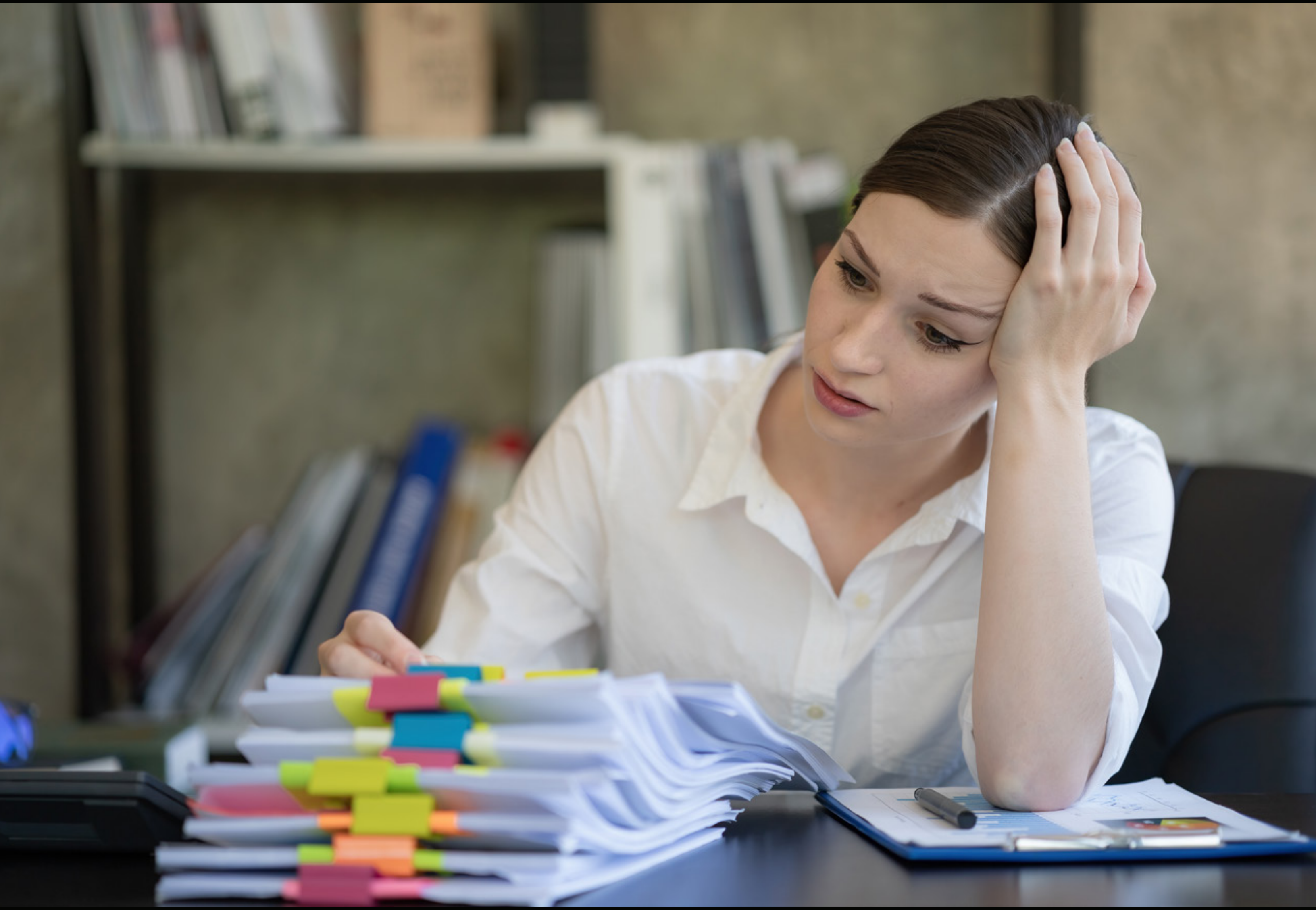

Climate Disclosure Spam

Why investors will suffer if SEC’s new rule survives

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Introduction

"Despite cost-saving changes from the proposed rule, the final rule will prove expensive for public companies and their shareholders who will be paying for climate disclosure spam."[1] That was the judgement of Securities and Exchange Commission (SEC) Commissioner Hester Peirce on her agency's finalized climate disclosure rule. From the perspective of a public company's bottom line, and investors' inboxes, she was not wrong about that.

The draft rule, released two years prior and clocking in at 534 pages, amounted to the most substantial corporate disclosure overhaul in the SEC's 90-year history. The final rule, while less prescriptive and expensive, comes to 850 pages, which includes 250 pages of supplementary material. These additional disclosures will provide investors with little meaningful information about the value of a company's current activities or perspective performance. Rather, this rule will flood investors with pages upon pages of secondary information.

The SEC officially proposed its rule entitled, "The Enhancement and Standardization of Climate-Related Disclosures for Investors" on March 21, 2022. It consists of hundreds of pages of extensive new disclosure requirements.[2] The estimated price tag attached to that draft rule was by no means small. The SEC's own numbers found that the rule would've increased annual compliance costs from $3.8 billion to $10.2 billion, a $6.4 billion rise.

Some analysts projected a much higher cost, but even accepting the SEC's numbers as a low-end estimate, that would mean that a single new rule would cost more than all the accumulated SEC disclosure rules to date – combined.

The final version was somewhat scaled back, with compliance costs that the SEC estimates to be about one-third of what was initially proposed in year one ($327,000 per firm) and slightly lower costs for firms going forward ($183,000 per firm). As a whole, the estimated costs come in at $628 million.

The rule sees the SEC adopting an approach to financial regulation unseen in its 90-year history. The agency devoted to financial disclosure of public companies would expand its purview into assessing the environmental impact made by the financial actions of federally registered companies and their unregulated partners.

The final rule, the reportedly less ambitious one, requires disclosures to gauge the effects of climate change on a registrant's business model, strategy, and outlook; board governance; risk management; corporate goals and targets; GHG emissions; and attestation over GHG emissions.[3] With this expansive set of requirements, the SEC has turned over a new green leaf, shifting from its role as an independent regulatory agency into a political body that conducts climate-based oversight, emulating the Environmental Protection Agency (EPA).

The current leadership of the Commission believes factors affecting the climate are material to the principal decisions made by investors. This then warrants substantial disclosure by public companies on how they are contributing to climate change via their operations. Yet, Congress has never instructed the SEC to engage in such oversight. Nor does any portion of the Securities and Exchange Act of 1934 instruct the SEC to consider environmental factors as materially relevant to an investor's decision to purchase stock in a company.

SEC Chairman Gary Gensler claimed that the final rule is "merit neutral" from the agency's standpoint. Demerits are another matter. The SEC's Division of Enforcement stands ready to make examples of companies that fail to provide full or accurate disclosures. Where companies were once largely in the driver's seat, regulators will now determine which climate disclosures will pass muster.

Companies will not only be forced to pay an estimated $628 million in additional disclosure costs. An unlucky subset of these firms will also be forced to expend additional resources fighting the SEC and activist investors in court for disclosures deemed insufficient or problematic.

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1 Hester M. Peirce, "Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors," US Securities and Exchange Commission, March 6, 2024, https://www.sec.gov/news/statement/peirce-statement-mandatory-climate-risk-disclosures-030624#_ftn4.

2 Vanessa A. Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Proposed Rules, March 2022, https://www.sec.gov/rules/proposed/2022/33-11042.pdf.

3 Vanessa A. Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors", Final Rules, March 2024, https://www.sec.gov/files/rules/final/2024/33-11275.pdf.

The SEC is set to receive a myriad of reports with conflicting assessments for climate-related financial risks. Some firms may emphasize the assumed severity of climate change because of their corporate practices, while other firms may have different assumptions about said severity.

"It will require reliance on third-parties and an array of experts who will employ their own assumptions, speculations, and models. How could the results of such an exercise be reliable, let alone comparable across companies or even consistent over time within the same company?" Commissioner Peirce asked in her public rebuke of the rule. [4] As the SEC will eventually realize, there is no one-size-fits-all for forecasting climate change risks to business activity. Every firm assesses its own risks differently.

Companies will have to divert capital away from other priorities like customer service and innovation, toward compliance. Smaller firms will suffer a disproportionate burden, leading to a potential exodus of smaller firms from public markets. In business, increased compliance burdens function less as means to protect the consumer and more as moats against competition by smaller upstarts.[5]

Of course, all of the above should come with the caveat *if it comes to that*. The SEC created a less burdensome rule in response to criticism from a variety of policy and stakeholder sources, not the least of which was the Competitive Enterprise Institute (CEI). Now, despite paring back some of the worst elements of the rule, the SEC faces a whirlwind of lawsuits.

The fact that a total of 25 state attorneys general are challenging the rule is not surprising,[6] but industry groups immediately sued as well. "The natural inclination of businesses is to accept that Washington will impose some regulations and then quibble over where precisely the line is drawn,"[7] sagely observed CEI labor policy analyst Sean Higgins. Historically, that has been mostly true of how businesses deal with regulators. Yet in suits seeking to overturn the SEC's latest rule, litigants are not simply quibbling over where to draw the line. They are saying the SEC has no authority to draw it in the first place.

As these legal challenges play out, it's a fair bet that the SEC will continue to defend the indefensible: mandating a complicated new form of disclosure beyond its statutory mission. The agency's prescriptive approach is driven by global initiatives and shadowy proxy advisors that seek to foster a net zero, carbon neutral, green-focused approach to the future of investing – one that global markets are currently rejecting.

A legal history of climate disclosures

In promulgating a climate disclosure rule, the SEC has found itself on the defensive against legal challenges from energy companies, trade associations, and even progressive environmental groups. The latter groups include the Sierra Club[8] suing in the D.C. Circuit and National Resource Defense Council (NRDC) in the Second Circuit. These groups would otherwise agree with the Commission's Environmental and Social Governance (ESG) agenda if not for the perception that the climate rule does not go far enough. On the same day the rule was finalized, it also drew a challenge from a 10-state coalition in the Eleventh Circuit led by West Virginia, raising similar arguments against the agency's regulation of GHG emissions as seen in the landmark *West Virginia v. EPA* case (2022).[9] Then there was the challenge in the Fifth Circuit, which put everything on hold.[10]

4 Hester M. Peirce, "We are Not the Securities and Environment Commission - At Least Not Yet," US Securities and Exchange Commission, March 2022, https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

5 Rick Rouan, "Dimon says Dodd-Frank puts 'bigger moat' around JPMorgan Chase," *Columbus Business Journal*, February 2013, https://www.bizjournals.com/columbus/blog/2013/02/dimon-says-dodd-frank-puts-bigger.html.

6 Paul A. Davies, Sarah E. Fortt, and Betty M. Huber, "Fifth Circuit Presses Pause on SEC's Final Climate Regulation," Latham & Watkins website, March 21, 2024, https://www.globalelr.com/2024/03/fifth-circuit-presses-pause-on-secs-final-climate-regulation/.

7 Sean Higgins, "Businesses asks courts if the NLRB is constitutional," CEI OpenMarket blog, Competitive Enterprise Institute, February 2, 2023, https://cei.org/blog/businesses-ask-courts-if-the-nlrb-is-constitutional/#:~:text=The%20natural%20inclination%20of%20businesses,to%20challenge%20its%20underlying%20constitutionality.

8 Sierra Club, "Earthjustice Lawsuit Challenges SEC's Weakened Climate Risk Disclosure Rule," Sierra Club, March 13, 2024, https://www.sierraclub.org/press-releases/2024/03/sierra-club-earthjustice-lawsuit-challenges-sec-s-weakened-climate-risk.

9 *West Virginia v. EPA (2022), 597 U.S.,* https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

10 Stone Washington, "The Fifth Circuit blocks the SEC's climate disclosure rule in the first legal challenge to the rule," CEI OpenMarket blog, Competitive Enterprise Institute, March 19, 2023, https://cei.org/blog/the-fifth-circuit-blocks-the-secs-climate-disclosure-rule-in-the-first-legal-challenge-to-the-rule/.

Nine days after its release, the SEC's rule was stayed in the Fifth Circuit to allow judges time to examine challenges raised by two oil companies—Liberty Energy Inc. and Nomad Proppant Services LLC. There has also been a concurrent challenge to the SEC's rule out of the Fifth Circuit, spearheaded by the Texas Alliance of Energy Producers and Domestic Alliance of Energy Producers and a challenge brought by the National Center for Public Policy Research and the New Civil Liberties Alliance in the Third Circuit.[11] Additionally, the US Chamber of Commerce[12] sued the SEC in the Eighth Circuit Court. Shortly after, the Judicial Panel on Multidistrict Litigation (JPML) conducted a lottery to consolidate all nine independent suits against the climate disclosure rule into one circuit court.[13]

On April 4, the SEC announced that it would pause the implementation of its rule to address these mounting lawsuits. The JPML lottery selected the Eighth Circuit, where all of the pending cases are now combined into one for consideration by the court.[14] To date, there are 25 GOP-state attorneys general suing the SEC over the rule, while 18 Democrat attorneys general have backed the SEC's defense of the rule. There remains a strong possibility that the rule will be struck down at the circuit level. Regardless of the initial outcome, it will likely be appealed to the Supreme Court.

Speculation among SEC watchers chalked the repeated delays of the rule's release up to staff needing to pare back the most legally vulnerable aspects of the original proposal, and there were many. The changes have likely made the final rule more durable to legal challenges, particularly by reducing the estimated costs and removing what was called the Scope 3 mandate.[15]

Section 7 of the Securities Act of 1933 enables the SEC to promulgate rules that require information to be provided by investors in companies' registration statements for public offerings. This enables Commission to determine what information the issuers of securities are supposed to submit, so long as this information contains fundamental facts about the issuer itself and the terms of the offered securities.[16]

The Securities Act contains a wide-ranging list of requirements for issuers, such as information about the issuer's officers, the issuer's business, terms of executive compensation, past market performance, taxes paid, and the terms of the issued securities. This information is processed through the Commission's EDGAR database and becomes public domain. Proponents of the climate disclosure rule point to the line from Section 7, which enables the SEC to extract from registered issuers "such other information . . . as the Commission may by rules or regulation require as being necessary or appropriate in the public interest or for the protection of investors."[17]

Section 12 of the Securities and Exchange Act of 1934 also states that corporate disclosures should be made to provide "such information, in such detail, as to the [company] . . . as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect of the following: . . . the organization, financial structure, and nature of the business."[18] SEC boosters have pointed to the above sections of the 1933 and 1934 laws as evidence that Congress has delegated broad authority to the Commission to determine what sort of information should be disclosed by regulated companies.

11 *National Center for Public Policy Research v. Securities and Exchange Commission*, "Petition for Review and Motion for Transfer," Third Circuit Court of Appeals, https://nationalcenter.org/wp-content/uploads/2024/04/Petition-for-Review-and-Motion-for-Transfer_NCPPR-v-SEC_filed-2024.04.29.pdf.

12 "Chamber of Commerce v. SEC: Challenge to SEC Climate Disclosure Rule," US Chamber of Commerce, accessed April 1, 2024, https://www.uschamber.com/cases/capital-markets-and-corporate-law/sec-climate-disclosure-rule.

13 Ufonobong Umanah and Andrew Ramonas, "SEC Climate Rule Suits Head to Eighth Circuit After Lottery (3)," Bloomberg Law, March 21, 2024, https://news.bloomberglaw.com/esg/sec-climate-reporting-suits-head-to-eighth-circuit-after-lottery.

14 Lamar Johnson, "SEC stays climate-risk disclosure rule as it works through legal challenges," *ESG Dive*, April 4, 2024, https://www.esgdive.com/news/sec-stays-climate-risk-disclosure-rule-until-legal-challenges-complete-8th-circuit/712354/#:~:text=The%20Securities%20and%20Exchange%20Commission-,U.S.%20Eighth%20Circuit%20of%20Appeals. See the following" "The rule had been temporarily halted once before, when a petition brought forward by Liberty Energy and Nomad Proppant Services was still pending in the Fifth Circuit of Appeals. That pause was dissolved when all of the cases were transferred to the Eighth Circuit."

15 Richard Morrison, "SEC's Climate Rule is Finally Here, but for How Long?" *National Review,* March 13, 2024, https://www.nationalreview.com/2024/03/secs-climate-rule-is-finally-here-but-for-how-long/.

16 "Securities Act of 1933," Legal Information Institute of Cornell Law School, https://www.law.cornell.edu/wex/securities_act_of_1933.

17 Securities Act of 1933, 15 U.S.C. §77g, § 7(a)(1).

18 Securities Exchange Act of 1934, 15 U.S.C. § 78l, § 12

This is an "elastic clause" interpretation of the SEC's grant of authority, and it leaves some important things out. Following the 1933 and 1934 acts, Congress imposed a variety of formal limitations of how the SEC can operate as a financial regulator. Within these acts is a clear requirement for companies to disclose an annual registration statement and report to the SEC. These documents were limited to the relevant information that the company provided in their Regulation S-K and S-X forms. S-K pertains to material factors affecting business development, financial data (net income, sales, etc.), the company's management structure, and corporate offerings of securities.[19] The SEC was never empowered by Congress to create a separate, special category for climate disclosures within the Exchange Act that companies must suddenly attach to their registration statement and report.[20] The plain text of the Act simply does not permit such an extension beyond the bounds of the financial information and business activity alluded to above.

The clear intent of this regulation was to avoid perceived conflicts of interests. These statues never empowered the SEC to supervise the investment decisions of regulated firms. This is in stark contrast with the Commission's proposed climate rule, where the SEC essentially deputizes itself to closely monitor the investment decisions and governance of companies.

In a comment letter supporting the SEC's climate disclosure rule,[21] law professors Jill Fisch and George Georgiev look to the 1979 case of *Nat. Res. Def. Council, Inc. v. SEC*. In that decision, the D.C. Circuit Court of Appeals ruled that the Commission was designated with broad authority by Congress to promulgate rules on the disclosure of information from registered companies beyond the scope of existing statue.[22]

That case featured a challenge to the SEC with a group of organizations attempting to compel the agency to require that companies submit lengthy disclosures about their environmental and equal employment opportunity (EEO) policies. These organizations, which include the Project on Corporate Responsibility, Inc., and the Center on Corporate Responsibility, Inc., felt that companies were not responsive enough to concerns over instances of environmental decline and unequal employment opportunities, both now-popular topics of concern with ESG proponents. The NRDC felt that these issues were compounded by the lack of adequate information available to stockholders, and sought more disclosure by public companies to counteract this perceived information imbalance.

This case represents the pre-history of the SEC's present-day attempt to compel environmental disclosures from public companies. At the time, the SEC was on the opposing side of the issue, declining to amend its rules to incorporate mandatory disclosures on EEO and environmental quality. Instead of caving to the demands from the activist organizations, the Commission adopted its own more limited set of rules on corporate disclosure, requiring these to be submitted only on the basis of *material* financial effects of corporate compliance with environmental laws.

The D.C. Circuit acknowledged that the NRDC's suit against the SEC hinged largely on intentions. The real "grievance" that the appellees had was against the SEC's refusal to adopt its proposed disclosure rules, without actually protesting the rule that was adopted, which the court found to be a "disingenuous" legal claim.[23]

While the Commission was opposed to enacting mandatory, widespread environmental disclosure requirements during the time of the *Natural Resources Defense Council* case, it has reversed its outlook 44 years later to impose a federal mandate that does just that. Where the SEC of 1979 was unmoved by cries from environmental activists, the SEC of today seems to be all aboard that particular train.

It is surely relevant that the ruling by the D.C. Circuit on environmental and EEO corporate disclosure is the opposite of the SEC's present-day justification for the climate disclosure rule. In terms of the relative

[19] Securities Act of 1934, Regulation S-K, 17 CFR Part 229

[20] Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors", Final Rules, MO-Guidance-for-working-with-large-brand-owners A4 060424 37.

[21] Jill E. Fisch and George S. Georgiev, "Comment Letter of Securities Law Scholars on the SEC's Authority to Pursue Climate-Related Disclosure," US Securities and Exchange Commission, June 2022, https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf.

[22] Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1045 (1979), https://casetext.com/case/natural-resources-defense-council-v-sec

[23] *Natural Resources Defense Council, v. S.E.C*, 606 F.2d 1031 at 1037.

costs for companies to disclose "environmental impact studies" to their investors, one estimate mentioned in the court's ruling found that disclosure costs would exceed $1 billion. The District Court's ruling against Natural Resources Defense Council, et al. prophetically forecasts many of the prevailing arguments used by dissenters to the SEC's present climate disclosure rule, including this key passage:

> *There appears to be no established, uniform method by which the environmental effects of corporate practices may be comprehensively described. Nor does there appear to be scientific agreement as to the harmfulness to the environment of many activities. It appears, therefore, that the proposed disclosures would be extremely voluminous, subjective and costly to all concerned. They also would not lend themselves to comparisons of different companies, which is of great importance to investors since investment decisions essentially involve a choice between competing investment alternatives.*[24]

The D.C. Circuit also cited an overall lack of uniform investor support for such comprehensive disclosure requirements. The perceived benefits for providing investors with this information were also outweighed by the inconvenience and cost of mandating such disclosures, according to the court majority. There seems to be no acknowledgement of this case's outcome, however, by present-day legal proponents of the SEC's authority to compel climate disclosures.

To be clear, in *Natural Resources Defense Council* the SEC was actively litigating against the idea of forcing companies to disclose their impact and decisions as they relate to the environment. The Commission maintained this stance for seven years of court proceedings leading up to its victory before the D.C. Circuit. If the SEC of 1979 felt it was not right or proper to impose such mandatory disclosures on companies, what makes it permissible for the SEC of today to reverse course?

Fisch and Georgiev make the point that the SEC is hardly the only agency that solicits disclosures from individuals and organizations registered with the federal government. "[F]or example, the Internal Revenue Service requires companies to disclose information about their financial condition including their profits and expenses, the Occupational Safety and Health Administration requires employers to disclose information about workplace safety, the Equal Employment Opportunity Commission requires disclosure of workforce demographic data, and the Environmental Protection Agency requires companies to disclose information about their environmental impact," they write.[25]

Yet each of these other agencies remains within the boundaries of its jurisdictional functions when mandating these disclosures from registrants. Each agency cited has a designated policy lane that it stays within, with clearly defined borders. In the case of the SEC, Congress requires the Commission to collect disclosures from companies predicated on information that is financially material to a reasonable investor.[26]

Helpfully, the US Supreme Court has weighed in on the subject of what it classifies as material to investors. In *TSC Industries, Inc. v. Northway, Inc.* (1976), the Court ruled that information is material when there is a considerable likelihood that a reasonable investor would consider such information to be important when making an investment-based decision. It can be inferred that a reasonable investor is someone with a specific financial interest in the public company providing a return on investment.[27] Thus, an investor's material interest in an item is significantly or directly tethered to the expectation that he or she would receive a financial return.

The expectation at the heart of materiality specifically excludes other political, social, or religious considerations, regardless of how important they may

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[24] *Natural Resources Defense Council, v. S.E.C,* 606 F.2d 1031 at 1040.

[25] Georgiev and Fisch's "Comment Letter of Securities Law Scholars on the SEC's Authority to Pursue Climate-Related Disclosure," p. 7.

[26] Securities Act of 1933, Rule 405, (amended in 1982). See the following passage from the Business Roundtable's "The Materiality Standard for Public Company Disclosure: Maintain What Works (October 2015), "In 1982, in keeping with the U.S. Supreme Court decisions, the SEC amended the definition of 'material' in Rule 405 as follows: '[W]hen used to qualify a requirement for the furnishing of information as to any subject, [materiality] limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.'"

[27] *Basic Inc. v. Levinson,* 485 US 224 (1988), where Justice Harry Blackmun wrote in his plurality opinion that the materiality of a fact disclosed by a company (either verbally or written) hinges on its significance to "the reasonable investor."

be to any specific individual or group of investors. This includes considerations to how a company's investments will impact climate change over time. In writing the majority opinion in *TSC Industries*, Justice Thurgood Marshall found that for the information disclosed by the public company to be material, "the omitted fact would have assumed actual significance in the reasonable shareholder's deliberations."[28]

The push for mandatory climate disclosure

There is no consensus among investors that climate change qualifies as a blanket material risk. Nor is there a consensus that the reasonable investor regularly considers climate risk when making financial decisions about investing in companies. The SEC under Biden appointee Gensler has essentially imposed the political leadership's opinion about the importance of climate-related data. This is an approach that critics charge will not help investors enhance their investment returns.

"The prescriptive [enforcement] approach taken by the SEC will limit companies' ability to provide information that shareholders and stakeholders find meaningful while at the same time requiring that companies provide information in securities filings that are not material to investors," the US Chamber of Commerce charged.[29] This regulation through enforcement approach has caused consternation with some Commissioners, such as Peirce. She has found it necessary to repeatedly and emphatically dissent from her fellow Commissioners when they adopt such an approach to agency actions.[30]

Even more telling is the stated goal by many of the activist groups who helped to bring this sea change about. The intent is not to safeguard financial performance from any documented risks associated with climate change (which could, conceivably, be relevant). Rather, it is to force corporate decarbonization regardless of the impact on shareholders.

Another global source of inspiration behind the climate disclosure rule can be seen with Ceres. The California-based advocacy group Ceres is referenced over 70 times in the SEC's rule and manages its own webpage that favors the rule.[31] Ceres boasts that it is "working to decarbonize six of the highest-emitting sectors. We're building a zero emissions economy by driving greater corporate ambition, transparency, and accountability for aggressive reductions in greenhouse gas emissions."[32]

Ceres is part of a loose group of financial and nonprofit organizations centered around climate change activism, such as the Climate Action 100+ initiative, which seeks to curb greenhouse gas emissions produced by what it considers the largest corporate polluters.

Many asset management firms, including BlackRock, State Street, Alliance Bernstein, and Boston Common Asset Management, were part of the initial push to decarbonize. There has been some reevaluation since the initial push. Climate Action 100+ recently suffered a major institutional blow when two of its largest signatories, JP Morgan and State Street Global Advisers, pulled out of the alliance in February 2024. Its largest signatory, BlackRock, diminished its involvement in the alliance by allowing its international arm to participate, rather than the primary firm.[33]

Another top asset manager, Vanguard, which never joined the Climate Action 100+, eventually dropped out of the Net Zero Asset Managers Initiative (NZAM) in December 2022. NZAM is a similar coalition to Climate Action 100+ that seeks to facilitate cooperation among leading global financial institutions to reduce the world's greenhouse gas emissions to zero by 2050. The research from Climate Action+ was referenced in the SEC's proposed climate disclosure rule.

28 *TSC Industries, Inc. v. Northway, Inc.* 426 U. S. at 444-449.

29 US Chamber of Commerce, "U.S. Chamber Voices Concern with Prescriptive Approach of SEC Climate Disclosures Proposal, Will Work with SEC to Develop Clear and Workable Rules," March 2022, https://www.uschamber.com/finance/corporate-governance/u-s-chamber-voices-concern-with-prescriptive-approachof-sec-climate-disclosures-proposal-will-work-with-sec-to-develop-clear-and-workable-rules.

30 Hester M. Peirce, "Kraken Down: Statement on SEC v. Payward Ventures, Inc., et al.", US Securities and Exchange Commission, February 2023, https://www.sec.gov/news/statement/peirce-statement-kraken-020923.

31 "Get ready for standardized climate disclosure," Ceres, https://www.ceres.org/accelerator/regulation/sec.

32 Ceres Ambition 2030, Ceres, https://www.ceres.org/climate/ambition2030.

33 Simon Jessop and Ross Kerber, "JPMorgan, State Street quit climate group, BlackRock steps back," Reuters, February 15, 2024, https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15/.

Manhattan Institute Senior Fellow James R. Copland points out that the primary goal of the various climate activist groups like Ceres that influenced the SEC's rule is not in safeguarding financial performance from actual risks associated with climate change. Rather, it is to force corporate decarbonization regardless of the impact on shareholders. These corporate activist organizations seek to de-incentivize future fossil fuel investments by reducing or eliminating reliance on primary sources of energy (i.e., oil, coal, and shale). Taking advantage of regulatory burdens imposed by the SEC's rule, the organizations would shift investment incentives toward alternative energy sources (i.e., renewable fuel sources like wind and solar).

The SEC's climate disclosure rule is simply an administrative means to a politically motivated end. "In creating a broad disclosure scheme, climate activists open the door to public shaming and to aggressive enforcement actions, by the SEC, other agencies, state, and local officials, and in particular to private lawsuits by the plaintiffs' bar," Copland warns.[34] The SEC's enhanced disclosure will almost certainly expose public issuers of securities and investors to substantial climate-related litigation from environmentally concerned organizations and government regulators. This will likely foster an entirely new genre of litigation that invites outside stakeholders to challenge corporate management of alleged climate risks. Such activists will have ample grounds to weaponize the SEC's rule. Regulated companies will be ostracized for not going far enough to report any range of climate-related risks. The rule will give new legal backing to claims of greenwashing, while emboldening activist groups to sue regulated firms that refuse to course correct toward sustainable activities or mitigate their reported climate change risks.

The SEC's mandate is essentially environmental regulation cloaked as routine disclosure rulemaking. The SEC is prohibited from adopting any novel disclosures that advance climate change policy, absent a clear directive from Congress.[35] The current rule thus violates the "major questions" doctrine, which the Supreme Court made clear in its landmark decision in *West Virginia v. EPA* (2022), that administrative agencies are prohibited from enacting substantial policies in absence of congressional authorization. The Court applied this reasoning in striking down the EPA's Obama-era Clean Power Plan (CPP), limiting the agency's ability to move on dilemmas of "economic and political significance."[36]

The major questions doctrine serves as an outgrowth of the non-delegation principle, a vital component of the separation of powers within America's constitutional framework. The nondelegation principle directly bars the legislative branch from entrusting lawmaking authority to the executive branch, including its various administrative agencies. This principle, devised by the Founding Fathers, was intended to prevent Congress from conferring its law-making authority on other branches. This understanding stemmed from a long-held maxim in Roman law, *"delegate potestas non potest delegari"* which translates to "no delegated powers can be further delegated."[37]

In *West Virginia,* the Supreme Court invalidated the EPA's generation-shifting approach for reducing power plant emissions that sought to shift to alternative clean energy sources (namely solar and wind power) upon the states. Writing for the majority, Chief Justice John Roberts invoked the major questions doctrine to demonstrate how the EPA acted on issues of "economic and political significance" without clear authorization from Congress. Therefore, the agency was strictly prohibited from enforcing its CPP emission reduction and clean energy transition standards. Invoking Chief Justice John Marshall's opinion in *Wayman v. Southward* (1825), Justice Neil Gorsuch reminds in a concurrence that important policy matters must be addressed directly by congressional action, while more "general provisions" are best left to be handled by the executive branch to "fill up the details" between larger legislatively addressed issues.[38]

[34] James R. Copland, Boyden Gray & Associates PLLC, comment letter on the Enhancement and Standardization of Climate Related Disclosures for Investors, https://www.sec.gov/comments/s7-10-22/s71022-20132160-302652.pdf#page=113. Pg 119.

[35] Bernard S. Sharfman and James R. Copland, "The SEC Can't Transform Itself Into a Climate-Change Enforcer," *Wall Street Journal*, September 2022, https://www.wsj.com/articles/securities-exchange-sec-climate-change-esg-major-questions-doctrine-west-virginia-v-epa-supreme-court-disclosure-rule-11663178488.

[36] *West Virginia v. EPA,* 597 *U.S.*

[37] James R. Copland, *The Unelected: How an Unaccountable Elite Is Governing America,* (New York: Encounter Books, 2020), https://www.manhattan-institute.org/theunelected.

[38] Gary S. Lawson, "Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation", in No. 20-16 Boston University School of Law Public Law & Legal Theory Paper (2020). Available at: https://scholarship.law.bu.edu/faculty_scholarship/909

Agencies cannot "work around" Congress to address major policy issues or resolve significant political questions. Over the past 30 years, courts have issued decisions that block administrative efforts to resolve policy disputes without clear congressional authorization. These range across policy areas like tobacco, telecommunications, and mandatory vaccines. The SEC's climate rule is no different, as it sidesteps Congress by introducing a whole new area of disclosure that would impose substantial political and economic consequences.

The CPP has been described as a dangerous legislative mechanism that would've enabled the EPA to act as an aggressive "greenhouse-gas enforcer looking over the shoulders of exchange-listed companies' directors."[39] Likewise, the SEC's climate disclosure rule enables the Commission to breath down the necks of corporate directors for exchange-listed companies, leaning on them to substantially reduce or curtail their organizations' GHG emitting activities.

The climate disclosure rule, however, goes several steps beyond the CPP by incorporating a complex set of Scope requirements. This casts a wide net over thousands of public firms by requiring them to quantify and report their direct and indirect (purchased energy) GHG emissions. One of the adverse consequences of the SEC's environmental activism is that the rule may upend existing state corporate law. It does so by forcing corporations to prioritize the issue of climate change in their disclosures.[40] The corporate board requirements will force a public company's board of directors to account for climate-related risk factors at a level comparable to and integrated with disclosures pertaining to financial returns. Until recently, the SEC has never mandated disclosure of a corporate board's oversight and expertise of secondary concerns like climate change and cybersecurity risks. Corporate board disclosures have traditionally been tethered to the broader corporate governance and structure of corporate committees.

Board directors may or may not feel a need to account for climate risks depending on how it affects the firm's financial health. Yet, with the SEC's climate disclosure rule, companies will be incentivized to stack their boards with new directors based on their expertise in climate science, rather than their expert judgment of finance matters, leadership skills, and industry experience.[41] This will upend the discretion of board governance, while appeasing environmental activists and regulators seeking to steer the corporate leadership toward climate change mitigation.

Such activism by the SEC will also elevate speculative climate change risks to a level comparable to or superseding traditional financial risks before corporate boards. This will likely spur confusion on corporate board strategy, as directors consider prioritizing financial gains or appeasing environmental interests among activist shareholders. The SEC's intervention here would dictate what matters board directors should focus on and disclose to their shareholders.

The SEC's environmental activism approach has raised many red flags among members of Congress. With the agency lacking the legislative authority to pass such a substantive rule, members of the current 118th Congress have sounded the alarm against Chair Gensler's efforts. In a February 2023 letter sent to Gensler, Sen. Tim Scott (R-SC), Rep. Bill Huizenga (R-MI), and Rep. Patrick McHenry (R-NC) criticized the Commission's proposed climate disclosure rule and made demands for greater transparency about the agency's justifications for implementing it.[42] The letter was a follow-up to previous demands from Reps. McHenry, Kay Granger (R-TX), and James Comer (R-KY) in September 2022. These letters send a stark reminder to Gensler regarding the SEC's stonewalling of Congress.

[39] Bernard S. Sharfman and James R. Copland, "The SEC Can't Transform Itself Into a Climate-Change Enforcer," *The Wall Street* Journal, September 14, 2022, https://www.wsj.com/articles/securities-exchange-sec-climate-change-esg-major-questions-doctrine-west-virginia-v-epa-supreme-court-disclosure-rule-11663178488.

[40] Bernard S. Sharfman and James R. Copland, "The SEC Can't Transform Itself Into a Climate-Change Enforcer." They argue that "The proposed rule would also implicitly reallocate power from corporate boards and order them to bring climate-related risks to the fore of company priorities—in direct conflict with longstanding state corporate law. Though Congress could pre-empt state law concerning corporate governance, an agency on its own has no such power."

[41] Helena K. Grannis and Synne D. Chapman, "Turning a Corner on Corporate Governance: The SEC's Disclosure Agenda," *Clearly Gottlieb*, January 17, 2023, https://www.clearygottlieb.com/news-and-insights/publication-listing/turning-a-corner-on-corporate-governance-the-secs-disclosure-agenda. According to the authors, "While the proposed rules do not require boards to include directors with specific expertise, if adopted as they were proposed, many companies will feel strongly compelled by the disclose or explain mandates to include directors with expertise in these areas or fit existing director expertise into these buckets in order to meet peer company disclosure. Even if the rules are not finalized with the same level of detail in which they were proposed, the SEC has made clear its intention to step into the realm of governance activists in a way previously unseen."

[42] Rep. Patrick McHenry, Sen. Tim Scott, and Rep. Bill Huizenga, letter to Chairman Gary Gensler on the SEC's proposed climate disclosure rule, February 2023, https://financialservices.house.gov/uploadedfiles/2023-02-22_hfsc_sbc_to_gensler_re_climate_disclosure_rule.pdf.

"Congress did not intend for the SEC to be an arbiter of business strategies, much less the determining body for climate policies,"[43] the earlier letter said. This served as a clear nod by Congress regarding the SEC's violating the major questions doctrine and defying the will of the Supreme Court in the *West Virginia* case. The agency is clearly regulating outside of its congressionally approved boundaries and constitutional restraints to impose substantial environmental policy. This unprecedented, politically activist approach has sent the SEC spiraling into a myriad of court battles, mounting legislative opposition, and institutional disrepair from rushed and ill-devised rulemaking.[44]

There is a growing concern over how the Commission has shifted from its "principles-based disclosure" approach and toward a "partisan, activist, and prescriptive approach."[45] In both its proposed and final rules, the SEC also appears to avoid any acknowledgement for how its rule will impact energy prices. This reflects a broader concern that, in its obsessive drive to mandate climate disclosures, the SEC failed to account for a host of indirect costs from the rule that may negatively impact the US economy.[46]

Gensler's continual disregard for congressional intent was on display when SEC adopted the final rule in March. Soon after, House Republicans advanced a Congressional Review Act (CRA) resolution, seeking to overturn the climate disclosure rule.[47] The CRA resolution was passed out of the House Financial Services Committee along party lines (28-22) and now awaits an official vote from the full floor of the House of Representatives. Additionally, the Senate has passed its own companion resolution to the House CRA targeting the SEC's rule. This resolution was initiated by Sen. Tim Scott (R-SC), cosponsored by 33 other senators, including Sen. Joe Manchin (D-WV).

If both Houses approve the CRA resolution by a simple majority vote and it is signed by the president, the climate disclosure rule would effectively be nullified. The SEC would also be preempted from adopting anything similar. If the CRA motion is vetoed by President Biden, a new resolution can still be introduced to target the rule, so long as the rule was submitted to Congress after the estimated May 22nd deadline and at least 60 legislative days before Congress adjourns. This can trigger the "lookback period", allowing the next Congress (119th) to reconsider a CRA challenge to the rule. This is all to say that the SEC's unprecedented display of environmental activism has spurred legislative opposition and legal challenges.

Compelled disclosure vs. First Amendment

If a federal court examining the climate disclosure rule finds that regulated companies are compelled to release nonmaterial information, posing a greater risk of shareholder divestment, then the First Amendment may come into play. The Supreme Court recognizes a range of free speech categories that are understood to be constitutionally protected.[48] These include commercial speech, campaign finance expenditures, symbolic speech, and public-employee speech. This includes the right to speak as well as the right to remain silent. Compelled speech is considered a violation of a person's constitutional rights, a harm which extends to companies as well.

Compelled speech is when individuals or organizations are forced to express something that they may not agree with. This form of speech is generally imposed by a higher authority as a means of ensuring compliance with some policy or requirement. In the SEC's case, the climate disclosure rule seeks to compel speech on disclosing greenhouse

[43] McHenry, Scott, Huizenga, letter to Chairman Gary Gensler on the SEC's proposed climate disclosure rule.

[44] Rep. Patrick McHenry and Rep. Pat Toomey, letter to Chairman Gary Gensler over concerns raised in the 2022 Inspector General report, November 3, 2022, https://financialservices.house.gov/uploadedfiles/2022-11-02_rm_mchenry__rm_toomey_letter_to_sec_ig_report_final.pdf.

[45] McHenry, Scott, Huizenga, letter to Chairman Gary Gensler on the SEC's proposed climate disclosure rule. P. 2.

[46] Matthew Winden, "The Unconsidered Costs of the SEC's Climate Disclosure Rule," SSRN, July 2022, https://papers.ssrn.com/sol3/papers.cfm?abstractid=4156825. According to Winden, "the SEC only focused on direct compliance costs of firms and ignored the costs that would accrue economy-wide, including reductions in aggregate economic activity indirectly stemming from compliance, reductions in domestic business competitiveness, reductions in retail investor returns, and market inefficiency from a resulting misallocation of resources."

[47] Stone Washington, "House GOP prepares CRA resolutions against Biden climate-risk rules, including SEC climate disclosure rule," CEI OpenMarket blog, Competitive Enterprise Institute, May 2, 2024, https://cei.org/blog/house-gop-prepares-cra-resolutions-against-biden-climate-risk-rules-including-sec-climate-disclosure-rule/.

[48] Victoria L. Killion, "The First Amendment: Categories of Speech", Congressional Research Service (CRS), January 2019, https://sgp.fas.org/crs/misc/IF11072.pdf

gas emissions from organizations regulated by the Securities and Exchange Act of 1934.[49]

Consider the case of so called "blood diamonds" and other problematic precious stones. In the case of *National Association of Manufacturers v. SEC* (2016),[50] the "conflict free" minerals provision of the Dodd-Frank Act of 2010, which applied to mine products that might have been unearthed in the proximity of the Congolese Civil War, was struck down as a form of compelled speech. "Conflict free" certifications were in some ways similar to how the SEC's climate rule would compel organizations that are ambivalent about climate change risks to report how their products and activities negatively influence the environment. The court prevented the SEC from compelling speech regarding a conflict that might have negatively affected firms' operations then and may do so now with climate disclosures.

Or take *Janus v. AFSCME* (2018). In that case, labor unions were found to lack the authority to compel non-consenting public employees from donating to a union's activities, which included subsidizing political speech that they didn't support. The SEC may be found to lack the constitutional authority to compel politically motivated disclosures from companies to prioritize the Biden administration's climate change agenda.

Crashing over subject-matter boundaries

Andrew Vollmer, who served as the deputy general counsel at the SEC, has argued that while Congress gave broad authority to the SEC to promulgate disclosures,[51] this authority is restricted to the "subject-matter boundaries" that Congress delineated to the agency.

Commissioner Peirce agrees with that assessment. She has written that if the SEC were to have its way in imposing enhanced climate disclosures on regulated entities, it "would be misusing general rulemaking powers that Congress provided decades ago for different purposes and possibly usurping or preempting decisions Congress would have made."[52] In other words, the agency would be stepping on toes by engaging in undelegated rulemaking of new disclosure categories that Congress has neither spoken to nor specified as fair game.

Unelected officials cannot promulgate and enforce such a rule based on the argument that Congress is moving too slowly on the issue, according to Vollmer. It is precisely Congress's decision to reject previous climate legislation that created the current regulatory environment. In this construction, the absence of such policies is not an oversight. Rather, it is the considered choice of the legislative branch of government.

But what about the public interest? Vollmer marshals the Supreme Court's *FDA v. Brown & Williamson Tobacco Corp* (2000) ruling to answer that question. The Supreme Court has "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation," as expressed in a provision addressing the relevant acts.[53] Mere invocations of the "public interest" do not give government agencies the green light to veer outside of their statutorily defined lanes.

The D.C. Circuit Court in *N.Y. Stock Exchange v. SEC* (2020) held that an agency could not assume that a rule is fair game just because Congress did not expressly ban its ability to pursue it.[54] Federal agencies are only equipped to pass rules that respond to or complement existing legislation. The Securities and Exchange Act of 1934 was certainly not created with climate disclosures in mind. Indeed, even the type of data that the agency seeks disclosed here – information closely related to firms' environmental values and projections of climate change exposure – is likely far afield of what anyone in Congress or the executive branch had in mind at the time. Sensitive information required in disclosures is restricted to essential data on the

[49] Thomas A. Barry and Jennifer J. Schulp, "SEC Should Reject Climate Rules over First Amendment Issue," Cato Institute, July 1 2022. "Indeed, in multiple places, the SEC's proposed rule suggests methods by which companies can decrease their emissions. By forcing companies to condemn themselves, the rule promotes one side in a policy debate and violates the First Amendment requirement of viewpoint neutrality. Once mandatory disclosures exceed the bounds of the 'uncontroversial,' the government runs too much risk of using compelled speech to influence public debate."

[50] Richard Morrison, "The SEC's Costly Power Grab," Competitive Enterprise Institute, June 2022, https://cei.org/studies/the-secs-costly-power-grab/#_edn23.

[51] Andrew N. Vollmer, *"Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?",* August 2021, https://www.mercatus.org/system/files/vollmer_-_policy_brief_-_does_the_sec_have_legal_authority_to_adopt_corporate_disclosure_rules_on_climate_change_-_v1.pdf.

[52] Andrew N. Vollmer, *"Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?,"* p. 10.

[53] *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132–33 (2000)

[54] . *N.Y. Stock Exch. LLC v. SEC,* 962 F.3d 541, 546 (D.C. Cir. 2020)

organization's managing staff, its financial statement, and descriptions of the securities sold.

The SEC claims that Section 7(a)(1) of the Securities Act of 1933 gives it broad authority to require companies to disclose climate change risks. But the form on which such information is disclosed, SEC's Schedule A, is "largely financial in nature" and its creation was "intended to help investors assess a security's value,"[55] says Vollmer, not its broader environmental or societal impact.

Congress did pass an expansion of the SEC's Schedule A disclosure authority by means of two qualifications – one enabling the SEC to restrict certain information from being disclosed by the registrant firm and another enabling the Commission to pass rules for a corporate registration statement to encompass additional information as deemed "necessary or appropriate in the public interest or for the protection of investors."[56] Considerable weight is being given to the latter expansion.

There are additional guardrails that limit the SEC's disclosure capacity, as outlined in the general rulemaking provisions of section 23(a)(1) of the Securities Act, which does not permit the agency to go beyond specific disclosure requirements. Likewise, the specific rulemaking provisions of section 7(a)(1) does not permit the agency to go beyond the stated disclosure provisions, which focus strictly on financial statement information.

Beyond the Securities Act of 1933, there are limiting standards outlined in sections 12 and 13 of the Securities and Exchange Act of 1934. Section 12 outlines the disclosures that must be made by companies with registered securities on a stock exchange, that meet a certain asset test, or that possess a specified number of equity shareholders. Section 13 designates what sort of information can be disclosed via a set of periodic reporting obligations.

The SEC's rulemaking authority is explicitly limited to 13 categories of information that regulated entities can be compelled to disclose for the purpose of protecting investors in the Securities and Exchange Act. These categories provide financial and institutional information about the company making a public offering. Nowhere is it so much as hinted at that the SEC is authorized to adopt expansions to the categories to incorporate climate risk considerations.

The US House report for the Exchange Act of 1934 stated that the SEC was not to receive "unconfined authority to elicit any information whatsoever."[57] The subjects contained in section 13(b)(1) pertain to accounting matters that include a company's valuation of assets and liabilities. "Time and again, when Congress has spoken about a company's disclosure obligations, it has consistently singled out essential information about the company's business, securities, management, financial statements, and securities offering process," Vollmer says.[58]

In the past, Congress has expanded disclosures to incorporate various factors for companies to make known to the SEC, including certain aspects of executive compensation, corporate governance, and corporate responsibility.[59] Congress has also directed the SEC to require disclosure relevant to certain non-material public policy issues, such as how Section 1503 of the Dodd-Frank Act requires certain registrants to disclose information pertaining to health-related and safety violations occurring at mining facilities. If members of Congress want to enact similar requirements again, they are free to pass new legislation to that effect.

When the agency was updating its disclosure requirements in 2016, Commissioners acknowledged their limitations on compelling corporations to file disclosures relating to ESG investing. The mandatory climate disclosure rule falls squarely under the environmental category, and thus represents a violation of the Commission's own statement on what is in bounds and what is out of bounds. In a statement, the Commissioners said the SEC "has determined in the past that disclosure relating to environmental and

[55] US Securities and Exchange Commission, Concept Release, Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,918–19, 23,922 (Apr. 22, 2016), https://www.sec.gov/rules/concept/2016/33-10064.pdf .

[56] Andrew Vollmer, "The SEC Lacks Legal Authority To Adopt Climate-Change Disclosure Rules," Mercatus Center, April 2022, https://www.sec.gov/comments/s7-10-22/s71022-20123525-279742.pdf, citing Public Law 15 U.S.C. § 77g(a)(1).

[57] H.R. REP. NO. 73-1383, at 23 (1934)

[58] Andrew Vollmer, "The SEC Lacks Legal Authority To Adopt Climate-Change Disclosure Rules", Vollmer quoting 15 U.S.C. § 77c(b)(2)(G)(i) in his work "The SEC Lacks Legal Authority To Adopt Climate-Change Disclosure Rules."

[59] Sec. and Exch. Comm'n, Concept Release, April 2016

other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material."[60]

In this area, absent congressional authorization, the SEC is restricted to issuing non-binding guidance. Such documents can prod companies, but do not carry the force of law. The SEC released one such guidance document, "Regarding Disclosure Related to Climate Change," in February 2010.[61] The current SEC considers its mandatory disclosure proposal as the logical next step to the 2010 guidance, but nothing has changed in the interim to authorize such a conversion.

In fact, an agency's attempt to make the jump from guidance to enforceable rule absent an act of Congress could be taken as a sign that critics of informal guidance have a very solid point. Copland warns in his book *The Unelected* that these informal rules allow an agency to promulgate "interpretations of underlying legal and regulatory regimes that often bear little if any relationship to the government's current position."[62]

Liabilities and consequences of new rule

Comments submitted by concerned members of the public have played a seemingly large role in the SEC's climate disclosure rule. This is made clear in the agency's 2016 Concept Release, where it states that "commenters noted a growing interest in ESG disclosure among investors and many recommended increased sustainability disclosure requirements."[63]

The nature of the comments was varied, yet the Commission only seemed to act upon the most radically pro-environment suggestions that were later framed in its proposed rule, such as adopting line-item disclosure requirements regarding climate change issues and a mandate for registrants to disclose the carbon content of their reserves and natural resource holdings.

However, the SEC conceded an important point in the Release, stating, "the Commission concluded that it generally is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure requirements."[64]

Bear in mind there are other US government agencies statutorily committed to looking after the environment and that the Supreme Court has taken a dim view in the past of one federal agency double-dipping into the powers and responsibilities of another. For instance, the Supreme Court delivered a stinging rebuke in its *King v. Burwell* (2015) decision.[65] In that case, which was litigated by CEI, the IRS presumed authority to regulate healthcare plans under the Affordable Care Act, despite receiving no authorization from Congress and possessing no expertise in crafting healthcare policy.

Similarly, the SEC has no expertise on climate change policy. It is currently unequipped to weigh potential climate risks with projected rates of financial return on investments, or measure how corporate greenhouse gas emissions factor into a prospective investor's decision to invest in a public company.

There are further legal problems on the horizon for the agency. Former SEC Commissioner A.A. Sommer, Jr. has previously warned about the "slippery slope" of modifications to existing materiality standards recognized under securities law.[66] Expanding the definition of materiality to include subjective environmental goals (like sustainable investing) would undermine the original understanding of materiality, which historically has mattered a great deal to the SEC's legitimacy. Sommer went so far as to say that it would undermine the agency's "ability to carry out our statutory duties."[67]

Law Professors Paul and Julia Mahoney warned that if the SEC moved forward with mandating ESG

[60] Andrew Vollmer, "The SEC Lacks Legal Authority To Adopt Climate-Change Disclosure Rules," p. 205.

[61] Elizabeth Murphy, "Commission Guidance Regarding Disclosure Related to Climate Change," Securities and Exchange Commission, February 2010, https://www.sec.gov/rules/interp/2010/33-9106.pdf.

[62] Copland, The Unelected (New York: Encounter Books, 2020), p. 69.

[63] Sec. and Exch. Comm'n, Concept Release, April 2016, p. 206

[64] Sec. and Exch. Comm'n, Concept Release, April 2016, p. 209

[65] *King v. Burwell*, 576 U.S. 473, 486 (2015), https://supreme.justia.com/cases/federal/us/576/14-114/.

[66] Amanda Rose, A Response To Calls For Sec-Mandated ESG Disclosure, https://www.sec.gov/comments/climate-disclosure/cll12-8785693-237729.pdf. See Rose's reference to A. A. Sommer Jr., Comm'r, SEC, Address at the Practicing Law Institute: The Slippery Slope of Materiality (Dec. 8, 1975), https://www.sec.gov/news/speech/1975/120875sommer.pdf [https://perma.cc/89YR-WX36],

[67] Rose, A Response to Calls for SEC-Mandated ESG Disclosure, see footnote 102 and the provided quote.

disclosures, it would lead to "eroding public trust in its capacity and willingness to serve as an apolitical technocratic regulator of the capital markets."[68]

The climate disclosure rule also threatens to undermine the traditional role of the board of directors in public companies, plunging directors and executives into debates over ESG topics when it comes time to certify those corporate disclosures. The rule would force select members of an organization's board to provide disclosures on their knowledge and expertise on climate related risks.

This requirement is found under the "board oversight" section of the rule. It essentially compels organizations to identify such members or commissions that are best suited to assess the entity's risks related to climate change.[69] This portion of the rule also requires disclosure of how often meetings are being hosted to discuss climate risks and what processes are taken to address these risks.

Strategic discussions in corporate board meetings are traditionally kept private and not aired out for the public to see in a governmental disclosure. For the SEC to compel this information to be disclosed threatens to unduly advantage a corporation's competitors in the market, some of them perhaps not subject to the same regulations.

The rule could also erode the existing barrier between federal securities regulation and state corporate law. When the federal government intrudes on an area of law addressing corporate governance, typically reserved to the states, it threatens to undermine the dynamic of federalism.

Rules often entail new liabilities as well. The SEC proposal creates liability risks[70] by introducing a new breed of compliance standards. These standards exist wholly apart from the typical financial concerns of investors or traditional norms of materiality and will involve a new wave of lawsuits and enforcement actions.

It is hard to understate what a turnaround this rule represents for the SEC. Assistant Attorney General of Virginia Chandler Crenshaw highlights research from the Business Roundtable which found "100 times the SEC failed to include societal issues as material, arguing, '[I]t is impossible to provide every item of information that might be of interest to some investor in making investment and voting decisions.'"[71]

There's also the question of uniformity of data, which the SEC previously insisted on, and, for the most part, received from publicly traded companies. That will not be possible here. As Joe Shoen, CEO of U-Haul, pointed out in a comment, the SEC will fail to obtain standardized results for this rule.[72] This is because reporting firms of varying sizes will diverge widely on the lengths they will go through to account for climate change risks. Registrants will inevitably account for environmental impact to differing degrees, as some will derive materiality from nearly every corporate activity/decision. Others may underreport activities in absence of a viable methodological standard for accurately measuring climate-related risk factors.

For a rental company like U-Haul, increased GHG emissions could actually serve a beneficial purpose for the environment, since it prevents customers from having to purchase their own large truck and trailer when transporting supplies. Instead, they can simply rent a U-Haul truck for a limited time and reduce their personal-direct GHG output over the long term. But proving that through the sort of protracted litigation that this rule invites may present a costly proposition.

One potential method of avoiding legal liability is for firms to use aspirational and ambiguous terms in their sustainability reports and corresponding climate disclosures. Many lawyers are currently advising their corporate clients to do so. Using vague ESG-centered language to insulate their corporate activities may enable the firms to skirt the liability sections of the rule. Nevertheless, an SEC-mandated climate disclosure would still severely reduce the flexibility and discretion once enjoyed by American companies.

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68 Rose, A Response to Calls for SEC-Mandated ESG Disclosure, see the quote from Mahoney & Mahoney cited in the above footnote.

69 Countryman, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Final rules, p. 160.

70 Rose, A Response to Calls for SEC-Mandated ESG Disclosure, see Rose's concerns about liability risks borne to companies beginning on p. 29 of her comment to the SEC.

71 Chandler Crenshaw, "*Murky Skies Ahead! Analyzing Executive Authority and Future Policies Regarding Corporate Disclosure of Greenhouse Gases*", 42 Wm. & Mary Envtl. L. & Pol'y Rev. 285, 295 (2017), https://scholarship.law.wm.edu/wmelpr/vol42/iss1/7/ (quoting Business Roundtable, *The Materiality Standard for Public Company Disclosure: Maintain What Works* 5–6 (Oct. 2015).

72 Edward Joe Shoen, AMERICO & U-Haul comment letter responding to the Enhancement and Standardization of Climate-Related Disclosures for Investors, 2022, https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:1b15ef02-2dea-4628-8cb1-dbe84dd94758.

The enforceability problem

The critical flaw in the climate disclosure rule is that the SEC lacks any pre-existing legal basis to enforce its disclosure requirements. Existing disclosures require companies to report on a wide range of financial information relevant to their own activities. These requirements have mostly been confined to a company's business operations, financial condition, offered securities, corporate governance, and risk management.

With the climate disclosure rule, the SEC assumes that it can expand the reportable risk management criteria to include climate change risks. However, the SEC would only be able to adopt and enforce such a disclosure if there was a relevant statute to base its regulatory requirements upon. For instance, when the EPA adopted the National Environmental Policy Act (NEPA) of 1969[73], the SEC adopted additional disclosure provisions to ensure companies were following environmental law via their submitted SK, S-1, and 10-K.[74] This was expanded in 1976 with an SEC-disclosure requiring that companies report capital expenditures used to remain in compliance with NEPA.

The SEC cannot create a special categorization for climate change disclosure without any specific legislation to justify this move. The SEC has even acknowledged that its authority to adopt new disclosure requirements were limited to the provisions of NEPA as it impacted corporate affairs.[75]

Only the EPA is authorized to collect mandatory disclosures from companies that produce at least 5,000 metric tons or more of carbon dioxide (CO2) every year.[76] The EPA derives its authority to compel disclosure of CO2 emissions from the relevant provisions of the Clean Air Act.[77] By contrast, the SEC's Division of Corporate Finance possesses no statutory authority to compel reporting of GHG emissions from corporations. The SEC's Division of Enforcement will possess no legitimate basis to uphold the climate disclosure rule against businesses in the future.

The SEC also cannot assume new authority over emissions reporting and broaden the scope of disclosure. Traditionally, risk management disclosures are tethered to corporations mitigating risks within their realm of control. Risks were deemed to be internal to the decision-making of the board and could be reasonably accounted for by corporate management. By contrast, the SEC's climate disclosure rule forces corporations to assume new risk management of external conditions.

Clearly, the SEC's climate disclosure rule upends existing principle-based disclosure requirements. A study from Deloitte and the University of Southern California found that among the most widespread disclosure headings used to report general risk factors by public companies, none of them pertain to climate-related risks.[78] This is to say, public companies have by and large not found that climate change risks rise to the same level as what would normally be reported to the SEC under headings like "energy," "financials," and "materials."[79] If climate change hasn't warranted a general risk category of its own by public companies reporting to the SEC, then what justification does the present SEC assume to have by manufacturing a special category of disclosure for climate risks? In fact, most reporting companies that disclose on weather-related impacts only consider natural and

73 Department of Energy, National Environmental Policy Act, https://ceq.doe.gov/.

74 US Securities and Exchange Commission, "Report on Review of Disclosure Requirements in Regulation S-K", agency report, December 2013, https://www.sec.gov/files/reg-sk-disclosure-requirements-review.pdf.

75 Securities and Exchange Commission, "Report on Review of Disclosure Requirements in Regulation S-K." See footnote 96, "As discussed in the adopting release, this rulemaking was part of the Commission's consideration of the impact of the National Environmental Policy Act of 1969 on its disclosure regime."

76 "Mandatory Reporting of Greenhouse Gases (40 CFR part 98)," Environmental Protection Agency, August 2010, https://www.epa.gov/sites/default/files/2015-07/documents/part98factsheet.pdf. It is important to note that the EPA's rule already captures 85-90% of the total produced GHG emissions.

77 Environmental Protection Agency, "Climate Change Regulatory Actions and Initiatives", https://www.epa.gov/climate-change/climate-change-regulatory-actions-and-initiatives. Refer to the subsection on "Greenhouse Gas Reporting Program", which states that the EPA derives its reporting authority "under the Clean Air Act (40 CFR Part 98), facilities that meet reporting thresholds must report greenhouse gas emissions to the program annually."

78 Dean Kingsley and Matt Solomon, "SEC Risk Factor Disclosure Rules", Harvard Law School Forum on Corporate Governance, December 22, 2021, https://corpgov.law.harvard.edu/2021/12/22/sec-risk-factor-disclosure-rules/#2

79 Dean Kingsley and Matt Solomon, "SEC Risk Factor Disclosure Rules."

man-made disasters.[80] At present, there is simply no market-driven incentive to prioritize climate change risk factors.

Thanks to recent Supreme Court precedent, private litigants raising constitutional challenges against the SEC's climate rule will have an easier pathway to do so in court. Following the court's decision in *Axon v. FTC* (2023), claimants can now raise structural challenges to the SEC without undergoing the often long, cumbersome adjudicatory process.[81]

For instance, if the claim is collateral in nature, a litigant could point to how the SEC's expanded disclosure framework encompassing financial decisions based on environmental risks is beyond the agency's "competence and expertise." A claimant can also point to how the SEC's rule is collateral in that it falls outside of the Exchange Act of 1934's disclosure review scheme by seeking to incorporate non-material information. In other words, the expanded disclosure would require financially irrelevant material that is unrelated or "collateral" to the information required under existing disclosure mandates.

Additionally, if a claimant can prove that an SEC's administrative law court (ALC) bars jurisdiction of an outside federal district court in a manner depriving any meaningful judicial review over the matter, this satisfies all the requirements of *Thunder Basin Coal Co. v. Reich* (1994).[82] That would enable the litigant to bypass the SEC's in-house adjudication and present their case directly before an Article III court to challenge the rule. This provides a shot at a fair trial, given that the SEC wins 90 percent of the time in-house but only 60 percent when represented before the Supreme Court.

One more monkey wrench: A judge at any point in the review process could find that the rule is on its face arbitrary and capricious. Marlo Lewis, a senior fellow at CEI, argues that this finding could be warranted based on the agency's unrealistic assumption that climate change is a present crisis that endangers the stability of America's financial system.[83]

According to Lewis, "when an agency sets about to impose multi-billion-dollar compliance costs on an industry on the basis of deeply flawed assumptions of a deeply flawed methodology, that is arbitrary and capricious."[84] He points to a series of decisions made by the D.C. Circuit Court that declared that an agency's scientific model, on which its proposed rule is based, is arbitrary and capricious when it fails to comport with the reality that it presumes to represent. Lewis shows that the SEC has relied upon inflated estimates of fossil fuel usage and unrealistic projection of emissions presented through a particular set of computer models. The inaccuracy of relying upon such models opens the SEC to legal vulnerability.

Another way in which the rule appears to be arbitrary and capricious is in its apparently deliberate omission of the well-documented criticisms against the inflated climate models and lack of proper cost benefit analysis. Independent agencies like the SEC are required under the Administrative Procedure Act (APA) to incorporate a diverse range of considerations when formulating a rule. The climate disclosure rule does not meet this requirement because it relies only upon the cited models, while ignoring their documented shortfalls and scientific inaccuracies.

Additionally, the SEC's climate rule risks being overturned in court for lack of proper cost benefit analysis. Last December, the Fifth Circuit struck down an SEC disclosure rule – the Share Repurchase Disclosure Modernization rule – over a failure by the Commission to properly respond to public comments and provide adequate cost benefit analysis.[85] Here, the SEC asked for data which public commenters acknowledged had existed, yet, ultimately ignored

80 Dean Kingsley and Matt Solomon, "SEC Risk Factor Disclosure Rules." See the following passage, which omits any mention of climate change risks, "The most common risk factors included under the general risk factors heading were: recruitment and retention of talent; cybersecurity; stock price volatility; litigation and/or regulatory investigation; natural and man-made disasters; COVID-19; accounting standard changes; tax law changes; inability to access capital; financial reporting internal control weakness; strategic transactions; inability to pay dividends and/or repurchase shares; exchange rate fluctuations; restrictive change-of-control provisions; asset or goodwill impairment; international operations; lack of adequate insurance coverage; and adverse economic conditions."

81 Stone Washington, "The Supreme Court's Axon decision shatters the in-house advantage of administrative law courts," Competitive Enterprise Institute, April 2023, https://cei.org/blog/the-supreme-courts-axon-decision-shatters-the-in-house-advantage-of-administrative-law-courts/.

82 *Axon Enterprise, Inc. v. Federal Trade Commission, 598 U.S. 175* (2023). See also the three-part requirement to bypass administrative adjudication in the Court's ruling of *Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).*

83 Marlo Lewis, "Arbitrary and Capricious: SEC's Climate Risk Disclosure Rule," Heartland Institute Climate Conference 2023: Policy Track (Panel A), February 2023, https://www.youtube.com/watch?v=Or87gY5tNok&t=4470s.

84 Lewis, "Arbitrary and Capricious: SEC's Climate Risk Disclosure Rule."

85 "SEC share repurchase disclosure rule vacated," KPMG, January 2024, https://kpmg.com/us/en/frv/reference-library/2024/sec-share-repurchase-disclosure-rules.html#:~:text=Court%20vacates%20Share%20Repurchase%20Disclosure,rule%2C%20vacating%20the%20rule%20entirely.

the data in its final analysis. The SEC's climate disclosure rule may suffer the same fate in the Eighth Circuit, albeit the legal challenges to the climate rule may prove much broader in scope than the Share Repurchase rule. The Commission failed to account for every factually unique comment opposing mandatory disclosure or justify the substantial cost of new disclosure relative to the speculative benefits for corporate transparency of climate change risks.

Compliance costs as de facto carbon tax

While substantially less expensive than the proposed rule, the final rule will still greatly increase annual disclosure costs for most reporting companies. Public companies will likely need to outsource much of their time and resources to hired professionals just to meet the added burden for disclosure preparation. If fully implemented, the rule will inflict lasting financial consequences on public companies in the form of reduced innovation, decline in initial public offerings (IPOs), and reduced stock prices.

A registrant firm will not be able to measure or account for how its investments and operations are affected by climate change in the way that the SEC imagines. The long-term impacts of climate change on the balance sheet of any given company will be speculative, unverifiable, and theoretical, requiring multiple layers of assumptions about which even the climate scientists who study the climate full-time disagree. While the rule is titled "Enhancement and Standardization of Climate-Related Disclosures for Investors," the SEC has introduced an entirely novel disclosure regime that will offer little value compared to its cost burden.

The rule's demands will be especially burdensome for large accelerated and accelerated filers, both of which must disclose their scope 1 (direct emissions) and scope 2 (indirect emissions from purchased electricity) if deemed to be material. Only after much pushback from public commenters and participants in the 2023 Small Business Forum did the SEC exempt all small reporting companies (SRCs), non-accelerated filers (NAFs), and emerging growth company (EGCs) from the burdensome scope mandate requirements.[86]

There are approximately 8,300 reporting companies that must disclose their financial information to the SEC on a quarterly and annual basis.[87] The rule's GHG mandate will soon take effect by fiscal year 2026 for large accelerated filers (LAFs) and 2028 for accelerated filers (AFs). Part of the SEC's insistence on compelling GHG emissions disclosures from LAFs is that an SEC quantitative analysis found that 68 percent of these firms used key words relating to "climate change" or "climate related risks" in their filings in 2022, compared to AFs at 45 percent and NAFs at 23 percent.[88] Mention of climate risks by SRCs and EGCs averaged around 19 percent in 2022.

The SEC felt that while most public firms do not voluntarily disclose GHG emissions (only 18-20 percent of all registrants do), many larger firms at least acknowledge climate change in their filings. Yet, demonstrating minimal awareness to climate risks is hardly justification enough for forcing all LAFs and AFs to gather and report costly data on their GHG emissions.

Based on the SEC's data, there is no evidence that these larger firms prioritized climate change risks in their assessment of performance. In fact, less than half of all LAFs (42 percent) voluntarily reported their GHG emissions data to third parties in 2022. This was down from 50 percent the year prior, when embrace of ESG reporting seemed to be at a peak.[89] This figure only covers 81 percent of all SEC-registered LAFs, meaning that the actual number of LAFs who report such climate change data as a whole is mostly likely around 40 percent in 2021 and 30 percent in 2022.

When assessing the projected costs of the climate disclosure requirements, the financial reckoning awaiting companies is high. When measured across the total 8,300 reporting firms, the SEC's rule will impose an average per-firm cost of $76,000 in direct disclosure costs. By SEC estimates, there will be exactly 3,488 firms affected by the final rule's disclosure requirements.[90] This increases the direct

[86] Vanessa A. Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Final Rules, footnote 23.

[87] US Securities and Exchange Commission, *Congressional Budget Justification: Annual Performance Plan Fiscal Year 2025*, March 2024, https://www.sec.gov/files/fy-2025-congressional-budget-justification.pdf.

[88] Vanessa A. Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Final Rules, p. 614.

[89] Vanessa A. Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Final Rules, p. 628.

[90] Vanessa A. Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Final Rules, pp. 822-823.

per-firm costs to $180,045 and represents a more accurate picture of the large compliance burden facing companies. In fairness, this represents a major drop from the proposed rule's $6.4 billion price tag, which would have imposed a per-firm cost of $864,864. That would have increased disclosure costs $3.8 billion to a little over $10.2 billion, a more than 250 percent increase.[91]

Much of this decline from the initial proposal can be attributed to the final rule's exemption of smaller firms from Scopes 1-2 (emissions produced by immediate and purchased energy) and removal of the Scope 3 (value-chain produced emissions) requirement, the controversial 1 percent line-item requirement, physical location of businesses at risk of flooding, and various other cutbacks. While these represent welcome revisions on the part of regulated businesses, they by no means eliminate all problems with the final rule.

The SEC claims compliance costs will likely decrease over time due to accumulated institutional knowledge, growing competition among reporting companies seeking to produce favorable disclosures, and "operational efficiency." Because the SEC has aligned its rule with the Task Force on Climate Related Financial Disclosures (TCFD), the Commission has provided estimates on how much it would cost registrants to prepare "TCFD-aligned disclosures." By advertising this annual rate as being cheaper – in the $150,000 to $200,000 range – the Commission is most likely seeking to incentivize registrant companies into adopting the TCFD's disclosure framework.[92]

This endorsement of the TCFD is in line with the agency's deference to international coalitions for guidance on reframing the SEC's disclosure framework in order to prioritize climate change risks to investors. Here the agency is exceeding its original disclosure framework as outlined in Schedule A of the Securities and Exchange Act of 1934, which does not permit the agency to endorse or mimic international disclosures.[93]

Indirect and unaccounted costs of disclosure

Beyond the quantifiable direct costs on public companies, the SEC also acknowledges that there will be indirect costs associated with the rule's implementation. "Registrants unfamiliar preparing these disclosures may face significant uncertainty and novel compliance challenges," the proposed rule states.[94] However, both the SEC's proposal and final rule fail to account for many indirect costs beyond the increased compliance burdens. In terms of administrative burden, the SEC's final rule ranks highly in the uncertainty it imposes on registrants.

The lack of any reliable industry standard for disclosing such risks will likely generate a wave of costly litigation among companies sued by the SEC and environmentally concerned investors. Additionally, it will provide an opening for environmental groups to sue organizations for any range of claims of material misrepresentation over climate impact. Companies will be incapable of generating consistent or comparable climate-related financial disclosures, which undermines the rule's overarching purpose.

The SEC attempts to allay such fears with certain exemptions, which makes its final rule slightly less prescriptive. While the provided exemptions are an improvement on the initial proposal, this will do little to protect the thousands of companies regulated under said rule.

Similarly, the safe harbor provision for companies needing to disclose their climate mitigation strategies, such as "transition plans, scenario analysis, the use of an internal carbon price, and targets and goals,"[95] is only partially protective. Adversarial investors can still find many other ways to sue the registrant for perceived misrepresentations or material omissions. This safe harbor also does not protect the firm from public liability by state government lawsuits or the SEC's Division of Enforcement. This leaves a big opening for public and private-sector actors to sue reporting companies over subjective concerns they may have with the quality of their disclosure.

[91] Richard Morrison, "The SEC's Costly Power Grab," p. 5.

[92] Vanessa A. Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors."

[93] Schedule A: Contents of offering circular for small business investment companies, 17 CFR § 230.610a. Cornell Legal Information Institute, https://www.law.cornell.edu/cfr/text/17/230.610a.

[94] Vanessa A. Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Proposed Rules. See section on "indirect costs," p. 388.

[95] Vanessa A. Countrymen, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Final Rules, p. 35.

There are even potential consequences of the removal of Scope 3. By retaining the requirement for firms to report their direct and indirect emissions via Scopes 1-2, the SEC opens the likelihood of many firms reducing their rate of production to outsource their product development from third party firms.[96] Regulated firms would reduce the amount of their reportable direct and indirect GHG emissions by shifting production to private firms to avoid or reduce making Scope 1 and 2 disclosures. The private third-party firms do not need to disclose their Scope 3 emissions and thus would essentially offset the disclosure burden of their partnered registrant firm. Yet, this is a double-edged sword, as it will cause public companies to lose much of their business to third-party firms.

The SEC is forcing companies into a Catch-22. GHG-emitting firms will be pressured into adopting a costly climate transition plan. Where this threatens to undermine the firm's traditional forms of energy reliance/investment, companies that refuse to mitigate climate change risks will be exposed to a costly set of consequences as well. Ramifications may include divestment campaigns led by politically active stakeholders, more ESG shareholder proposals promoting climate reform at the firm, and lost business opportunities for politically-motivated reasons. The rule incentivizes companies to develop costly climate mitigation strategies or face heightened political pressure and divestment from inaction toward resolving climate risks.

In life, time is the most limited resource, and this rule will cost companies plenty of that. Much time by C-suite executives and directors will be taken up navigating the heightened regulatory requirements, both for disclosure preparation and in reviewing the increasing number of social and environmental proposals for consideration at annual meetings. The board's responsibility to oversee such reporting is further complicated by the existence of the SEC's Staff Legal Bulletin No. 14L, which has unleashed a flood of ESG-based shareholder proposals for firms to consider.[97]

Californian and European regulators will also add to C-suite heartburn as their parallel rules will come into force in roughly the same period. Worse, there is no safe harbor in place to protect the estimated 3,700 SEC-registered companies with firm locations across Europe, or the undisclosed number of firms in California. Affected companies will be entangled in overlapping dual, or even triple, disclosure costs, while multiplying the work hour burden for disclosure prep. Just as there is no one-size fits all disclosure for every reporting company, so too is there no standard disclosure that a company can use to satisfy mandatory state, federal, and international climate reporting requirements. The SEC's final rule refuses to factor in these overlapping, cross-disclosure burdens for companies.

ESG crackdown already underway

The SEC will not entrust ESG disclosure compliance solely to its Division of Corporation Finance (Corp-Fin). Compliance will require a triangular coordination between the divisions of Examinations, Enforcement, and Corporate Finance. We look to the SEC's 2023 budget request, released during the same month (March 2022) that it proposed its climate disclosure rule, in order to gauge how the agency was preparing for rule's release. As stated in its 2023 budget justification, the SEC's Enforcement division has already begun leveling punitive actions against perceived violators of SEC rules, based not on established securities law, but on ESG standards. The division has noticeably expanded the scope and detriment of its enforcement actions, including to areas for which the SEC lacks jurisdiction.[98]

According to its mission description, the Commission is now pursuing "enforcement actions against wrongdoers in new and emerging areas, including crypto-asset markets, cyber-related risks, the environmental, social, and governance space, and

[96] C-Span, "House Financial Services Subcommittee Field Hearing on SEC Climate Disclosure Rule," March 18, 2024, https://www.c-span.org/video/?534335-1/house-financial-services-subcommittee-field-hearing-sec-climate-disclosure-rule. See remarks by Professor Alex Scott (beg @ 20:55) during the hearing on how regulated firms may reduce compliance costs from the rule's scope mandate by increasing reliance upon third party firms.

[97] Stone Washington, "The Stop Woke Investing Act and 'ESG Fatigue,'" CEI OpenMarket blog, Competitive Enterprise Institute, https://cei.org/blog/the-stop-woke-investing-act-and-esg-fatigue/.

[98] Dan Shaw, "7 takeaways from the SEC's $5B enforcement year," Financial Planning, November 15, 2023, https://www.financial-planning.com/list/marketing-off-channel-messages-figure-heavily-in-sec-enforcement-priorities

special purpose acquisition companies."[99] Mandatory climate disclosures fall squarely within the ESG category, and represents the SEC's new goal to hold companies compliant to environmental policy standards, rather than the standard of financial materiality.

The Enforcement division has made no attempt here to hide its ESG-inspired enforcement actions, while Corp-Fin has indirectly stated its goal to use enhanced funding for enhanced disclosure review of corporate climate change risks. The Division of Investment Management (IM) has taken more of a cautious approach to revealing its interest to request additional funding. Among its list of proposed reforms, IM may adopt "augmented requirements for funds and investment advisers related to environmental, social, and governance factors as these investment strategies rapidly increase."[100]

While subtler than ENF's or Corp-Fin's ESG funding requests, it is clear that IM sought congressional appropriation for creating new ESG obligations for registered investment advisers and the funds they oversee. Not only did this request align with the SEC's climate disclosure rule, it also foreshadowed IM's finalized "names rule" in September 2023. This rule expanded Rule 35d-1 of the Investment Company Act of 1940 to encompass ESG associated terms like "growth" and "value" in the fund name. This means that ESG-named fund must pursue named ESG goals to the tune of 80 percent of its managed assets in order to avoid the appearance of misleading investors.[101]

IM's role in promulgating new ESG investment requirements will have a significant impact on the regulatory landscape, as IM is the division that oversees approximately 14,800 registered investment advisers (RIAs), who manage more than 4,900 federally registered funds.[102] This follows an increase of 906 new SEC-registered investment advisory firms in 2021, bringing the national total up to 14,806 firms (a 6.7 percent increase from 2020). There has been a steady increase in the rise of these firms over 19 of the last 21 years, according to a report from the Investment Adviser Association.[103] Thus, as the investment advisory industry continues to grow, so does the SEC's ambitions to extend its ESG compliance standards in this sphere.

SEC-registered firms manage assets that climbed to a record $128.4 trillion in 2021, a 16.7 percent increase from 2020. Registered advisers also have a record number of clients, with 64.7 million clients (up 6.4 percent). With a record number or RIAs, advisory firms, customers, and assets to oversee, IM's ESG obligations will impact the greatest number of recipients in the SEC's entire history.

With more assets being managed now than ever before and the largest valuation of public funds in US history, IM's ESG factorization would raise the institutional risk for financial losses across registered funds slapped with the new requirements. ESG funds performed noticeably worse than non-ESG funds in 2022, following a five-year trend of underperformance, with ESG funds amassing 250 basis points less than non-ESG funds in the market per year.[104]

IM also provides another ESG-funding Easter egg when another of its stated reforms seeks to impose "enhanced reporting and disclosure about private funds" on registered entities.[105] Like with Corp-Fin's request, IM uses the term "enhanced" as a nod to the Commission's climate disclosure rule, which contains "enhancement" in its title. ESG-enhanced reporting could affect 14,000 SEC-registered funds that manage approximately $33 trillion in assets.

To assist with these changes, IM submitted a request to hire 13 new employees, similar to Corp-Fin and Enforcement's requests. Its FY 2023 request amounts to $96.1 million, a $10.8 million increase from the

[99] US Securities and Exchange Commission, *fiscal year 2023 Congressional Budget Justification*, March 25, 2022, p. 24, https://www.sec.gov/files/fy-2023-congressional-budget-justification-annual-performance-plan_final.pdf.

[100] US Securities and Exchange Commission, *fiscal year 2023 Congressional Budget Justification*. p. 36.

[101] Wendall Faria, Walter Van Dorn, Gail A, Lione, Seth K. Abrams, "Changes to the SEC Fund Names Rule Impacts ESG Investments," Dentons, September 2023, https://www.dentons.com/en/insights/alerts/2023/september/27/changes-to-the-sec-fund-names-rule-impacts-esg-investments#_ftn1.

[102] Jeff Berman, "RIA Industry Broke Records, Again, in 2021: New Data," June 2023, Think Advisor, https://www.thinkadvisor.com/2022/06/23/all-about-the-ria-industry-in-2021-new-data/. Also see p. 15 of the SEC's 2022 Financial Report for context on the Division of Investment Management.

[103] The Investment Adviser Association (IAA) and National Regulatory Services, "Industry Snapshot Confirms Sector Growth of 16.7% Year-Over-Year," Investment Adviser, 2022, https://investmentadviser.org/industry-snapshots/

[104] Terrence Keely, "ESG Does Neither Much Good nor Very Well", *Wall Street Journal*, September 2022, https://www.wsj.com/articles/esg-does-neither-much-good-nor-very-well-evidence-composite-scores-impact-reports-strategy-jay-clayton-rating-agents-11663006833

[105] US Securities and Exchange Commission, *fiscal year 2023 Congressional Budget Justification*, p. 36.

previous year's continuing resolution. Three of these hires would be tasked directly with responding to the increased workload burden that the Disclosure Review Office will face involving climate-related financial disclosures. Just like Corp-Fin and Enforcement, IM is seeking to beef up its manpower to manage a new wave of complex environmental-based filings.

By tallying up the rising budgetary requests across the three divisions, we can form a general idea of how much they have spent on ESG initiatives. We see that the SEC is requesting a total of $101.8 million to hire 203 new federal employees. These new hires would contribute to processing tens of thousands of new corporate climate disclosures, help promulgate new ESG-centered rules, and ensue that registrants are compliant with the agency's expectations for corporate GHG emissions disclosure.

Inhibiting business development

The SEC's proposed climate disclosure rule would come at the expense of significant corporate growth and capital formation in the marketplace. Most obviously, companies will be effectively barred from entering into the publicly-regulated capital markets until they are prepared to clear the high bar of disclosing their climate change risks.[106]

Given how large public firms can commit more capital and hired hands to disclosure preparation, the rule will disproportionately burden smaller reporting firms. Private firms considering going public must also weigh greater litigation risks over climate risk reporting misrepresentation. Given the likelihood that disclosure estimates will be far from perfect,[107] public companies will face significant new legal and political risk in addition to their expanded compliance costs.

The rule singles out GHG intensity, which could create two different kinds of capital-related problems. The first problem is an investment bubble. Investors following this cue may be inclined to overemphasize the risks of GHG emissions across their financial analytics. The SEC predicates risk from GHG intensity not on measurable climate science, but on predictions of future US policy that will more strictly regulate emissions. By artificially amplifying these climate-related financial risks, the SEC paves the way for a future green asset bubble.

Assuming equity investors follow the SEC's expected dynamic, shares of firms reporting a lower intensity of GHG operations will be more expensive relative to other factors. Those inflated valuations could be poised for a crash once political and social enthusiasm for climate policy recedes. The bursting of the future green asset bubble would then harm the very investors whose interests the SEC is presuming to protect. US taxpayers could also be at risk, given future pressure for a federal bailout.

In certain circumstances, such as the expansion of new mining facilities, higher outputs of GHG emissions can actually provide a benefit to green-energy transitioning. These emissions may facilitate goals generally favored by environmentalists, such as harvesting rare earth minerals used to produce batteries for electric vehicles. In this way, the SEC's climate disclosure rule may run contrary even to the achievement of environmental goals. This effect can be seen in how limitations imposed by NEPA and other environmental laws are now standing in the way of various wind, solar, and transmission line construction projects.[108]

The second capital problem will be the opposite of a bubble. SEC's climate disclosure rule will impair many companies' ability to raise capital because high-GHG intensity firms will be singled out and have a harder time raising funds publicly. This could bring a devastating one-two punch for public companies that are already adversely affected by the rule.

Neither is this simply a problem for companies to bear on their own. Paul Ray of the Heritage Foundation warns how "companies that must bear the rule's costs would pass them on in the form of lower returns to investors and higher prices for consumers at a time when Americans can ill afford either."[109]

[106] Paul Ray, "The SEC Should Not Be Setting Corporate Climate Policy," The Heritage Foundation, June 2022, https://www.heritage.org/conservatism/report/free-enterprise-and-the-common-good-economic-science-and-political-economic-art.

[107] Marlo Lewis and Patrick Michaels, "CEI Comments on Proposed SEC Rule: Enhancement and Standardization of Climate-Related Disclosures for Investors," June 7, 2022, regulatory comment, Competitive Enterprise Institute, https://cei.org/regulatory_comments/cei-comments-on-proposed-sec-rule-enhancement-and-standardization-of-climate-related-disclosures-for-investors/. Lewis and Michaels point out how, "Despite the plea for 'granular' information, climate risk disclosure advocates typically rely on overheated models run with inflated emission scenarios, producing scary but implausible warming forecasts."

[108] Marlo Lewis, "Climate Coup Alert: CEQ Proposes to Transform NEPA", Competitive Enterprise Institute, October 2023, https://cei.org/opeds_articles/climate-coup-alert-ceq-proposes-to-transform-nepa/.

[109] Ray, "The SEC Should Not Be Setting Corporate Climate Policy."

Before a House Financial Services Committee hearing with SEC Chair Gary Gensler in April 2023, Reps. Patrick McHenry (R-NC) and Ann Wagner (R-MO) addressed the capital formation issue. Among the more than 50 rules proposed on Gensler's watch, none seem to positively address this core pillar of the SEC's mission, they charged. "Instead, the Commission has focused on implementing costly regulatory disclosure requirements on topics that go beyond its scope," the representatives said in a statement. "This approach has made the U.S. capital markets less attractive to existing and potential public companies."[110] This poses a challenge for domestic markets and runs the risk of outsourcing public capital investments to China, India, and other international markets.

Gensler acknowledges that capital in public markets is shifting to private markets. Current securities laws make it cost prohibitive for many would-be public companies to enter the market. Today, nearly 80 percent of companies have already achieved valuations of at least $50 million before they go public, a reversal of the 1990s, where 80 percent of initial public offerings (IPOs) were less than $50 million.[111] This higher threshold in combination with rising auditing costs has contributed to a sharp decline in the annual number of IPOs,[112] hitting a 30-year low on Gensler's watch. The alarming decline of new IPOs and other public offerings "stifles the growth and innovation of our economy since high-growth companies must rely on public markets to raise capital to achieve their objectives."[113]

The SEC's final climate disclosure rule will only raise those costs. The rule will reduce choices for investors who are investing in public markets, as it will likely lead to fewer IPOs, which in-turn reduces the range of public companies to invest in. In 2022, IPO capital output declined by 72 percent compared to 2021, while the number of IPOs is down 58 percent over the past two years.[114] The agency's proposed rule would constrain the investing options for non-accredited investors and thus harm its own mission of maintaining efficient markets.

Public perceptions: ESG and disclosure

There is a sharp political division between those who believe companies should be required to report information on their environmental impact and those who believe that companies should make their own decisions on this score. Many public companies are already including environmental and climate-themed data in their annual sustainability reports, public statements, and SEC disclosure documents. The proposal to shift to a mandatory, prescriptive new rule to govern this process has generated a great deal of controversy. It is not the obvious boon to market participants that the SEC's public documents describe.

Many advocates of mandatory climate disclosures fail to consider the increased compliance costs and legal risks. In fact, supportive analysis on the topic often omits any mention of costs and trade-offs. Financial experts have frequently complained about the fact that ESG, and to a lesser extent climate change risk, is too vague of a concept to garner a widely accepted definition.[115] How can a financial regulator such as the SEC incorporate ESG as the basis for a major new rulemaking when there is a lack of consensus among firms on whether climate change risks are even material?

It is true that many companies have publicly embraced some version of ESG best practices.[116] However, more than half of these companies have fallen short of implementing a viable program that advances their sustainability commitments. The SEC's unstated goal for mandating climate disclosures is to artificially shift activity in this space by pressuring companies to implement climate reduction strategies.

110 Patrick McHenry and Ann Wagner, "McHenry, Wagner Slam Chair Gensler for Ignoring the SEC's Capital Formation Mandate," House Financial Services Committee, April 2023, https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408700

111 Council on Jobs and Competitiveness, "Taking Action, Building Confidence: Five Common-sense Initiatives to Boost Jobs and Competitiveness," October 2011, pp. 17-18.

112 John Berlau, and Joshua Rutzick, "The 20-Year Experiment Holding America Back", *The Wall Street Journal*, September 2022, https://www.wsj.com/articles/the-20-year-experiment-holding-the-u-s-back-sarbanes-oxley-corporate-reform-bush-entrepreneurs-investors-fraud-business-11659044813.

113 McHenry and Wagner, "McHenry, Wagner Slam Chair Gensler for Ignoring the SEC's Capital Formation Mandate."

114 Stone Washington, "SEC commissioner bashes private markets, shows why public capital flight is happening," Competitive Enterprise Institute, November 2023, https://cei.org/blog/sec-commissioner-bashes-private-markets-shows-why-public-capital-flight-is-happening/.

115 Stone Washington, "Steamboat Institute Hosts an Exciting Debate on the Economic Harms of ESG Investing," The Steamboat Institute, November 2023, https://steamboatinstitute.org/update/steamboat-institute-hosts-an-exciting-debate-on-the-economic-harms-of-esg-investing/. See the following quote by Professor Michael Faulkender, "When a standard like ESG is murky in the eye of the beholder, it's impossible to enforce".

116 "(Even More) Social Impact Statistics You Should Know," Engage for Good, https://engageforgood.com/stats/.

Is that a popular move? According to a 2021 PwC survey, as many as 80 percent of consumers and 84 percent of employees are willing to support or penalize a company for its level of pro-environmental engagement beyond simply being compliant with regulation.[117] Are companies making sufficient climate-related investments to have a positive impact? Here, there is another divide, with 65 percent of corporate executives satisfied with existing investments, compared to 42 percent of consumers.

The second greatest obstacle that was perceived to be in the way of corporate environmental progress was a lack of specified reporting standards and too much regulatory complexity, according to 37 percent of respondents. Many have expressed confusion over which reporting standards to follow and what will ultimately satisfy the most customers. The SEC's climate rule seeks to resolve the perceived issue of competing reporting standards by introducing far greater regulatory complexity into the mix, which would only add fuel to the fire.

Consistent with other polls, Omidyar Network conducted focus group polling on political views toward ESG in 2022, finding that most people who were unfamiliar with ESG tended to express moderately positive views of it.[118] Among investors, strong familiarity with ESG polled at 30 percent while strong support for ESG polled at 61 percent.[119] Support for corporate ESG disclosures declined when it became a subject of debate among those polled. About 40 percent (up from 32 percent pre-debate) of respondents opposed a law mandating Fortune 500 companies to calculate and disclose their impacts on their employees, communities and the environment. From liberal, moderate, and conservative viewpoints, each category of recipients noted a decline in support for ESG disclosure following a debate. The largest decline in support occurred among those who were polled as "very liberal."[120]

A Deloitte survey found that virtually every company (97 percent) viewed external stakeholders as wielding the greatest measure of influence on internal corporate policy for climate disclosures.[121] Among the seven stakeholder categories, the most influential (39 percent) appeared to be prominent ESG rating agencies, such as Moody's, MSCI, S&P Sustainalytics, Vigeo, and Institutional Shareholder Services (ISS). Followed by this were basic customers polled at 33 percent and the boards of the companies at 32 percent.

Companies were least influenced by the employees themselves, which may show that employee interests are being undervalued in favor of external pro-ESG considerations. Despite the relative interest in mandating ESG disclosures, few companies possess internal bodies for promoting these disclosures. Only 21 percent of companies surveyed have internal ESG working groups or to ensure disclosures are prepared and strategic action is taken.

ESG for me, if it is free

Some regular themes emerge from the hodgepodge of findings around ESG and environmental disclosure that appear somewhat paradoxical. We see a generic preference for ESG policies paired with a cost-weighted indifference to such policies.

A 2023 survey by supply chain management firm Blue Yonder on whether American consumers would be willing to pay more out-of-pocket for environmental products, claimed that "Consumers are eager to shop green where possible, even if it means paying more for certain products." Yet drilling down into the survey's details provides the opposite impression, and suggests that very few Americans are willing to pay significantly more for sustainable products than they already do, despite professing widespread support for sustainability in general.[122]

117 "Beyond compliance: Consumers and employees want business to do more on ESG", PwC, Consumer Intelligence Series survey on ESG, 2021, https://www.pwc.com/us/en/services/consulting/library/consumer-intelligence-series/consumer-and-employee-esg-expectations.html.

118 Omidyar Network, *Omidyar ESG Advocacy Report from focus groups and poll*, 2022, https://gqrr.app.box.com/s/rmpxu8yrbw5yj3svtioz65ebcx3g2w3l.

119 Omidyar Network, *Omidyar ESG Advocacy Report from focus groups and poll*, p. 11.

120 Omidyar Network, *Omidyar ESG Advocacy Report from focus groups and poll*, p. 16.

121 Jon Raphael; Kristen Sullivan, "ESG executive survey Preparing for high-quality disclosures," Deloitte, March 2022, https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-esg-preparedness-disclosures-reporting-requirements.pdf.

122 Blue Yonder, "Blue Yonder Survey: Consumers Interest in Sustainable Products and Practices Still High," Blue Yonder Media Center, March 2023, https://media.blueyonder.com/blue-yonder-survey-consumers-interest-in-sustainable-products-and-practices-still-high/.

This contrast was most visible when only 4 percent of those polled expressed a willingness to pay an additional 20 percent on green-products than they already spend in the market. Similarly, very few airline passengers purchase carbon offsets for their flights.[123] This included the category of young, value-driven investors who expressed the highest levels of support for ESG and calls for companies to spend more on environmental efforts.

When people are called to practice what they preach, pollsters find that most Gen Z and Millennial Americans would be unwilling to spare a sliver of their salary to advance their environmental causes. The vast majority of Americans would not be willing to shoulder the burdens of the climate disclosure rule if such costs were shifted onto them by affected public companies in the form of higher prices for goods and services or dependence on less reliable, green-based alternatives. If price is the most important factor in a consumer's decision to invest more toward environmental sustainability, the SEC's costly disclosure mandate simply won't be welcome.

More recent polling has shown that ESG has actually been fading in support among Gen Z, Millennials, and Gen Xers. Scholars at the Hoover Institution have found that Gen Z investors are the least willing to accept lower returns on investment from ESG funds.[124] This provides evidence that the generational gap for ESG support appears to be shrinking, as Baby Boomers remain broadly skeptical or opposed to ESG, while Gen Z has shown declining enthusiasm for it.

On the issue of board directors being voted against because they weren't rapidly addressing climate change, there was a precipitous decline in support among Gen X (drop of 18 percentage points), and Millennials/Gen Z (drop of 17 percentage points) investors from 2022 to 2023.[125] Boomers remained unchanged at 17 percent support of voting against board directors over inaction toward climate change. Prof. David F. Larcker had this to say about the apparent polling whiplash in investor sentiment:

> *Just one year ago, young investors told us overwhelmingly that they were very concerned about environmental and social issues, and they wanted the fund managers that invest their savings to use their size and voting power to advocate for change, even if it meant a loss of personal wealth. This year, sentiment has changed dramatically, with young and middle-aged investors expressing lower support for ESG issues by doubledigit percentages across the board.*[126]

CEI conducted a survey in 2021, where Americans were asked how much they would be willing to spend on climate change mitigation from new rules, like enhanced climate disclosures.[127] Just over a third of those polled admitted that they weren't even willing to spend more than $1 a year to mitigate the potential risks of climate change, and 80 percent of those polled were willing to commit no more than $50 a year for climate risk spending, a figure far lower than the hundreds of thousands of dollars that the average company will be required to spend as a result of the SEC's rule. As US investor interest in ESG appears to be waning, the SEC loses much of its public appeal to justify adopting such a mandate.

Proxy advisory firms as the 800-pound gorilla

The outsized role of proxy advisory firms has contributed to the rise in shareholder calls for corporate climate change reporting and ESG broadly. These are firms that are contracted by public companies or asset managers to provide outside expertise on how to vote on shareholder proposals. Similar to how absentee ballots enable voters to participate in an election without physically showing up at a voting center, proxy voting allows a shareholder to vote on corporate matters without being present at every boardroom meeting. For ordinary resolutions, only proposals that receive a majority vote (over 50 percent) can be considered for adoption by a company's board of directors.

[123] Between 1 percent and 3 percent of air travelers buy offsets. JD Shadel, "Airlines want you to buy carbon offsets. Experts say they're a 'scam,'" *Washington Post,* April 17, 2023, https://www.washingtonpost.com/travel/2023/04/17/carbon-offsets-flights-airlines/.

[124] David Larcker, Amit Seru, Brian Tayan, *2023 Survey Of Investors, Retirement Savings, And ESG* (Palo Alto: Hoover Institution, December 23, 2023, https://www.hoover.org/research/2023-survey-investors-retirement-savings-and-esg.

[125] David Larcker, Amit Seru, Brian Tayan, *2023 Survey Of Investors, Retirement Savings, And ESG,* p. 32.

[126] David Larcker, Amit Seru, Brian Tayan, *2023 Survey Of Investors, Retirement Savings, And ESG,* p. 3.

[127] CEI National Poll, Competitive Enterprise Institute, 2021, https://cei.org/wp-content/uploads/2021/10/CEI-National-Poll-Final.pdf.

Given that there are more than 5,000 public companies in the US, shareholders often find that they don't have time to carefully vote on every board member or study each shareholder measure in the companies whose shares they own. Many investors outsource the research over corporate decision-making to third-party proxy advisory firms.

The proxy advisory industry is dominated by two firms wielding what amounts to duopolistic influence: Glass Lewis and ISS. Together these firms control between 91-97 percent of the proxy advisory market.[128] Their rate of support for ESG policies even surpasses the most ardent backers of ESG in asset management, like BlackRock, State Street, Fidelity, and Capital Group.[129] This influence, combined with the aggressive promotion of ESG proposals (especially from ISS) is why some in the investment world and academia have begun to view these firms as a threat.[130] State attorneys general have threatened legal action against these two firms for allegedly breaching their duty to clients through their ESG-guided board director recommendations.[131] In a series of tweets, Elon Musk warned that these firms are "too powerful," arguing that "ISS and Glass Lewis effectively control the stock market."[132]

ISS is the more ESG-heavy of the two, having recommended 75 percent of Share Action's (a charity promoting responsible investing) list of environmental and social resolutions to asset managers.[133] Following this was Glass Lewis at 41 percent, and the top-four asset managers, each of which exhibited less than 30 percent support for the resolutions. The big four asset managers were described by Share Action as being relatively more conservative when deciding whether to adopt ESG-based proposals.

There may be some self-dealing here as both ISS and Glass Lewis's pro-ESG bent is largely tethered to its sale of ESG-based solutions and other products that provide analytical guidance. The firms' motive to advise companies on proper conduct relating to ESG investing runs parallel to their profit-seeking motive to sell products that reinforce the advisory services. The following quote from a Consumers Research report on the proxy advisory industry underscores the lack of independence and conflict of interest at play with this duopoly, as both firms operate as for-profit consultants and interested salesmen:

> *The value of these [ESG] products depend on companies continued commitment to environmental and social goals—a matter that ISS and Glass Lewis deal with directly in their proxy advisory services when they advise investors on how to vote on thousands of ESG-focused shareholder proposals. This gives ISS and Glass Lewis a financial motive to use their proxy advisory services to promote their ESG-related services.*[134]

In the Consumers Research report, the major asset managers with assets under management (AUMs) of over $5 trillion were found to be more prone to using a practice known as "robovoting," where recommendations by proxy advisors are accepted automatically. Robovoting delegates this responsibility to unaccountable third parties that possess no fiduciary duty to the asset managers' clients. This further removes investors from the shareholder review process, adding an additional wall of separation to prevent decision-making of their shares in a company. The investor cedes some of this authority to an asset firm, which then cedes all its voting rights to a proxy advisor on autopilot. This enables proxy advisors to advance their ESG agenda without due diligence from asset managers.

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128 Wayne Winegarden, "Empowering Shareholders Will Help Reduce The Undue Influence Of Proxy Advisory Firms," *Forbes*, February 2023, https://www.forbes.com/sites/waynewinegarden/2023/02/07/empowering-shareholders-will-help-reduce-proxy-advisory-firms-undue-influence/?sh=546cbc2f5ac2

129 Share Action, "Voting Matters 2022 Report", Share Action, 2022, https://shareaction.org/reports/voting-matters-2022/general-findings#figure3

130 Dan Daskal. "ISS and Other Proxy Advisory Firms' Conflicts of Interest: Analyzing the Insufficiency of New Securities and Exchange Commission Rules and Guidance," *Columbia Business Law Review, 2021*(3). https://doi.org/10.52214/cblr.v2021i3.9114

131 Hazel Bradford. "Republican attorneys general warn proxy advisory firms on ESG", Pensions & Investments, January 2023, https://www.pionline.com/esg/republican-attorneys-general-warn-proxy-advisory-firms-esg

132 Brian Evans. "Elon Musk says these shareholder advisors 'effectively control the stock market' and have too much power," Business Insider, January 2023, https://markets.businessinsider.com/news/stocks/elon-musk-iss-glass-lewis-control-stock-market-twitter-tesla-2023-1. See the Twitter thread here: https://twitter.com/elonmusk/status/1617728786136727556?cxt=HHwWiIDUidHwqfMsAAAA

133 Share Action, "Voting Matters 2022 Report."

134 Consumer's Research, "Defeating the ESG Attack on the American Free Enterprise System: An Overview of the Corporate Proxy System for Oversight & Litigation Efforts," February 2023, https://consumersresearch.org/documents/defeating-esg/, see pp. 19-20.

This is far from a best practice. Even Larry Fink, often criticized for his embrace of ESG policies, expressed opposition to overreliance on proxy advisory firms. In a 2023 letter to BlackRock clients, Fink wrote:

> *We believe that voting choice can empower more asset owners to have a deeper and more direct connection to the companies they are invested in and allow company management to better understand the views of these asset owners on critical governance issues.*
>
> *While proxy advisors have a role to play in this process, overreliance on outsourcing to proxy advisors risks distorting the relationship between asset owners and the companies they invest in.*[135]

A 2023 report by the American Accountability Foundation argues that Glass Lewis is incapable of generating impartial recommendations on shareholder voting given its consistent track record of advancing progressive ESG criteria in their recommendations. These ESG proposals include mandatory DEI trainings for corporations, corporate-paid abortions for employees, mandatory corporate greenhouse gas emission disclosures, and board diversity quotas.[136]

Many large asset managers can afford to manage their own proxy advisory services, by funding in-house research and casting votes on shareholder proposals. The mid-to-smaller firms with less capital are more likely to hire outside proxy advisory firms to manage these services. That creates a point of inflection that pushes both the corporate world and its regulators in a certain policy direction.

Proxy climate disclosure pressures

On the subject of this paper, Glass Lewis has consistently prioritized recommendations that support mandatory, rather than voluntary, climate-related disclosures. Glass Lewis has committed to issuing recommendations that demand more information on a company's climate change lobbying, climate reporting, and assurance of meeting GHG emission targets.[137] On the lobbying front, Glass Lewis pushes companies to use political expenditures in a manner that aligns with their stated environmental goals.

Glass Lewis believes that every company is obligated to address the issue of climate change, viewing it as a presumptively material risk. This of course ignores the unique set of circumstances and interests of each firm, many of which may not perceive any risk from climate change.[138] And Glass Lewis encourages companies to disclose their climate change mitigation strategies. The proxy firm's 2024 policy guidelines move in lockstep with the SEC's final rule, stating that the firm will tailor its recommendations toward board directors based on their oversight of climate risks. Translation: If directors fail to exercise "proper" oversight that aligns with requirements from the SEC's rule, Glass Lewis will recommend voting against them. The firm even examines whether climate risks have been codified into the corporate board committee charter, which is an expansion from the 2023 guidelines.[139]

Glass Lewis's recommendations are heavily predicated upon the standards set by international bodies that issue guidance on climate change. Glass Lewis tends to adopt a more aggressive approach than the SEC, requiring companies that recommend votes in line with management to make specific reductions to (rather than merely disclose the volume of) their GHG emissions. This more aggressive approach by Glass Lewis aligns with some of the arguments being raised by leftwing environmental groups like the NRDC and Sierra Club against the SEC's rule in court. They allege that the SEC hasn't gone "far enough" to compel corporations to mitigate the effects of climate change by curbing their activities. As explained earlier, if the SEC's rule survives, such groups will become the primary drivers of a new genre of litigation against certain companies for climate change inaction and

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135 Larry Fink, "The transformative power of choice in proxy voting," BlackRock, 2023, https://www.blackrock.com/corporate/about-us/investment-stewardship/blackrock-voting-choice/proxy-voting-power-of-choice

136 American Accountability Foundation, *Proxy Wars: Glass Lewis An Introduction to the Liberal Activists at the Proxy Advisory Firm Glass Lewis Who are Forcing Woke ESG Policies at American Companies*, July 2023, p. 2.

137 American Accountability Foundation, *Proxy Wars,* p. 12.

138 Ropes & Gray, "Glass Lewis releases 2024 updates to U.S. Benchmark Policy Guidelines – board oversight of ESG matters", November 28, 2023, https://www.ropesgray.com/en/insights/viewpoints/102itwh/glass-lewis-releases-2024-updates-to-u-s-benchmark-policy-guidelines-board-ove.

139 Glass Lewis, "2024 Benchmark Policy Guidelines," January 2024, https://www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf.

unsatisfactory disclosures. Glass Lewis inspires such activist sentiment in its reccomendations.

During the 2021 proxy season, Glass Lewis issued a total of 13 recommendations on climate change for public companies to consider, 10 being in favor of companies disclosing their climate lobbying, internal GHG emissions targets, production of plastic pollution, and climate reporting. It voted against the GHG targets of Conoco Philips, Chevron, and Bloomin' Brands. Many of Glass Lewis's recommendations across the ESG spectrum aligned with proposals initiated by the nonprofit organization As You Sow, which fashions itself "the nation's non-profit leader in shareholder advocacy."[140]

In 2022 alone, As You Sow submitted shareholder proposals catered to ESG initiatives to 79 different companies.[141] The proxy push for ESG was a convenient corporate backdrop while the SEC was soliciting comments on climate-related risks in 2021 and later proposed its climate rule in 2022. The SEC then seized on this high period of domestic enthusiasm for ESG in the midst of the pandemic.

Many leading asset firms have adopted Glass Lewis-endorsed shareholder proposals on GHG emissions. These were nearly as popular as the "Say on Climate Change" proposals, which Glass Lewis pushed in 2021.[142] These proposals ensure that companies hold an annual shareholder vote on their current climate change strategies. Examples of adoption include BlackRock CEO Larry Fink in his 2022 letter to CEOs advising "companies to [adopt] short-, medium-, and long-term targets for greenhouse gas reductions."[143] BlackRock has voted against board directors of companies like TransDigm for refusing to adopt sufficiently strict GHG targets. Voting against board members running for re-election is a common tactic used by large asset managers like BlackRock, which pressure companies into compliance with ESG proposals using their control of a firm's shares.

Glass Lewis is not alone in targeting board members over insufficient climate reporting, as ISS has also pledged to vote against board members for similar reasons. ISS directs companies to vote against its directors with the exception of businesses that provide "[d]etailed disclosure of climate-related risks" and have passed sufficient "Net-Zero-by-2050 [greenhouse gas emissions] reduction targets."[144]

Nearly every pro-ESG activist organization has promoted mandatory disclosures of corporate information as a basis for spurring activism on climate change. For example, As You Sow has emerged as a major proponent for companies to adopt Scope 3 emissions reporting, which requires companies to reveal GHG emissions produced by their value chain. Some shareholders have even agreed to drop climate change proposals to strike deals with companies to adopt internal climate reduction policies.[145]

Glass Lewis acknowledges that no mandatory disclosure proposal had ever received majority shareholder support prior to 2017. Before 2017, only 21 of these shareholder proposals have ever come to a vote, resulting in an average shareholder support level of 40 percent.[146] In 2017, three climate reporting proposals received over 50 percent support, followed by six additional proposals between 2018 and 2021 that also received majority support. This sudden interest in climate-related financial disclosures were largely influenced by the June 2017 recommendations issued through the Financial Stability Board's TCFD.[147]

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140 "About Us," AS YOU SOW, https://www.asyousow.org/about-us.

141 "About Us," AS YOU SOW.

142 Brianna Castro, Harrison Evans, and Julian Hamud, *Proxy Season Review 2021* (San Francisco, CA: Glass Lewis, 2021), https://acrobat.adobe.com/id/urn:aaid:sc:va6c2:61cb5d47-bb3b-4224-9267-f754a3e884c1, p. 44.

143 Larry Fink, *Larry Fink's 2022 Letter to CEOs*, BLACKROCK (2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter#:~:text=We%20believe%20the%20companies%20leading,a%20powerful%20catalyst%20for%20change. Specifically, see the following quote by Fink that endorses the TCFD's recommendations, "It's also why we ask you to issue reports consistent with the Task Force on Climate-related Financial Disclosures (TCFD): because we believe these are essential tools for understanding a company's ability to adapt for the future."

144 Consumer's Research, "Defeating the ESG Attack on the American Free Enterprise System," p. 12, with the report citing Ron S. Berenblat et al., "Racial Equity Audits: A New ESG Initiative," HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 30, 2021), https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative/.

145 Michael Copley, "Businesses face more and more pressure from investors to act on climate change," National Public Radio, April 2023, https://www.npr.org/2023/04/09/1168446621/businesses-face-more-and-more-pressure-from-investors-to-act-on-climate-change. See the following, "Last year, shareholders withdrew a record 110 proposals that were focused on climate change after they struck deals with companies," according to Ceres.

146 Castro, Evans, Hamud, *Proxy Season Review 2021*, p. 38.

147 Michael R. Bloomberg, "Recommendations of the Task Force on Climate-related Financial Disclosures," Task Force on Climate-Related Financial Disclosures, June 2017, https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf

These recommendations encouraged public companies to consistently make available climate disclosures that adhered to a standardized framework. The number of climate disclosure shareholder proposals remained low in 2018 (eight) and 2019 (seven), before spiking in volume in 2020 (17).[148]

Among the four mandatory climate disclosure proposals in 2020, two of these—Dollar Tree and J.B. Hunt Transport Services, Inc.—garnered majority approval. This was repeated during the 2021 season, when two similar proposals were accepted out of six in total. Regardless of the mixed corporate feelings toward these proposals, Glass Lewis pledged 100 percent support to mandatory climate disclosures in 2021, compared to only 59 percent in 2020, and 43 percent in 2019.

There appears to be an upward trend for Glass Lewis supporting ESG-focused proposals more vigorously over the past four years. Fueling the rise of environmental-based proposals in the proxy advisory process since the 2021 season is an unconventional measure imposed by the SEC. This little-known bulletin is called the "Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)." The bulletin's provisions made it simpler for shareholders to incorporate their political projects and subjective views for consideration by board members up for election into their proxy votes.[149] It represents one of the many informal guidance actions that independent agencies like the SEC release every year, often flying under the radar of the more publicly visible "notice and comment" rules promulgated under the terms of the APA.

This bulletin has made it far easier for politically motivated shareholders to advance ESG proposals for inclusion in annual proxy statements. Activists need only to have obtained a $2,000 stake in a firm and maintained this level of investment for three years to submit an unlimited number of ESG-based proposals. These tend to drown out shareholders who would prefer to focus on growth and profitability in the proxy process.[150] When looking to the social category of ESG, these proposals increased by 20 percent between 2020 and 2021, while environmental-based proposals rose by 51 percent. When looking to the 2022 season, ESG proposals accounted for the lion's share of topics, comprising 61 percent (212) of all proxy ballots. This was nearly twice as many as the 2021 season at 112, and 107 in 2020.[151]

Passage was a different story. Such proposals only garnered an average 25 percent margin of support among shareholders per ballot, leading to a mere 5 percent of these proposals passing.[152] Hype aside, three-fourths of shareholders have rejected these measures. Yet the proposals keep coming, because companies have effectively been stripped of one means of avoiding them.

The SEC's SLB 14L policy led to a major decline in companies issuing no-action letters, which would typically be reserved for the sort of ESG proposals that either lacked material relevance or was disconnected from the company's core operations. Prior to the SEC's intervention, no-action letters served as an important valve for dismissing waves of politically-motivated shareholder proposals.

Another matter of increased concern in 2022 is the direct targeting and vilification of board members by activist shareholders over their approach to ESG issues. According to the Glass Lewis report, "although voting against board members is a common way to express shareholder dissatisfaction regarding traditional corporate governance and compensation concerns, targeting directors for ESG matters is still a relatively new concept, but one that is growing in popularity."[153]

Activists target board members on the companies who have voted against initiatives such as adopting risk mitigation for climate change or embracing diversity hiring goals for the company. Spearheading the "vote-no" campaign is Majority Action, which implemented

148 Castro, Evans, Hamud, *Proxy Season Review 2021*, p. 39.

149 See Announcement, Division of Corporation Finance, Securities and Exchange Commission, Shareholder Proposals: Staff Legal Bulletin No. 14L (CF), November 2021, https://www.sec.gov/corpfin/staff-legal-bulletin-14lshareholder-proposals.

150 Republican ESG Working Group, "Preliminary Report on ESG Climate Related Financial Services Concerns," House Financial Services Committee, June 2023, https://financialservices.house.gov/uploadedfiles/hfsc_esg_working_group_memo_final.pdf

151 James R. Copland, Comment Letter to the SEC, September 2022, https://www.sec.gov/comments/s7-20- 22/s72022-20138931-308628.pdf.

152 Lawrence Cunningham, "Protecting Investor Interests: Examining Environmental and Social Policy in Financial Regulation," Hearing before the House Financial Services Committee, July 2023, https://www.youtube.com/watch?v=jGNTlD8cnXQ.

153 Glass Lewis, *Proxy Season Review Highlights: Spotlight on ESG*, 2022, p. 4, https://grow.glasslewis.com/hubfs/Proxy%20Season%20Highlights%20US%20ESG%20Spotlight.pdf.

campaigns against 20 companies last year, urging shareholders to vote against approximately 40 directors because of their ESG positions.[154] Most of these campaigns were targeting popular directors (average shareholder support of 91 percent) on the boards of energy giants like Chevron, Exxon, and Shell, which have consistently opposed wholesale ESG reforms. Despite growing in relevance, the rate of total shareholder pushback against directors has yet to get many scalps, with some of the largest no votes hovering around 20 percent shareholder support at annual meetings.

Glass Lewis has facilitated some of the vote-no campaigns as it relates to directors who remained opposed to the adoption of environmental disclosure mandates. Such policies would require board members to disclose information on what oversight is being conducted over a company's ostensible environmental and social risks. This form of board disclosure is becoming increasingly popular at firms that are part of the Russell 1000, where just over 88 percent of all companies listed provided disclosure of board oversight on environmental and social issues in 2022.[155] This marked a 31 percent increase from the previous year. Importantly, this campaign helped inspire the SEC's board oversight disclosure requirement in the proposed and final version of its climate rule.

One thing that had been missing from much of the activism was why this should matter to most investors. The view from Glass Lewis seems to be that board members who vote against such disclosures are threatening the value of their company's stock, which, before the SEC rule, simply wasn't the case.

"What proxy advisor reports don't provide is any evidence that these recommendations will maximize value," wrote state treasurers Marlo Oaks and Todd Russ in a *Wall Street Journal* op-ed. "For both the 2022 and 2023 annual meeting seasons, activists have introduced hundreds of shareholder resolutions demanding that companies sacrifice growth and competitiveness to pursue political agendas."[156]

Shareholders vs. robo-proxy voters

Alongside Glass Lewis in the proxy advisor duopoly stands proxy advisor ISS, the world's largest advisor on corporate governance, social responsibility, and sustainable investing strategies. Since 1985, ISS has primarily advised clients (investors and businesses) on how to obtain sustainable growth through their investments. The firm is majority owned by Germany-based Deutsche Bank, which is well known for its embrace of international ESG commitments.

Deutsche Bank itself has committed itself to a bold policy of diminishing its financed emissions of oil and gas companies by 23 percent by 2030 and 90 percent by 2050.[157] According to its website, the bank is "committed to supporting the sustainable transformation of our economy with the constant development of our ESG offerings. Reaching net zero climate neutrality by 2025 – 25 years ahead of the official target of the European Union – shows that sustainability is also part of our DNA as a company as we ambitiously lead the way."[158]

Additionally, Deutsche Bank refuses to provide service to clients who either are unwilling to or have not already decarbonized their investment portfolios. It should come as little surprise that ISS has employed similar policies when engaging with its clients and promoting its proxy recommendations. This also raises multiple conflicts of interests, since ISS is in the business of selling ESG products, while professing to provide neutral advice to its clients, at the same time its ESG research aligns with Deutsche Bank's sustainability commitments.[159] Like Glass Lewis, ISS's influence stretches across the world, with offices in 15 countries that cater to 3,400 clients. And similar to Glass Lewis, by default, ISS appears to support encouraging companies to adopt "ESG solutions" into their practices.

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154 Glass Lewis, *Proxy Season Review Highlights: Spotlight on ESG,* p. 5.

155 Glass Lewis, *Proxy Season Review Highlights: Spotlight on ESG,* p. 6.

156 Marlo Oaks; Todd Russ, "A Historic Breach of Fiduciary Duty," *Wall Street Journal*, May 2023, https://www.wsj.com/articles/a-historic-breach-of-fiduciary-duty-shareholder-proposals-proxy-adivsory-climate-43baa5ba?mod=opinion_lead_pos5.

157 Deutsche Bank Management Board, "Investor Resources on ESG," https://investor-relations.db.com/esg/.

158 Deutsche Bank, "Deutsche Bank to achieve Net Zero Carbon Neutrality by 2025," Press Release, 2022, https://www.db.com/news/detail/20221021-deutsche-bank-publishes-targets-for-carbon-footprint-reduction?language_id=1.

159 Derek Kreifels, "ESG cheerleaders are suddenly pivoting and running for cover," Fox News, August 2023, https://www.foxnews.com/opinion/esg-cheerleaders-suddenly-pivoting-running-cover.

ISS advertises itself as a neutral, independent aggregator of objective research for interested public companies. Instead, ISS selectively promotes data and analytics in favor of corporate ESG adoption.[160] On paper, ISS is a proxy advisor, but in practice, it is a proxy advocate, pushing a wholesale adoption across the thousands of companies it contracts with during the proxy season. ISS employees 610 people to service 1,100 clients across a broad range of services, including ESG scoring, ESG fund screening, advising on climate-related financial risks, and proxy advisory.[161]

	Environmental	Social	Governance
Number Voted	60	231	271
Number Passed	15	23	48
Passage Rate	25%	10%	18%

Rate of 2022 ESG shareholder proposals voted and passed.
Source: Harvard Law School Forum on Corporate Governance, "A Look Back at the 2022 Proxy Season".

According to ISS's 2022 Proxy Resolution Review, there have only been seven environmental proposals that pertain to the funding of new fossil fuel exploration by public companies in the US.[162] In its recent US Disclosures Trends Report, ISS boasts about its role in contributing to the increase in voluntary environmental and social disclosures among public corporations. Climate change was the chief environmental concern among proposed disclosures, as investors sought to establish a material interest for companies to reduce risks associated with climate change. ISS argues that there is a growing demand among stakeholders for corporate disclosure transparency, as regulators explore ways to impose strict climate reporting standards.

The evidence does not necessarily bear that out. When looking to ISS's 2022 review of environmental and social issues in proxy voting, ISS claims that the year saw a record number of shareholder proposals that were filed and taken up for a vote.[163] The number of ESG proposals receiving majority support was similar to those approvals in the 2021 season. Despite this, the overall margin for majority support across the approved proposals declined from the previous year and continued to drop in 2023.

ISS finds that climate change issues took precedence as the most frequently filed type of shareholder proposal, even when majority support was less than the year prior. In line with a recent study, it was discovered that among environmental reporting proposals, there was a notable trend of demands for companies to disclose their Scope 3 (value-chain produced) emissions reduction targets.[164] This is an example of policy alignment in the US reflecting the same ESG reporting standards pushed by international entities, particularly the IEA's Net Zero scenario, which encourages policymakers to set long term net zero targets.[165]

GHG reporting targets were the primary subject of environmental proposals submitted in both 2021 and 2022. According to the Rosati, et al. analysis, among the 75 GHG reporting proposals, 55 (73 percent) of these proposed the corporate adoption of Scope 3 disclosure. Only 18 of these proposals were ultimately taken up for a vote, while 36 were withdrawn.[166]

The 2023 proxy review season continued both upward and downward trends. Garnering 803 proposals for the Russell 3000, the year's proposal count was slightly higher than the previous record of 798 in 2021.[167]

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160 Will Hild, Tweet, March 20, 2024, Will Hild on X: "@ConsumersFirst If the proxy advisor duopoly is ever broken up (as it should be), this exchange will perfectly illustrate why. Investors outsource their governance decisions to 1 of 2 firms — and both firms have made it their mission to advance ESG using their duopoly power." / X (twitter.com)

161 ISS, "ISS ESG Solutions," https://www.issgovernance.com/about/about-iss/#1574276741161-7ca718d3-32ae.

162 Paul Hodgson, "Shareholder Resolutions in Review: Fossil Fuel Lending and Underwriting," January 2023, https://insights.issgovernance.com/posts/shareholder-resolutions-in-review-fossil-fuel-lending-and-underwriting/.

163 Institutional Shareholder Services, *United States ISS Governance 2022 Review Environmental and Social Issues*, March 2023, https://insights.issgovernance.com/posts/2022-review-united-states-environmental-social-issues-in-proxy-voting/.

164 Brigid Rosati, Kilian Moote, Rajeev Kumar, Michael Maiolo, "Harvard Law School Forum on Corporate Governance: A Look Back at the 2022 Proxy Season," October 2022, https://corpgov.law.harvard.edu/2022/10/23/a-look-back-at-the-2022-proxy-season/.

165 International Energy Agency, "Net Zero by 2050 - A Roadmap for the Global Energy Sector - Summary for Policy Makers," IEA, May 2021, https://iea.blob.core.windows.net/assets/7ebafc81-74ed-412b-9c60-5cc32c8396e4/NetZeroby2050-ARoadmapfortheGlobalEnergySector-SummaryforPolicyMakers_CORR.pdf.

166 Rosati, Moote, Kumar, and Maiolo, "A Look Back at the 2022 Proxy Season."

167 Paul Washington; Merel Spierings; "2023 Proxy Season: More Proposals, Lower Support", Harvard Law School Forum on Corporate Governance, June 2023, https://corpgov.law.harvard.edu/2023/06/01/2023-proxy-season-more-proposals-lower-support/.

But, while ESG proposals are gradually increasing, shareholder support for these is declining. Support for environmental-based measures dropped from 34 percent in 2022 to 21 percent in 2023. Climate-related proposals saw a yearly decline from 35 percent in 2022 to 22 percent in 2023.

What seems to be happening is that the patterns of direct-voting shareholders and the proxy-advised robovoters are diverging. The reason for this is that ESG-sensitive funds are not performing nearly as well as had been hoped. Markets are trying to correct, in other words, from an overemphasis on risks associated with climate change and a host of causes.

At the same time, regulatory agencies all over the world, including the SEC, are seeking to enact expensive and time-consuming reporting requirements that the proxy advisors have been pushing. This would likely lock in market failure on a large scale.

Conclusion

The SEC's final climate disclosure rule introduces a costly and legally complex hurdle for public companies to scale. The SEC's proposed regulatory framework incentivizes private firms to remain private, while pressuring public firms to outsource business to private partners as a means of reducing compliance costs associated with GHG reporting.

The SEC's endgame is to reduce corporate activities that produce GHG emissions, incentivize corporate sustainability, and undermine the discretion of corporate boards by forcing them to prioritize environmental matters in disclosure. Proxy advisory firms have shown a clear willingness to advance activist-inspired climate policy over profit maximization for shareholders. The SEC's rule will mandate much of what the proxy advisers have proposed, while emboldening their efforts to achieve widespread climate change reduction.

While the SEC claims to be acting in the public interest or the best interest of investors, data shows a sharp and growing decline among investor support for environmental and social proposals. This includes a rejection of many GHG reporting standards and climate-risk measures reflected in the SEC's climate rule requirements. The SEC's rule would conscript public companies to report on climate change risks in absence of market-based incentives. This is inappropriate, as less than 20 percent of reporting firms voluntarily disclose their GHG emissions.

American capital markets are already going through a rough patch, with IPO offerings down significantly. Though it is good that the SEC dialed back its climate reporting requirement, the end result was not nearly enough. The SEC should not be permitted to undermine viewpoint materiality through a rule that favors and incentivizes GHG reduction. If Congress and the courts allow this to take effect, the final climate disclosure rule will do great harm to public companies in America.

About the author

Stone Washington is a research fellow with the Competitive Enterprise Institute's Center for Advancing Capitalism. His research primarily focuses on financial developments in the securities market, ESG investing, and federal regulation of the economy. His writings have appeared in *The Wall Street Journal, National Review, Discourse Magazine, City Journal* and a number of other outlets. He holds a J.M. from Emory University in Atlanta, Georgia, and a B.A. in history from Clemson University in Clemson, South Carolina.

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