].

44. Proposed Rule, *supra* note 7, at 36 (citing TCFD, 2021 Status Report).

45. Ho, *supra* note 5, at 289.

46. Ho, *supra* note 5, at 291; Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, *We are NOT the Securities and Environment Commission – At Least Not Yet* (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 [https://perma.cc/D8DF-STB6].

47. *See* Part I (detailing anti-ESG congressional efforts).

48. H.R.2570, 117th Cong. (2021) (proposing to give the SEC a legislative mandate to enact climate disclosure requirements).

ESG metrics on its long-term business strategy.[49] Historically, both the House and the Senate have proposed legislation that would authorize the Environmental Protection Agency (EPA) to regulate environmental marketing.[50] Given the increasingly politicized divide around ESG investing, it is not likely that Congress will pass mandatory disclosure laws. However, there are increasing efforts at the state level to mandate climate risk disclosures.[51]

There are both state and federal reporting requirements related to GHG emissions. At least seventeen states have specific GHG emissions reporting requirements, most of which focus on direct emissions (Scope 1).[52] Federal GHG reporting requirements consist of the EPA 2009 Mandatory Reporting of Greenhouse Gases Rule which requires large direct emitters and suppliers of fossil fuels to report their emissions to the EPA.[53] However, due to the nature of the EPA's reporting requirements, its data does not allow a clean disaggregation across the different scopes of emissions for a given registrant.[54]

C. THE ROLE OF OTHER REGULATORY AGENCIES IN THE U.S.

The Federal Trade Commission (FTC) offers an important source of guidance for environmental marketing called "Guides for the Use of Environmental Marketing Claims," also known as the "Green Guides." The FTC promulgated the Green Guides pursuant to its authority to enforce Section 5 of the Federal Trade Commission Act, which generally prohibits, among other things, deceptive-advertising practices.[55] Although the Green Guides are not legally binding, they reflect the FTC's approach to evaluating environmental marketing claims, so courts generally view them as persuasive authority.[56] Accordingly, the Green Guides offer important guideposts to companies that make environmental claims. However, the FTC does not deal with financial disclosures and proves ineffective in regulating public statements regarding ESG and climate risk for two essential

49. H.R. 1187, 117th Cong. § 101 (2021).

50. For example, the Environmental Marketing Claims Act of 1991 (the Lautenberg Act), S. 615 102d Cong., 1st Sess. (1991); Environmental Marketing Claims Section of the National Waste Reduction, Recycling, and Management Act (the Swift Act), H.R. 3865, 102d Cong., 2nd Sess. (1992).

51. *See, e.g.*, Cydney Posner, *California's Proposed Climate Corporate Accountability Act Goes Belly Up*, HARV. L. SCHOOL F. CORP. GOVERNANCE (Sept. 25, 2022), https://corpgov.law.harvard.edu/2022/09/25/californias-proposed-climate-corporate-accountability-act-goes-belly-up/ [https://perma.cc/5CAB-KE83] (detailing the Climate Corporate Accountability Act proposed in California).

52. Proposed Rule, *supra* note 7, at 298 n.742 ("The 17 states with GHG reporting requirements are Hawaii, Washington, Oregon, California, Nevada, Colorado, Minnesota, Iowa, Virginia, Pennsylvania, New York, New Jersey, Maryland, Connecticut, Massachusetts, Vermont, and Maine.").

53. Proposed Rule, *supra* note 7, at 298.

54. *See* Proposed Rule, *supra* note 7, at 298.

55. Eric L. Lane, *Greenwashing 2.0*, 38 Colum. J. Env't L. 279, 287 (2013).

56. *Id.* at 289.

reasons. First, there is no independent enforcement under the Green Guides, and second, the FTC does not specifically define terms within its Green Guides. [57]

Other financial regulatory agencies have signaled to the market that they intend to step up ESG regulation and enforcement. For example, the Commodity Futures Trading Commission (CFTC) established its own Climate Risk Unit "to support the agency's mission by focusing on the role of derivatives in understanding, pricing, and addressing the climate-related risk and transitioning to a low-carbon economy."[58] In January 2022, Federal Reserve Chair Jerome Powell stated that the Federal Reserve was looking at "climate stress tests," and that he thought it was "very likely that climate stress scenarios, as we like to call them, will be a key tool going forward."[59] In February 2022, Acting Chairman of the Federal Deposit Insurance Corporation (FDIC), Martin J. Gruenberg, released the FDIC's priorities for 2022, which included "[a]ddressing the financial risks that climate change poses to banking organizations and the financial system."[60] In the release, the FDIC stated that it would "seek[] public comment on guidance designed to help banks prudently manage [climate] risks, establish[] an FDIC interdivisional, interdisciplinary working group on climate-related financial risks, and join[] the international Network of Central Banks and Supervisors for Greening the Financial System."[61]

D. THE ROLE OF THE SEC

The SEC mandatory disclosure regime is motivated by the idea that "investors must have access to accurate information important to making investment and voting decisions in order for the financial markets to function effectively."[62]

The SEC requires public companies to disclose material information, which can include material ESG information, in their annual 10-K filings and other periodic filings.[63] Under securities law, materiality is assessed by evaluating whether

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57. Elizabeth K. Coppolecchia, *The Greenwashing Deluge: Who Will Rise Above the Waters of Deceptive Advertising?* 64 U. MIAMI L. REV. 1353, 1374 (2010). Note, there are several pending FTC actions challenging corporate misrepresentations. *See* Greenpeace Jointly Files FTC Complaint Against Chevron, GREENPEACE, https://www.greenpeace.org/usa/news/greenpeace-jointly-files-ftc-complaint-against-chevron/ [https://perma.cc/XK58-QWB3] (detailing March, 2021 complaint against Chevron for unlawfully deceptive advertisements which overstate investment in renewable energy and commitment to reducing fossil fuel pollution).

58. Press Release, U.S. Commodity Futures Trading Commission, CFTC Acting Chairman Behnam Establishes New Climate Risk Unit (Mar. 17, 2021), https://www.cftc.gov/PressRoom/PressReleases/8368-21 [https://perma.cc/RX24-VQWQ].

59. Senate Banking Committee, Testimony of Jerome Powell, January 11, 2022 (available at https://www.youtube.com/watch?v=OyxIn6cPGq4) [https://perma.cc/499L-KUFS].

60. Federal Deposit Insurance Corporation, Press Release, "Acting Chairman Martin J. Gruenberg Announces FDIC Priorities for 2022" (Feb. 7, 2022), https://www.fdic.gov/news/press-releases/2022/pr22015.html [https://perma.cc/P99X-FZCD].

61. *Id.*

62. *See* Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10,064, Exchange Act Release No. 77,599, 81 Fed. Reg. 23,916, 23,921 (Apr. 22, 2016).

63. *Id.*

a reasonable investor would have viewed the information "as having significantly altered the 'total mix' of information made available."[64] Therefore, investors may be expected to rely on how individual companies assess materiality.[65]

There are currently no federal securities laws specifically referencing climate related risk. However, companies may be required to disclose some ESG information if material.[66] In 2010, the SEC issued an interpretive release that provided guidance to issuers as to how existing disclosure requirements apply to climate change matters.[67] The 2010 Climate Change Guidance noted that, "depending on the circumstances, information about climate change-related risks and opportunities might be required in a registrant's disclosures related to its description of business, legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations."[68] The release outlined certain ways in which climate change may trigger disclosure obligations under the SEC's rules such as legislation and regulations governing climate change, international accords, changes in market demand for goods or services, and physical risks associated with climate change.[69] Since 2010, investor demand for and company disclosure of information about climate change risks, impacts, and opportunities has grown dramatically.[70]

As climate-risk and ESG considerations grow in popularity, the SEC has signaled its increasing attention to the area.[71] In addition to the Proposed Rule announced in March 2022, the SEC also announced two additional proposed rules in May 2022 aimed at mandating ESG disclosures.[72] There are currently several

64. Proposed Rule, *supra* note 7, at 64.

65. Lee, *supra* note 11; *see* People by James v. Exxon Mobil Corp., 119 N.Y.S.3d 829 (N.Y. Sup. Ct. 2019) (alleging that ExxonMobil engaged in a "longstanding fraudulent scheme" creating the illusion that it had "fully considered the risks of climate change regulation and had factored those risks into its business operations") (holding that the Office of the Attorney General failed to prove by a preponderance of the evidence that ExxonMobil made any material misrepresentations) (illustrating the difficulty of enforcing informational standards under current securities laws).

66. For example, Securities Act Rule 408 and Exchange Act Rule 12b-20 require companies to disclose, in addition to the information that is subject to specific disclosure mandates, "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading. 17 C.F.R. § 230.408 and 17 C.F.R. § 240.12b-20.

67. Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 2, 2010) [75 FR 6290 (Feb 8, 2010)].

68. *Id.*

69. *Id.*

70. *See generally* Uyeda, *supra* note 1.

71. The SEC first solicited public comment on the need for sustainability disclosure in 2016. In 2020, it identified ESG disclosures as an emerging area of focus. In March 2021, the SEC requested public input on potential climate change disclosures and announced its Climate and ESG Task Force created to investigate ESG-related disclosure violations. *See* Allison H. Lee, Comm'r, U.S. Sec. & Exch. Comm'n, *Public Input Welcomed on Climate Change Disclosures* (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures [https://perma.cc/EGH9-PU5U].

72. In addition to the rule proposed in March, *infra* Part III, the SEC also announced two proposed rules in May regarding disclosures by certain investment advisors and investment companies and funds touting ESG terms in their names. *See* Lauren Aguiar & Anita Bandy, *Recent ESG Litigation and Regulatory Developments,*

SEC rules that may impact or implicitly require environmental disclosures, but there are no specific, consistent, or comparable standards.

The foundation of the SEC's disclosure requirements is set forth in Regulation S-K, pursuant to which a company must make a number of mandatory disclosures.[73] The 2010 Climate Change Guidance served to clarify companies' obligations to disclose information related to climate change under these existing rules and regulations.[74] Regulation S-K includes several items that may trigger mandatory climate-risk disclosures. Item 303 requires disclosure of "material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."[75] Item 101 of Regulation S-K requires a description of the registrant's business, including each reportable segment and specifically requires disclosure of the material effects that compliance with environmental regulations may have on capital expenditures.[76] Item 103 requires a description of material pending legal proceedings.[77] Item 105, Risk Factors, might include climate-related risks under its broad requirement to discuss the "material factors that make an investment in the registrant or offering speculative or risky."[78] However, Regulation S-K's existing disclosure requirements do not produce disclosures with "sufficiently detailed and comparable information" to adeqautely inform investors of corporate readiness to manage the climate change uncertainties.[79]

The Sarbanes–Oxley Act of 2002 made several changes to disclosure laws with the aim of strengthening the accountability of companies, in part by increasing their liability for making incomplete or inaccurate disclosures.[80] Although the Act does not explicitly address climate-risk or environmental disclosures, "it significantly heightens the standard for all corporate disclosures."[81] However, the Act mandates that public companies should disclose "on a rapid and current basis" such information about "material changes in [their] financial condition or operations" as the SEC determines "necessary or useful for the protection of

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Harv. L. School F. Corp. Governance (JULY 25, 2022), HTTPS://CORPGOV.LAW.HARVARD.EDU/2022/07/25/RECENT-ESG-LITIGATION-AND-REGULATORY-DEVELOPMENTS/ [HTTPS://PERMA.CC/PSK8-JBCQ].

73. Proposed Rule, *supra* note 7, at 40.

74. Lee, *supra* note 11.

75. 17 C.F.R. § 229.303(a).

76. 17 C.F.R. § 229.101(c)(1)(xii).

77. 17 C.F.R. § 229.103(a).

78. 17 C.F.R. § 229.101(c)(5).

79. *See* Hana V. Vizcarra, *Entering a New Era in Climate-Related Disclosure and Financial Risk Management in the U.S.*, HARV. L. SCHOOL ENV'T & ENERGY L. PROG. 1, 4 (Feb. 17, 2021), http://eelp.law.harvard.edu/wp-content/uploads/Vizcarra-ALI2021-ClimateFinanceRiskOutlook.pdf [https://perma.cc/M2NG-2GTV]; Lee, *supra* note 11 (noting that investors are not getting material information).

80. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 409.

81. Roshaan Wasim, *Corporate (Non)Disclosure of Climate Change Information*, 119 COLUM. L. REV. 1311, 1325 (2019).

investors and in the public interest."[82] The Act also empowers the SEC to impose "minimum standards of professional conduct," thus heightening the ethical duties of lawyers representing issuers before the SEC.[83] In accordance with this mandate, the SEC promulgated Rule 205, Standards of Professional Conduct for Attorneys.[84] The Rule intends to "protect investors and increase their confidence in public companies by ensuring that attorneys who work for those companies respond appropriately to evidence of material misconduct."[85] In form, both SEC Rule 205 and the *Model Rules* impose ethical duties on securities lawyers; however, the Sarbanes-Oxley Act strengthens this mandate.[86]

III. THE SEC PROPOSED RULE

On March 21, 2022, the SEC announced a Proposed Rule to address the insufficiency of current regulations and the lack of standardization in corporate reporting on climate risk.[87] If the Proposed Rule goes into effect, for the first time, public companies will be required to disclose specific environmental risk information and obtain assurance on their impact on climate through mainstream financial filings.

The Proposed Rule covers three categories of disclosure: material climate impacts, GHG emissions, and any targets or transition plans. On material risks and strategic implications, the Proposed Rule mandates disclosure of risks from physical climate-related hazards, such as fires or floods, as well as transition risks, such as regulatory, technological, or reputational risks.[88] On GHG emissions, the Proposed Rule requires reporting of Scope 1 and Scope 2 emissions and Scope 3 emissions if they are material or if the filer has a target.[89] Finally, on targets and transition plans, companies must disclose any existing emissions targets and the transition plans to achieve those targets.[90]

82. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 409.

83. 15 U.S.C. § 7245 (2008).

84. 17 C.F.R. § 205 (2008).

85. *Id.*

86. *See infra* Part IV(E).

87. Proposed Rule, *supra* note 7, at 29 (noting that the use of "multiple voluntary frameworks has failed to produce the consistent, comparable, and reliable information that investors need").

88. Laura Corb, Kimberly Henderson, Tim Koller, & Shally Venugopal, *Understanding the SEC's Proposed Climate Risk Disclosure Rule*, MCKINSEY & CO. (June 3, 2022), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/understanding-the-secs-proposed-climate-risk-disclosure-rule [https://perma.cc/Y347-2BQZ] ("Filers would need to disclose strategic impacts, financial impacts, and operational impacts, as well as their governance and risk management processes to manage these risks.").

89. *Id.* ("The emissions reporting would need to be in absolute terms and in terms of intensity, both per unit of revenue, that is, greenhouse gases per dollar in sales and per unit of product, such as emissions per car manufactured. Filers would need to disclose how they arrived at those estimates and what greenhouse gases the estimates cover—be they methane, nitrous oxide, or CO2—and the type of source.").

90. *Id.*

The Proposed Rule establishes a disclosure framework based, in large part, on the TCFD and the Greenhouse Gas Protocol frameworks.[91] Rather than creating a new stand-alone reporting form, the Proposed Rule would include the climate-related disclosure rules in Regulation S-K and Regulation S-X.[92] Similar to the TCFD framework, the proposed climate-related provisions under Regulation S-K would require disclosure of a registrant's "governance of climate-related risks; any material climate-related impacts on its strategy, business model, and outlook; climate- related risk management; GHG emissions metrics; and climate-related targets and goals, if any."[93] Additionally, provisions under Regulation S-X would require companies to disclose certain climate metrics and related disclosures in the notes to their financial statements unless the aggregated effect of the severe weather events, other natural conditions, transition activities, and identified climate-related risks is less than one percent of the total line item for the relevant fiscal year.[94] As proposed, "climate-related risks" means the "actual or potential negative impacts of climate-related conditions and events on a registrant's consolidated financial statements, business operations, or value chains, as a whole."[95]

The SEC's Proposed Rule requires the disclosure of certain GHG emissions as they have "become a commonly used metric to assess a registrant's exposure to" risk.[96] These emissions are divided into three categories based on the Greenhouse Gas Protocol definitions.[97] Scope 1 emissions are the direct GHG emissions that occur from sources that a company owns or controls.[98] Scope 2 emissions are the indirect emissions resulting from the energy purchased and consumed by the company.[99] Scope 3 emissions are "a consequence of the company's activities but are generated from sources that are neither owned nor controlled by the company."[100] These emissions may include purchased goods and services, waste generation, business travel, downstream transportation, distribution and use of products sold, and the end-of-life treatment of products sold.[101] Scope 3 emissions would have to be disclosed only if considered material or if the registrant

91. Proposed Rule, *supra* note 7, at 34–40.

92. Proposed Rule, *supra* note 7, at 51; *see generally* Rules, Regulations and Schedules, https://www.sec.gov/divisions/corpfin/ecfrlinks [https://perma.cc/C9Z7-T3UT] (explaining that Regulation S-X outlines how registrants should disclose financial statements and Regulation S-K outlines how registrants should disclosure qualitative descriptors in filings).

93. Proposed Rule, *supra* note 7, at 49.

94. Proposed Rule, *supra* note 7, at 121.

95. Proposed Rule, *supra* note 7, at 56.

96. Proposed Rule, *supra* note 7, at 351 (for example "should a transition to a low-carbon economy gain momentum, registrants with higher amounts of . . . emissions may be more likely to face sharp declines in cash flows, either from greater costs of emissions or the need to scale back on high-emitting activities.").

97. Proposed Rule, *supra* note 7, at 39.

98. Proposed Rule, *supra* note 7, at 39 (i.e., emissions from manufacturing activities and vehicles).

99. Proposed Rule, *supra* note 7, at 39.

100. Proposed Rule, *supra* note 7, at 39.

101. Proposed Rule, *supra* note 7, at 106.

has a target or goal related to Scope 3.[102] The Proposed Rule proposes an attestation requirement for large companies' Scope 1 and 2 disclosures and several "accommodations" with respect to Scope 3 disclosures including (i) a special safe harbor from liability, (ii) an exemption for smaller reporting companies, (iii) delayed compliance dates for Scope 3 emissions disclosure, and (iv) different "attestation" standards for Scope 3 data.[103]

IV. ARGUMENTS SURROUNDING THE PROPOSED RULE

In response to one of the most anticipated rules in SEC history, thousands submitted comments on the 490-page Proposed Rule.[104] Lawmakers including attorneys general, senators, and representatives have weighed in on the Proposed Rule, primarily along party lines.[105] Companies that have embraced ESG told the Commission that "the Proposed Rule would provide much-needed transparency and standardization around companies' material climate risks."[106] Although there was significant investor support for climate disclosure regulation, comments diverge on the economic impacts, technical feasibility, legality, and political motives of the Proposed Rule. Additionally, the Proposed Rule implicates and may alleviate the ethical conflicts faced by corporate counsel tasked with determining material climate disclosures.

A. ECONOMIC IMPACTS: THE COSTS OF COMPLIANCE WITH THE PROPOSED RULE

Since the SEC issued its Proposed Rule in March, critics have leaned heavily on the cost and complexity of compliance, specifically as it pertains to calculating and disclosing Scope 3 emissions.[107] Additionally, critics argue that the Proposed Rule will ultimately hurt investors and the economy.[108]

102. Proposed Rule, *supra* note 7, at 355.

103. Proposed Rule, *supra* note 7.

104. *See* U.S. Sec. & Exch. Comm'n, Comments for "The Enhancement and Standardization of Climate-Related Disclosures for Investors", https://bit.ly/3jolDfY [https://perma.cc/8N7Z-8AVD].

105. *See id.*; *supra* Part I.

106. *See* Ellen Meyers, As SEC works to finalize climate rule, both sides make their case, ROLL CALL (Nov. 10, 2022), https://rollcall.com/2022/11/10/as-sec-works-to-finalize-climate-rule-both-sides-make-their-case/ [https://perma.cc/T6TJ-RN9S]; Steven M. Rothstein, *Analysis Shows that investors strongly support the SEC's Climate Disclosure Rule*, Ceres (Oct. 11, 2022), https://www.ceres.org/news-center/blog/analysis-shows-investors-strongly-support-secs-proposed-climate-disclosure-rule [https://perma.cc/T6TJ-RN9S]; Michael Panfil & David G. Victor, *Climate Change Creates Financial Risks. Investors Need to Know What Those Are*, BROOKINGS (Mar. 29, 2022), https://www.brookings.edu/blog/planetpolicy/2022/03/29/climate-change-creates-financial-risks-investors-need-to-know-what-those-are/ [https://perma.cc/U8KW-9F2A].

107. Bill Flook, Scope 3 Emissions Disclosure Emerges as Top GOP Target in SEC Climate Risk Rules, THOMAS REUTERS (Aug. 24, 2022), https://tax.thomsonreuters.com/news/scope-3-emissions-disclosure-emerges-as-top-gop-target-in-sec-climate-risk-rules/ [https://perma.cc/NK8H-MKJR].

108. Peirce, *supra* note 46.

There are three primary reasons why critics of the Proposed Rule believe implementation will be too costly.[109] First, "although the Proposed Rule is based in part on popular voluntary frameworks," such as the TCFD, "those frameworks are neither universally used nor precisely followed."[110] Second, companies may not be able to get the information needed to calculate Scope 3 emissions if suppliers do not track this information, so many companies will have to turn to third-party consultants.[111] Third, companies will have to incur audit costs in connection with several metrics proposed.[112] Despite the Commission's estimates, some suggest that the cost of external legal advice would quadruple the external cost burden on public companies.[113]

SEC Commissioner Hester M. Peirce, opposing the rule, argued that the Proposed Rule mistakenly relies on standards in accordance with the TCFD due to its popularity.[114] However, companies may pick and choose elements of the TCFD framework to follow, and the majority do not adhere to key parts, so its popularity does not accurately depict the difficulty of compliance with the totality of standards. Consequently, "neither the data regarding predicted costs of complying with the TCFD as it was originally designed nor the data regarding costs to companies using bespoke versions of the TCFD are particularly instructive on the potential costs of complying with this proposal."[115]

In addition to the costs of compliance, critics argue that the Proposed Rule will ultimately be bad for the economy. Although the Proposed Rule does not mandate any changes in climate practices, only disclosure of those practices, it includes recommendations that direct "managerial attention to climate issues."[116] The fear is that "driving more capital toward green investments as defined uniformly by financial regulators could fuel an asset bubble that could make the financial system more vulnerable rather than more resilient."[117] A letter submitted by numerous Republican members of the House of Representatives claimed that by "simply wrapping climate activism in financial regulation," the Proposed Rule will "only

109. Peirce, *supra* note 46; *see, e.g.*, Letter from Exxon at 12 (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132323-302882.pdf [https://perma.cc/8ZBU-7ETE] ("[O]ur initial work indicates the cost of implementation and compliance for issuers will be orders of magnitude greater than the estimates in the Proposal."); Letter from U.S. Chamber of Commerce at 3, 10-15 (November 1, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20148911-315866.pdf [https://perma.cc/553U-MLRJ] (explaining why actual compliance costs would be much higher).

110. Peirce, *supra* note 46.

111. Peirce, *supra* note 46.

112. For example, the requirement to include an attestation report on Scope 1 and 2 emissions signed by an independent GHG emissions attestation provider. Peirce, *supra* note 46.

113. Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, *It's Not Just Scope 3: Remarks at the American Enterprise Institute*, n.3 at (Dec. 7, 2022), https://www.sec.gov/news/speech/peirce-remarks-american-enterprise-institute-120722#_ftn4 [https://perma.cc/2GA7-84EV].

114. Peirce, *supra* note 46.

115. Peirce, *supra* note 46.

116. Peirce, *supra* note 46; *see supra* Part IV(D).

117. Peirce, *supra* note 46.

further exacerbate our current energy crisis."[118] Senate Republicans shared this concern, claiming the Proposed Rule "will only further allocate capital away from domestic fossil fuel producers, increase the costs of energy for everyday Americans, and transfer investment to dirtier sources of energy overseas."[119]

However, climate risk information gaps are also a potential source of systemic risk.[120] The TCFD found that the current lack of investment grade information about the financial impacts of climate change may lead to price distortions that expose global markets to destabilizing and unpredictable volatility.[121] Further, the CFTC stressed the need for SEC action, noting that "systemic shocks are more likely when the prices of a wide variety of financial assets do not fully reflect climate-related physical and transition risks."[122]

Among the comments submitted to the SEC, many are concerned that the proposed requirements would burden smaller companies that are part of major corporations' supply chains. While Republicans have been the most vocal about this argument, a smaller segment of Democrats have raised similar concerns.[123] Democratic Representatives from Iowa, California, Virginia, and Georgia sent a letter expressing concern that farmers and small businesses that serve as vendors and suppliers to major companies will get swept up in corporations' reporting on Scope 3 emissions.[124] In response, proponents argue that "increased visibility into supply chains can help companies mitigate future business vulnerabilities, ensure the long-term stability of their supply chains, and support their suppliers' ability to respond to escalating climate risks."[125] The argument is that visibility in the value chain, especially with smallholder farmers, allows an understanding of which raw materials have the most climate risks so companies can ensure efforts are focused on the right places.[126]

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118. Letter from Republican Representatives (April 11, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20123081-279409.pdf [https://perma.cc/M984-GHVW].

119. Letter from Republican Senators (April 5, 2022), https://www.cramer.senate.gov/news/press-releases/sen-cramer-leads-colleagues-in-calling-on-the-sec-to-withdraw-the-proposed-climate-disclosure-rule [https://perma.cc/YVT2-NQW6].

120. Ho, *supra* note 5, at 296 ("Systemic risk is financial risk both *within* and *to* the financial system itself that investors cannot shield themselves from through diversification.

121. Task Force on Climate Related Fin. Disclosures (TCFD), Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (2017), https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf [https://perma.cc/LGF8-B9FF].

122. Ho, *supra* note 5, at 298 (citing COMMODITY FUTURES TRADING COMM'N (CFTC), MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM 26 (2020), https://www.cftc.gov/ [https://perma.cc/U6L6-57WL]) ("[W]hen [these] risks are not fully priced in, market participants will accumulate larger exposures to risky assets than would otherwise be desirable.").

123. Meyers, *supra* note 106.

124. Letter from Cynthia Axne & other members of Congress (Oct. 21, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20147099-312697.pdf [https://perma.cc/4NNA-7KKW].

125. Laura Draucker & Nako Kobayashi, The Strong Business Case for Measuring, Reporting, and Reducing Scope 3 Emissions, CERES (Sept. 19, 2022), https://www.ceres.org/news-center/blog/strong-business-case-measuring-reporting-and-reducing-scope-3-emissions [https://perma.cc/XAJ9-8Z6A].

126. *Id.*

Just as critics of the Proposed Rule point to the costs associated with preparing the disclosures, proponents equally recognize the costs associated with not having ESG disclosure requirements.[127] Companies must confront the physical impacts of climate change such as worsening natural disasters from hazardous flooding and dangerous heatwaves. These climate-related risks create financial risks for companies and for their investors.[128] A 2019 survey found that 215 of the largest global companies faced nearly $1 trillion in risk from climate impacts.[129]

The Proposed Rule follows the SEC's 2021 Request for Input on climate risk disclosure in which 70 percent of investor commenters called for "disclosure in alignment with the TCFD and 65 percent of investor commenters called for reporting on Scope 1, 2, and 3 emissions."[130] One investment firm commented, "from an investor perspective, sustainability is a matter of value, not values, and is an investment risk that needs to be appropriately incorporated into the investment risk framework."[131] The current system of voluntary reporting is not giving investors sufficient information. Matthew Patsky, CEO of Trillium Asset Management, a firm with approximately $5.3 billion in assets under advisement, stated, "the current ad-hoc state of climate disclosure from U.S. registrants does not meet many investors' needs for comprehensive, science-based, decision-useful data from all enterprises facing material short, medium, and long-term climate change risks." [132] Consequently, proponents of the Proposed Rule argue that the costs of nondisclosure far exceed those associated with compliance.

B. LEGALITY: THE COMMISSION'S AUTHORITY TO PROPOSE THE RULE

Another significant criticism of the Proposed Rule is that it exceeds the SEC's statutory authority. The SEC is authorized to require disclosures that are "necessary or appropriate in the public interest or for the protection of investors."[133] Along with investor protection, the SEC is tasked with "promot[ing] efficiency, competition, and capital formation."[134] The SEC's core mission is to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[135]

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127. *See* Public Statement, John Coates, Acting Dir., Div. Corp. Fin., SEC, ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets (Mar. 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121#_ftnref3 [https://perma.cc/H6N7-RP7D]; Michael Panfil & David G. Victor, *Climate Change Creates Financial Risks. Investors Need to Know What Those Are*, BROOKINGS (Mar. 29, 2022), https://www.brookings.edu/blog/planetpolicy/2022/03/29/climate-change-creates-financial-risks-investors-need-to-know-what-those-are/ [https://perma.cc/HWE8-6KDZ].

128. Lee, *supra* note 11.

129. Dewey, *supra* note 25.

130. Dewey, *supra* note 25.

131. Letter from State Street Global Advisors, *supra* note 32.

132. Meyers, *supra* note 106.

133. 15 U.S.C. § 77g.

134. 15 U.S.C. §§ 77b(b), 78c(f).

135. *See* Regulation S-K Concept Release at 212 (stating the SEC's statutory authority in these terms).

Another argument regarding the Commission's authority to propose this rule concerns First Amendment limitations on compelled speech. According to Commissioner Peirce, Congress instructed the Commission "to protect investors in their pursuit of returns on their investments, not in other capacities."[136] Therefore, "disclosure mandates must be limited to information that is material to the prospect of financial returns."[137] Republican Senators argued in a comment letter that "requiring the disclosure of non-material information runs afoul of the First Amendment prohibitions against compelled speech."[138] House Republicans submitted a letter claiming the climate disclosure rules "would only be used to smear these companies" and that "ultimately, the SEC's actions would act to undermine and shame public companies, not to provide investors with necessary financial disclosures."[139]

Whether the Proposed Rule runs afoul to the First Amendment depends on whether the disclosure mandates focus on "purely factual and uncontroversial information" and whether they are "unjustified or unduly burdensome."[140] Proponents argue that it is not controversial because it is "consistent with the language and objectives of the statute authorizing the mandate," the "contemporaneous delegation of authority to update and build upon that template," and the long history of subsequent regulatory practice.[141] Further, proponents argue that climate-risk is undeniably material, even though there is debate on whether Congress imposed a materiality requirement.[142]

The SEC's broad authority to promulgate the Proposed Rule has also been questioned under the Major Questions Doctrine. The argument is that by requiring companies to disclose information that may not be material, the Commission is reaching beyond the confines of Congress' grant of power. Although this is an evolving area of administrative law, critics argue that the SEC is claiming power to regulate a significant portion of the American economy pursuant to a long-extant statute.[143] In light of the Supreme Court's decision in *West Virginia v. EPA* (2022), the Commission's authority to broadly regulate emissions disclosures,

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136. Peirce, *supra* note 46.

137. Peirce, *supra* note 46 ("The Commission today proposes to require companies to disclose information that may not be material to them and recasts materiality to encompass information that investors want based on interests other than their financial interest in the company doing the disclosing.").

138. Letter from Members of the Senate (April 5, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20122544-278541.pdf [https://perma.cc/N9FL-W6MT].

139. Letter from Ted Bud & Members of Congress (April 11, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20123081-279409.pdf [https://perma.cc/9FAF-VC3N].

140. Georgiev, *supra* note 8, at 129 (citing Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018)).

141. Georgiev, *supra* note 8, at 129.

142. *See* Cydney Posner, *ESG Disclosure Rules and the SEC's Mission*, HARV. L. SCHOOL F. CORP. GOVERNANCE (May 24, 2022), https://corpgov.law.harvard.edu/2022/05/24/esg-disclosure-rules-and-the-secs-mission/ [https://perma.cc/9EDN-WNBP].

143. *E.g.*, Peirce, *supra* note 46.

specifically Scope 3, will be contested.[144] There, the Court held that courts must be "skeptical" of agency efforts to assert broad authority to regulate matters of "vast economic and political significance"; in those instances, the agency must "point to 'clear congressional authorization" to regulate.[145] Former Pennsylvania Senator Patrick Toomey saw this decision as a direct notice to the SEC not to "impose this whole climate change disclosure regime . . . with no authority from Congress."[146]

Opponents, like Senator Toomey, argue the Proposed Rule falls under the Major Questions Doctrine because it would "involve a novel approach; would require technical and policy expertise not typically needed by the agency; as a consequential decision, was unlikely to have been left by Congress to the agency; and had previously been rejected by Congress in a similar form before."[147] However, Commission Chair Gensler defended the Proposed Rule as well within the SEC's mandate, noting that, "[o]ver the generations, the SEC has stepped in when there's significant need for the disclosure of information relevant to investors' decisions."[148] Other proponents point to Congress' grant of authority through agency delegation with respect to disclosure matters such as in the 2002 Sarbanes-Oxley Act.[149]

Relying on the power granted to it by Congress in 1933, the SEC has adapted its disclosure regime to evolve with changing social and economic priorities.[150] The SEC, without an explicit mandate from Congress, has mandated disclosure of executive compensation, related-party transactions, asset-backed securities, and various technical industry-specific items.[151] The SEC has a tradition of providing guidance in response to existential threats, including on disclosure relating to the impacts of Brexit, the COVID-19 pandemic, and Russia's invasion of

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144. West Virginia v. EPA, 142 S. Ct. 2587 (2022); *See* Cydney Posner, *Final Climate Rules Are Months Away, Reports Bloomberg*, COOLEY (Oct. 20, 2022), https://cooleypubco.com/2022/10/20/final-climate-rules-months-away/ [https://perma.cc/4P7R-W38X] (addressing the impact of *West Virginia* on the Proposed Rule).

145. *West Virginia*, 142 S. Ct. 2587 at 2595; *see* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."); Jonathan D. Uslaner & Will Horowitz, *Will the SEC's Proposed Climate Risk Disclosure Rules Survive Supreme Court Scrutiny,* REUTERS (Aug. 5, 2022), https://www.reuters.com/legal/legalindustry/will-secs-proposed-climate-risk-disclosure-rules-survive-supreme-court-scrutiny-2022-08-05/ [https://perma.cc/2HVR-W75V] (noting that Chief Justice Roberts found it persuasive that Congress previously considered and declined to grant the EPA the power to enact rules on climate change. Opponents of the Proposed Rule note that Congress similarly rejected laws that would have included similar mandates such as the Climate Disclosure Acts of 2018, 2019 and 2021).

146. Posner, *supra* note 142.

147. Posner, *supra* note 142.

148. Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, *Statement on Proposed Climate Risk Disclosures* (Mar. 21, 2022), https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321 [https://perma.cc/TAJ8-7VHK].

149. *See supra* Part II(D); Georgiev, *supra* note 8, at 116.

150. Georgiev, *supra* note 8, at 117.

151. *See* George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 718–22 (2021).

Ukraine.[152] Thus, proponents of the Proposed Rule argue "the SEC is not aiming to address climate change any more than it was trying to solve a geopolitical crisis (Russia's war on Ukraine) or a global health crisis (the COVID-19 pandemic)" when it required public companies to disclose the risks associated with these critical events for the benefit of investors.[153]

Proponents argue that the SEC has "well-established authority to require disclosures to ensure that investors have the information they need to make sound decisions."[154] The Proposed Rule is "grounded in the SEC's past work on risk disclosure in the environmental realm, starting with the disclosure of risk factors related to environmental law compliance in 1971 and including its 2010 interpretive guidance on climate-related risk disclosure."[155] In 2018, then-Chairman Clayton described the SEC's disclosure authority as "dynamic," noting that "[a]s stewards of this. . . system, a key responsibility of the SEC is to ensure that the mix of information companies provide to investors facilitates well-informed decision making."[156]

C. FEASIBILITY: THE PRACTICABILITY OF THE PROPOSED DISCLOSURES

Another prominent criticism of the Proposed Rule is that the disclosures are too difficult and there are insufficient quality standards for accurate compliance. This is the primary issue surrounding Scope 3 emission reporting.

Although critics have argued that the complexity of Scope 3 accounting creates a burden for reporting companies, the SEC has built in accommodations that recognize its unprecedented nature. First, the Proposed Rule exempts smaller reporting companies.[157] Second, it provides a safe harbor for Scope 3 disclosures.[158] The safe harbor covers Scope 3 statements unless they were "made or reaffirmed without a reasonable basis or [were] disclosed other than in good faith."[159] Critics challenge this mechanism arguing that a company will be unable to determine which particular climate model or set of estimates constitutes a "reasonable basis" when different models and estimations lead to substantially different results.[160] Third, the Proposed Rule also recognizes the unreliability of Scope 3 data by excluding those data from the assurance requirement. Although this aids

152. Georgiev, *supra* note 8, at 119.

153. Georgiev, *supra* note 8, at 119.

154. Dewey, *supra* note 25.

155. Dewey, *supra* note 25; *see* Georgiev, *supra* note 8, at 118–119 (outlining the SEC's long history of requiring environmental disclosures).

156. Georgiev, *supra* note 8, at 120 (citing Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at Meeting of the Investor Advisory Committee (Dec. 13, 2018)).

157. Proposed Rule, *supra* note 7, at 15.

158. Proposed Rule, *supra* note 7, at 15.

159. Proposed Rule, *supra* note 7, at 211.

160. Peirce, *supra* note 46.

in compliance and feasibility, critics argue that if there is no assurance, investors will be unlikely to rely on this data for making investment decisions.[161]

Additionally, there are concerns regarding the accuracy of reporting this information, particularly if the company's customers and suppliers do not track this information.[162] Even if its suppliers disclose their emissions information, "a reporting company may not feel sufficiently confident in the information to include it in its SEC filings."[163] However, many companies have already begun to release information about their GHG emissions; "the SEC estimates that a third of the 7,000 corporate annual reports it reviewed in 2019 and 2020 included some climate impact disclosures."[164] Democratic Senator Jack Reed of Rhode Island said the Proposed Rule would bring order to the process.[165]

The Proposed Rule would require Scope 3 emissions disclosure only if a company's Scope 3 emissions are material or if a company's climate targets include Scope 3.[166] In determining materiality, the SEC explains that companies should consider whether Scope 3 emissions are a relatively significant portion of their GHG emissions or pose a significant risk, either of which would make them important for investment decisions.[167] The Commission notes that Scope 3 emissions are likely to be material for the auto industry and oil and gas sector, for example.[168] Critics have argued that "the complexity of Scope 3 accounting creates a burden for reporting companies," but the SEC's accommodations allow for flexibility.[169]

The SEC interpretive release and its reasonably well-defined guidelines should provide reliable and comprehensive standards for companies in industries where climate issues are important. The Proposed Rule allows for "reasonable estimates" of Scope 3 emissions, provided the registrant discloses the assumptions behind their estimate, obviating the need for precise measurements. Further, similar disclosures can be expected within a given industry, since climate change

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161. Letter from Ken Paxton, Attorney General of Texas & Other Attorneys General (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132121-302606.pdf [https://perma.cc/BBN8-V73E] (claiming the Proposed Rule imposes requirement that are "inherently speculative and will provide no benefit to investors in assessing the financial value of registrants" as certain "types of climate-related risks cannot be predicted with a sufficient degree of certainty to make disclosures of those risks useful to investors").

162. *See id.* ("Requiring companies to disclose this unreliable information puts registrants in a liability catch-22: if a company voluntarily includes a disclosure and its stock price drops, it may face liability for an allegedly misleading disclosure; if damage from an unforeseen hurricane results in a stock price drop, it might face a derivative suit for insufficient disclosure of risk. Errors are inevitable when the metrics are unreliable, subjecting companies to litigation exposure regardless of their efforts to comply with the Proposed Rule.").

163. Peirce, *supra* note 46.

164. Matthew Goldstein & Peter Eavis, *The S.E.C. Moves Closer to Enacting a Sweeping Climate Disclosure Rule*, N.Y. TIMES (Mar. 21, 2022), https://www.nytimes.com/2022/03/21/business/sec-climate-disclosure-rule.html?searchResultPosition=1 [https://perma.cc/3R4J-JXEE].

165. *Id.*

166. Dewey, *supra* note 25.

167. Dewey, *supra* note 25.

168. Dewey, *supra* note 25.

169. Dewey, *supra* note 25.

issues would be similarly relevant to all the companies within that industry.[170] Although there are clear ambiguities, disclosure of Scope 3 emissions is not novel. There are currently eight foreign jurisdictions that have already implemented formal TCFD-aligned disclosure requirements, demonstrating feasibility.[171]

D. POLITICAL: OTHER MOTIVATIONS BEHIND THE PROPOSED RULE

As discussed in the introduction, the rise of ESG investing has been met with considerable political attention.[172] Although the SEC claims the Proposed Rule is "neutral as to the benefits or risks of ESG investing," many opponents argue it pushes a liberal agenda.[173] Patrick Morrisey, Attorney General of West Virginia, threatened litigation claiming the SEC was using mandatory disclosures to "pressure companies and investors to change their behavior."[174] Thus, the Proposed Rule is criticized as being motivated "not by an interest in financial returns from an investment . . . but by deep concerns about the climate, or, sometimes, superficial concerns expressed to garner goodwill."[175] Attorneys general from twenty-four states submitted a letter accusing the Commission of not responding to "empirical evidence and genuine market demand" but "reacting to the political influences of the present administration and its allies."[176]

Dozens of Republican members of Congress have cautioned that the Proposed Rule will take the SEC "outside its historical purview" and into the area of "climate-related policy" reserved for Congress.[177] Sixteen state governors submitted a letter claiming the Proposed Rule "degrades and undermines [the SEC mission] by injecting subjective political judgments on climate policy in corporate disclosures, in a manner calculated to harm the states that provide for America's energy security."[178]

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170. *See* Robert G. Eccles, Michael P. Krzus, Jean Rogers & George Serafeim, *The Need for Sector-Specific Materiality and Sustainability Reporting Standards*, 24 J. APPLIED CORP. FIN. 65, 68 (2012).

171. *See* Proposed Rule, *supra* note 7, at 300 (listing Brazil, the European Union, Hong Kong, Japan, New Zealand, Singapore, Switzerland, and the United Kingdom).

172. *Supra* Part I.

173. Crenshaw, *supra* note 29.

174. Lesley Clark, *Red States Decry 'Woke Left' SEC Proposal for ESG Investing*, E&E NEWS (Aug. 8, 2022), https://www.eenews.net/articles/red-states-decry-woke-left-sec-proposal-for-esg-investing/ [https://perma.cc/MA9F-HQLW].

175. Peirce, *supra* note 46.

176. Letter from Patrick Morrisey, West Virginia Attorney General, et al. (June 15, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131409-301574.pdf [https://perma.cc/DE4T-JKV8]; *see* Letter from Patrick Morrisey, West Virginia Attorney General, et al. (August 16, 2022), https://ago.wv.gov/Documents/2022.08.16%20ESG%20Funds%20Comment.pdf [https://perma.cc/PA5A-ZD6X] (comment on SEC proposed rule, 87 Fed. Reg. 36,654, announced in May 2022 proposing different enhanced disclosures for ESG funds specifically) (accusing the SEC of transforming itself into a regulator of "broader social ills").

177. Letter from Ted Bud, U.S. Representative, et al. to Gary Gensler, Chairman, SEC (Apr. 11, 2022), https://bit.ly/3OY4qFb [https://perma.cc/B4YD-F9D7]; *see also* Letter from John Hoeven, U.S. Senator, et al. to Gary Gensler, Chairman, SEC (June 10, 2022), https://bit.ly/3tC3EVg [https://perma.cc/RV2Q-Y7WJ].

178. Letter from Spencer Cox, Utah Governor, et al. to Joseph Biden, U.S. President, et al. (May 31, 2022), https://bit.ly/3Q1Dt4f [https://perma.cc/2KW4-7ZLM].

In contrast, Democratic Senators submitted a letter supporting the Proposed Rule while also advocating for more aggressive requirements including disclosures of lobbying devoted to both pro- and anti-climate legislation and regulations.[179] The politicization of ESG and climate-risk disregards the inevitable impacts of climate-change and the importance of accounting for those risks in economic planning. Conflating disclosure with advocacy may ignore the core function of the Proposed Rule, which is to serve capital markets and its participants.

E. LEGAL ETHICS: AN ALTERNATIVE ARGUMENT FOR THE PROPOSED RULE

Although many commenters, primarily activists, raised moral and ethical concerns defending the Proposed Rule, there is also a legal ethics argument to be made, particularly for registrants' counsel. What happens if a lawyer preparing a disclosure believes climate information is material, but the company does not want to release the information? Both the *Model Rules* and The Sarbanes-Oxley Act of 2002 govern the bounds of client confidentiality and disclosure duties for corporate securities lawyers.

Corporate securities lawyers must ensure their clients' compliance with federal securities laws; consequently, they must "continually balance the competing interests of their clients and the investing public, who the federal securities laws are meant to protect."[180] It is for this reason that a clear set of materiality standards is needed to guide corporate attorneys in striking a balance between their conflicting duties. Attorneys are obligated to preserve the integrity of the attorney-client relationship by maintaining the confidentiality of communications with their clients.[181] However, the SEC has long held that attorneys who practice securities law are obligated to assist the Commission in the enforcement of securities laws.[182] Corporate attorneys who suspect that undisclosed information is material face a dilemma in determining the "nature and scope of their ethical obligations vis-à-vis the client and regulatory authorities."[183]

Model Rule 1.6 governs confidentiality of information and permits attorneys to report evidence of a client's ongoing or future financial fraud if the fraud is "reasonably certain" to result in "substantial injury" to the financial interest of

179. Letter from Sheldon Whitehouse, U.S. Senator, et al. to Gary Gensler, Chairman, SEC (Mar. 15, 2022), https://bit.ly/3OW3elU [https://perma.cc/TA4S-UUGR].

180. Christin M. Stephens, *Sarbanes-Oxley and Regulation of Lawyers' Conduct: Pushing the Boundaries of the Duty of Confidentiality*, 24 SAINT LOUIS U. PUB. L.R. 271, 299 (2005).

181. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2018) [hereinafter MODEL RULES] (Under Model Rule 1.6, a lawyer is prohibited from revealing information relating to the representation of a client unless the client gives informed consent there is implied authorization).

182. Robert B. Robbins, *Ethics and Professional Responsibility for Attorneys in Securities Transactions*, A. L.I. CONTINUING LEGAL EDUCATION, https://www.pillsburylaw.com/en/news-and-insights/ethics-and-professional-responsibility-for-attorneys.html [https://perma.cc/ACM8-HBJ7] (citing *In re Emanuel Fields*, 45 S.E.C. 262, 266 n.20 (1973)).

183. *Id*. at 2.

another, and if the lawyer's services have been used by the client in the commission of such fraud.[184]

This duty is heightened for attorneys practicing in securities law. As discussed in Part II(D), the SEC has mechanisms in place to mandate disclosure of information considered material.[185] These mechanisms seek to impose on securities lawyers duties of disclosure that exceed the lawyer's ethical duties.[186] The Sarbanes-Oxley Act codified more affirmative duties for attorneys.[187] Section 307 of the Act mandates that the SEC prescribe "minimum standards of professional conduct" for securities lawyers.[188] Accordingly, the SEC adopted Rule 205 which requires attorneys who become aware of "credible evidence of an issuer's material violation" of securities law, a breach of a fiduciary duty, or any "similar violation" to report such evidence "up-the-ladder" within the issuer until an "appropriate response" is made.[189]

Rule 205 "permits but does not require reporting out when the lawyer reasonably believes that disclosure of confidential information is necessary to prevent a material violation likely to cause substantial injury to the organization or to investors."[190] This permissive standard arguably fails to provide a sufficient counterbalance to the interests of the corporation and the duties of an attorney to provide independent, objective legal advice.[191]

Under Model Rule 1.6, a lawyer is permitted to disclose fraud only if it is "reasonably certain" to result in substantial injury to the financial interests of another.[192] In contrast, the SEC permits an attorney to disclose fraud even when the attorney only believes it is "likely" to cause substantial financial injury.[193] These differing standards pose an ethical dilemma for attorneys determining whether disclosure is required. For example, if an attorney believes that the companies' emissions data might cause financial injury, then the SEC would permit disclosure whereas the *Model Rules* would forbid it.[194]

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184. *Id.* at 6.

185. *Id.* at 30 (Noting that under 10b-5(b), an attorney who makes a material misstatement or omission may be liable as a primary violator under 10b-5).

186. *Id.* (a lawyer may be required to take action "beyond advising a client to comply with regulatory requirements in order to avoid suspension or disbarment from practice before the Commission.").

187. *See supra* Part II (D).

188. 15 U.S.C. § 7245 (2008).

189. *See* 17 C.F.R. § 205.3(b).

190. Caroline Harrington, *Attorney Gatekeeper Duties in an Increasingly Complex World: Revisiting the "Noisy Withdrawal" Proposal of SEC Rule 205*, 22 GEO. J. LEGAL ETHICS 893, 903 (2009).

191. *See* MODEL RULES R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment."); Harrington, *supra* note 190 (outlining the "gatekeeper thesis" which is premised on "the notion that transactional lawyers have a duty to provide detached and independent judgment to promote compliance with the law.").

192. MODEL RULES R. 1.6.

193. Robbins, *supra* note 182 (noting the SEC rule is much broader and requires disclosure more often than Model Rule 1.6).

194. *See* G Thomas Stromberg & Anna R. Popov, *Lawyer Conduct Rules Under Sarbanes-Oxley & State Bars: Conflicts to Navigate?*, WASH. LEGAL FOUND. 1,7 (2005).

Consequently, inconsistent conceptions of materiality make it difficult for attorneys to determine whether disclosure is required or prohibited. Lawyers, like fiduciaries, are asked to apply the "reasonable investor" test to determine materiality without necessarily knowing what investors want or expect.[195] As articulated by Commissioner Lee, because the current system "lacks sufficient specificity and relies too heavily on a broad-based concept of materiality" it falls "short of eliciting information material to reasonable investors."[196]

Although lawyers are traditionally conceptualized as zealous advocates for their clients, in securities matters, attorneys must maintain greater independence and objectivity.[197] It has been suggested that "increasingly the attorney involved in the securities marketing process must be alert to the interests of the public and recognize the critical importance of [her] role in determining whether that public is treated fairly."[198] However, professional ethics have continuously defined the role of an attorney as including "unremitting loyalty to the interest of [her] client (short of engaging in or countenancing fraud)."[199] Thus, there is a balance between duties owed to both the public and the client, and lawyers have "additional incentives to agree with management, particularly on close cases."[200]

> [T]he attorney faces pressures to acquiesce in the decisions and conduct of managers and officers. Institutional incentives, including reluctance to jeopardize business relationships or to act beyond the scope of a 'faithful agent,' apply, though perhaps to varying degrees, to both in-house and outside counsel. In addition, as mentioned above, to the extent that outside counsel are fungible, they have an incentive to go along with managerial decisions for fear of being replaced.[201]

The reliance on attorney discretion creates a conflict of interest for corporate counsel. Given the rapid growth of ESG and the increasing investor demand for environmental disclosures,[202] attorneys are increasingly likely to conclude that this information is material to the reasonable investor. However, attorneys must balance this consideration with confidentiality and attorney-client privilege.[203] If

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195. Allison H. Lee, Comm'r, U.S. Sec. & Exch. Comm'n, *Living in a Material World Myths and Misconceptions About "Materiality"* (May 24, 2021), https://www.sec.gov/news/speech/lee-living-material-world-052421 [https://perma.cc/KS3J-8TNG].

196. *Id.*

197. *See* A. A. Sommer, Jr., Comm'r, U.S. Sec. & Exch. Comm'n, Address at the Banking Corporation and Business Law Section, New York State Bar Association: The Emerging Responsibilities of the Securities Lawyer 1, 7 (Jan. 24, 1974).

198. *Id.* at 6.

199. *Id.* at 12.

200. Lee, *supra* note 195 (lawyers "have an economic and psychological incentive to want to retain positive relations with management. This can create a form of implicit bias or predisposition, causing . . . lawyers to often expend efforts to support, rather than independently analyze, management's decisions.").

201. Harrington, *supra* note 190, at 906.

202. *See supra* Part II(A)–(B).

203. *See* MODEL RULES R. 1.6 cmt. 3.

corporate management disagrees with a materiality determination, counsel may still be obligated to disclose information under the heightened duties associated with Section 205. The Proposed Rule would help alleviate this dilemma. Although reliance on attorney discretion is an unavoidable aspect of Securities Law, the Proposed Rule would provide needed standards of guidance.

V. CONCLUSION

Climate change is an inexorable threat with physical and economic implications that continue to impact the market, so investors must be prepared. The SEC's Proposed Rule addresses the information gaps related to the effects of climate change through mandated standardized reporting on climate-related matters for the benefit of investors and markets.[204] The SEC's legal authority, the economic costs of compliance, the technological feasibility of accurate reporting, and the politicization of ESG are legitimate concerns and, should the Proposed Rule become law, will likely lead to challenges in court. However, there is a discernible problem with the lack of consistent and reliable information that requires regulatory intervention. The costs associated with nondisclosure, including the threat of greenwashing and climate-related risks in investments, evidence the importance of the SEC's involvement in climate-related disclosures.

204. Georgiev, *supra* note 8, at 101.