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A Future of Mandatory Environment, Social, and Governance (ESG) Disclosures: A Review of Public Comments as a Case Study in the Impact of ESG

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A FUTURE OF MANDATORY ENVIRONMENT, SOCIAL, AND GOVERNANCE (ESG) DISCLOSURES: A REVIEW OF PUBLIC COMMENTS AS A CASE STUDY IN THE IMPACT OF ESG

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INTRODUCTION

What does maximizing shareholder value mean in 2022? Historically, the role of the corporation has been to maximize profits to present the greatest financial return to shareholders.[1] Companies are vessels for profit—after all, is profit not really the endgame of the American Dream? In a May 2020 post on the Harvard Law School Forum on Corporate Governance, Martin Lipton, a founding partner of the renowned corporate law firm Wachtell, Lipton, Rosen & Katz, articulated corporate purpose as follows:

> The purpose of a corporation is to conduct a lawful, ethical, profitable and sustainable business in order to create value over the long-term, which requires consideration of the stakeholders that are critical to its success (shareholders, employees, customers, suppliers, creditors and communities), as determined by the corporation and the board of directors using its business judgment and with regular engagement with shareholders, who are essential partners in supporting the corporation's pursuit of this mission.[2]

[1] George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TULANE L. REV. 639, 648–49 (2021).

[2] Martin Lipton, William Savitt, & Karessa L. Cain, *On the Purpose of the Corporation*, HARVARD LAW

How, then, should we expect companies to act in the face of public pressure to appear aligned with social progress and sustainability, as opposed to good old-fashioned profitability? This Comment aims to answer this question in the context of corporate social responsibility (CSR) commitments and socially responsible investments. As this Comment highlights, the answer varies depending on who you ask, and such a divergence of thought has caused the market to initiate the emergence of sustainable investment standards-setters, companies, environmental groups, and regulators with wildly different solutions aimed at maximizing the traditional *and* emerging purpose of the American corporation as a champion for shareholders and social progress.

Environmental, social, and governance (ESG) criteria or metrics "are a "set of standards for a company's operations that socially conscious investors use to screen potential investments."[3] Such metrics allow socially conscious investors to evaluate how well or to what extent a company's operations consider the environmental, social, and governance-related impacts of their business.[4] Environmental criteria measure the extent a company has a positive or negative impact on the natural environment or how the company takes climate change and sustainability into consideration when conducting its business operations.[5] Social metrics examine how companies interact with the people they employ and the communities they operate in, including community impacts, its employees, and its customers.[6] Notably, social metrics include consideration of human capital management, or the idea that "workers can be viewed as 'assets' that are crucial to firm performance and that ought to be managed just as carefully as physical and financial assets."[7] Governance concerns the ethics of its internal operations from the top down, and considers factors like corporate leadership, executive compensation and ethics, and shareholder rights.[8]

Market forces, consumer demand, and investor demand have driven the implementation of corporate ESG initiatives, leaving companies with no option but to be more conscious about the way they do business. Investors use ESG

SCHOOL FORUM ON CORPORATE GOVERNANCE (May 27, 2020), https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation/#:~:text=The%20purpose%20of%20a%20corporation,and%20communities)%2C%20as%20determined%20by.

[3] *Environmental, Social, and Governance (ESG) Criteria*, INVESTOPEDIA (last updated Mar. 5, 2021), https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] George S. Georgiev, The "S" in ESG: Human Capital Management, THE CLS BLUE SKY BLOG (March 16, 2022), https://clsbluesky.law.columbia.edu/2022/03/16/the-s-in-esg-human-capital-management/.

[8] *Id.*

disclosures not only to determine a company's alignment with environmental and social progress, but also in part to measure the risk a given investment carries.

Many companies have moved to measure their success in several ESG criteria and have been proactive in disclosing their ESG indicators to the public to compete with a growing number of other future-oriented companies and investments.[9] A company or brand's actual or apparent consideration of environmental sustainability or social responsibility has become increasingly tied to its reputation and marketability. However, without any current legal duty or regulatory guidance as to what ESG measurements to consider and how to record and disclose them, companies are left to decide what to measure and disclose on their own. Further, such decisions, including materiality judgments, are expensive for companies to come by, as they must frequently respond to shareholder inquiries regarding ESG information.[10]

The Securities and Exchange Commission (SEC) has long indicated its plan to focus on ESG disclosure regulation, specifically climate change disclosures, including a company's greenhouse gas emissions and financial impacts of climate change.[11] This Comment was written before the SEC released its March 21, 2022 proposed rule changes for The Enhancement and Standardization of Climate-Related Disclosures for Investors[12] that would require registrants to "include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements."[13] This Comment primarily surveys public participation in response to the SEC's informal March 15, 2021 Request for Public Input (RFPI) on climate disclosures.[14] Responses

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9 Andrew Ramonas, SEC Eyes Phased Approach to Climate Reporting, Gensler Says, BLOOMBERG LAW (Oct. 5, 2021), https://news.bloomberglaw.com/esg/sec-eyes-phased-approach-to-climate-reporting-gensler-says.

10 *See* Georgiev, *supra* note i, at 720.

11 David A. Katz & Laura A. McIntosh, SEC Regulation of ESG Disclosures, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (May 28, 2021), https://corpgov.law.harvard.edu/2021/05/28/sec-regulation-of-esg-disclosures/.

12 The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042 & 34-94478 (proposed March 21, 2022) (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, and 249) https://www.sec.gov/rules/proposed/2022/33-11042.pdf.

13 Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (March 21, 2022), https://www.sec.gov/news/press-release/2022-46.

14 *See infra* note 74.

to the RFPI shaped the proposed rule, and they foreshadow what we can likely expect in response to the proposed rule.[15]

The business and environmental risks associated with climate change have caused investors and sustainability organizations to advocate for SEC attention to climate change disclosures specifically. While the market has sped ahead of regulators in terms of favoring ESG initiatives and demonstrating knowledge that certain ESG disclosures could very likely be required in due time, there has been less talk around certification frameworks companies can or will be required to use to ensure their disclosures are vetted and accurate.[16]

Climate disclosures are increasingly top of mind for companies and the public, as we have seen a recent and abrupt shift from some denying the reality of climate change (ExxonMobil undermined its involvement in and the public perception of climate change for decades)[17] or refusing to admit that humans are the cause of global temperature increase to even the largest fossil fuel companies on the planet vowing sustainability commitments (like ExxonMobil's 2022 announcement of its pledge to net zero by 2050).[18] Most important are greenhouse gas (GHG) emissions, as science shows that human-generated GHG emissions are the cause of global temperature rise, which contributes to global sea level rise—both of which are serious, existential threats to the way humans live and conduct business.[19] We know that industry is a major contributor to GHG emissions, and we know we need to decrease GHG emissions to work toward a sustainable use of resources on this planet. Investors are increasingly aware of the risk and uncertainty that climate change poses to the outcome of their investments, and companies are increasingly aware of the costs associated with continuing business as usual.[20] Proxy season showed an upward trend of shareholder proposals on environment and social issues—a trend the SEC has recognized and has stated it will consider when taking agency action.[21]

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[15] *Id*.

[16] See Amanda Iacone, SEC Eyes Inconsistent Outside Review of ESG Reporting, BLOOMBERG LAW (Dec. 6, 2021), https://news.bloomberglaw.com/daily-labor-report/sec-eyes-inconsistent-outside-review-of-esg-reporting?context=article-related.

[17] Geoffrey Supran & Naomi Oreskes, *Rhetoric and frame analysis of ExxonMobil's climate change communications*, Science Direct, ONE EARTH 696, 701 (May 21, 2021).

[18] Press Release, ExxonMobil, ExxonMobil announces ambition for net zero greenhouse gas emissions by 2050 (Jan. 18, 2022), https://corporate.exxonmobil.com/News/Newsroom/News-releases/2022/0118_ExxonMobil-announces-ambition-for-net-zero-greenhouse-gas-emissions-by-2050.

[19] SOURCES OF GREENHOUSE GAS EMISSIONS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Feb. 13, 2022).

[20] Melissa K. Scanlan, *Climate Risk is Investment Risk*, 36 J. ENV'T LAW AND LITIGATION 1 (2021).

[21] James Nani & Lydia Beyoud, Shareholders Up Climate, Social Demands After SEC Policy Shift, BLOOMBERG LAW (April 4, 2022), https://news.bloomberglaw.com/esg/shareholders-up-climate-social-demands-after-

The demand for corporate sustainability initiatives and sustainable investing has created a façade of heightened corporate scrutiny, and some companies look to play optical catch up in the fastest way possible. This has led firms to engage in "greenwashing" or displaying "proactive public signals, not backed by operational evidence, that a firm is engaging in sustainability practices."[22] Such "demand for ESG considerations in portfolio decision-making creates a potential conflict of interest (and misaligned incentive) for asset managers to 'deceptively endorse' sustainability principles . . . to attract capital flows, without ensuring ESG principles are reflected in investment decisions."[23]

Market demand for ESG initiatives and reports will only take us so far. To ensure that companies are genuinely considering the environmental and social impacts of their business and weighing the significance of their operations, we must see tangible actions that address investor concerns and align with social progress. This Comment argues that the SEC should require disclosure of material corporate climate risk information in public filings in its rulemaking on climate change disclosures and other ESG disclosures in the future to ensure transparency and incentivize climate-forward corporate accountability.

In addition to disclosing material corporate climate risk information, companies should also invest in third-party verifiers and accountants to ensure the accuracy of their ESG disclosures and voluntary CSR reports. Without stringent verification, companies run the risk of inaccurate disclosures and discrepancies between their disclosures, if mandated by future rulemaking, and values released in voluntary CSR reports—an issue which the SEC has already indicated it will pay close attention to, and a potential liability. Further, without standardization in measurement metrics, investors lose the ability to properly vet their ESG investments and compare ESG performance over time. This Comment provides examples of existing standardized disclosure frameworks and how those frameworks could interact with or fit into SEC rulemaking on climate disclosures.

This Comment features five Parts. Part I is about market demand for corporate social responsibility and corporate commitment to ESG initiatives. Part II discusses the history of ESG and provides a clear timeline of the SEC's action regarding ESG disclosure requirements.

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sec-policy-shift.

22 Dr. Ryan Clements, *Misaligned Incentives in Markets: Envisioning Finance That Benefits All of Society*, 19 DEPAUL BUS. & COMM. L.J. 1, 3 (2021).

23 *Id.*

Next, in Part III, this Comment analyzes public responses to the SEC's RFPI on climate disclosures by examining a breadth of public comments from Fortune 500 companies, major investment and asset managers, ESG metrics standards-setters, and others. The analysis aims to highlight diverging perspectives regarding things like what types of ESG disclosures the SEC should require, how disclosure requirements should be standardized, and whether the SEC should make such disclosures publicly available.

Part IV discusses critical perspectives on ESG initiatives and disclosure requirements, both from a perspective that the SEC's proposed disclosure requirements are too invasive and from the perspective that ESG is merely a marketing tool that does not really enhance corporate governance and social responsibility.

Finally, Part V discusses solutions for moving forward and how the comments received in response to the RFPI might substantively inform the Commission's rulemaking mandating ESG disclosures, even beyond the March 2022 proposed rule to standardize climate-related disclosures.

A. Delta Air Lines Case Study

Atlanta-based Delta Air Lines is one of the major airlines of the United States, and one of the most widely recognized airlines in the world. As a commercial airline, Delta's operations in its normal course of business rely on emitting tons of carbon dioxide into the atmosphere. However, in recent years, climate activists and consumers criticize global reliance on major commercial and private air travel because of inherent association with greenhouse gas emissions. Memorably, activist Greta Thunberg traveled across the Atlantic Ocean by sailboat to reach the U.N. Climate Summit in 2019, stoking an existing conversation in Sweden around flight shaming (or, *flygskam*), aiming to reduce global reliance on air travel.[24] Airlines had an inherent marketability problem, and Delta responded in February 2020 by announcing its plan to commit $1 billion over ten years to become carbon neutral.[25] The announcement was largely unexpected, as 2020 marked the first year that Delta released an ESG

[24] Jeremy Bogaisky, It's Trying Times for Greta Thunberg's Hometown Airline, FORBES (Sep. 30, 2019), https://www.forbes.com/sites/jeremybogaisky/2019/09/30/its-trying-times-for-greta-thunbergs-hometown-airline/?sh=1960e9637eaa.

[25] Press Release, Delta Air Lines, Delta Commits $1 billion to become first carbon neutral airline globally (Feb. 14, 2020), https://news.delta.com/delta-commits-1-billion-become-first-carbon-neutral-airline-globally.

report altogether (although the airline has released annual CSR reports since 2009).[26]

This Comment looks at Delta's ESG net zero pledge as a benchmark to illustrate how major companies are thinking about ESG in preparation for SEC rulemaking on mandatory climate disclosures, and how they have acted to satisfy market and investor demands in their past, present, and prospective future. Delta has also submitted a response to the SEC's RFPI regarding climate change disclosures, and this Comment will provide an overview of the views contained therein.[27]

I. MARKET DEMAND FOR ESG INITIATIVES, AND HOW THE MARKET HAS DEVELOPED ESG STRATEGIES OF ITS OWN, ABSENT REGULATION

In February 2021, Bloomberg Intelligence (BI) released an ESG investment analysis by BI Head of ESG and Thematic Investing EMEA Adeline Diab and BI Chief Equity Strategist Gina Martin Adams, which showed that global ESG assets are set to exceed $53 trillion by 2025, which would comprise over a third of the projected total assets for that year.[28] An article in the Harvard Business Review suggests that "[t]he number of companies filing . . . CSR . . . reports that use the GRI (Global Reporting Initiative standards—the most comprehensive ones available—has increased a hundredfold in the past two decades."[29] The increasing release of voluntary CSR reports illustrates companies' acknowledgement that investor demand for ESG information is here to stay. Further, the COVID-19 pandemic fundamentally changed the way many people interact with companies and investment opportunities and heightened the move toward increased ESG interest.[30] However, although demand for ESG-driven corporate governance policies have increased, regulation has not yet followed, which led

[26] Press Release, Delta Air Lines, Delta's ESG Report: Powering purpose-driven goals to be a catalyst for change (May 6, 2021), https://news.delta.com/deltas-esg-report-powering-purpose-driven-goals-be-catalyst-change.

[27] Peter W. Carter, Executive Vice President, Chief Legal Officer, & Corporate Secretary, Delta Air Lines, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 16, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8971396-245949.pdf.

[28] ESG Assets may hit $53 trillion by 2025, a third of global AUM, BLOOMBERG INTELLIGENCE (Feb. 23, 2021) https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/.

[29] Kenneth P. Pucker, Overselling Sustainability Reporting, HARVARD BUSINESS REVIEW (May–June 2021), https://hbr.org/2021/05/overselling-sustainability-reporting.

[30] Demand for ESG Investments Soars Emerging from COVID-19 Pandemic, INVESTOPEDIA (July 21, 2021), https://www.investopedia.com/demand-for-esg-investments-soars-emerging-from-covid-19-pandemic-5193532.

the SEC to take a hard look at whether and how ESG metrics, beginning with climate risk disclosures, should be accounted for and disclosed by companies.

One of the major concerns of corporations is that the prospective rulemaking would require climate disclosures as part of annual 10-K or quarterly 10-Q filings with the SEC, as such filings are available to the public. Some companies suggest they *furnish* the SEC with their climate disclosures rather than include them in public filings, to limit liability for inaccurate or mistaken reporting. A 10-K filing "is a comprehensive report filed by a publicly-traded company about its financial performance and is required by the [SEC]."[31] A 10-K includes information beyond the scope of a company's annual report, and its purpose is to "keep investors aware of a company's financial condition and to allow them to have enough information before they buy or sell shares in the corporation, or before investing in the firm's corporate bonds."[32] Most important for investors, the 10-K outlines "any and all risks that the company faces or may face in the future," and the forms are readily and easily available and accessible to the public, often through a company's website.[33] Note that federal regulations "prohibit companies from making materially false or misleading statements [or] from omitting material information that is needed to make the disclosure not misleading" in 10-K filings.[34]

Absent concrete regulation, many companies have moved to align their disclosures with standards set by third-party organizations specializing in ESG values disclosures, like the Sustainability Accounting Standards Board (SASB), and recommendations by the Task Force on Climate-related Financial Disclosures (TCFD).[35]

SASB is "an independent, nonprofit organization established in 2011 to set standards for companies to use when disclosing "sustainability" or "ESG" . . . information to investors and other providers of financial capital."[36] The standards-setter has developed metrics for 77 different industries to identify

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[31] *10-K*, INVESTOPEDIA (last updated Mar. 16, 2020), https://www.investopedia.com/terms/1/10-k.asp.

[32] *Id.*

[33] *Id.*

[34] HOW TO READ A 10-K/10-Q, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/fast-answers/answersreada10khtm.html (last visited Feb. 13, 2022).

[35] TCFD REPORTING, S&P GLOBAL, https://www.spglobal.com/esg/solutions/tcfd-reporting?utm_source=google&utm_medium=cpc&utm_campaign=TCFD_Search&utm_term=tcfd&utm_content=534418150455&gclid=CjwKCAiA9aKQBhBREiwAyGP5laaKvdU9mmzaO-VaMCswVUuFfqQtWV6-lt2uDRFjb3-aTJofnQ5k3BoCc2kQAvD_BwE (last visited Feb. 13, 2022).

[36] Janine Guillot, Chief Executive Officer, Sustainability Accounting Standards Board, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (May 19, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8819945-238161.pdf.

which climate disclosures and sustainability risks are "reasonably likely to materially affect the financial condition, operating performance, or risk profile of a typical company within an industry."[37] Like SASB, the TCFD is a widely-accepted authority on climate disclosure frameworks, and the SASB Standards complement TCFD recommendations.

For example, both the TCFD framework and SASB Standards recognize that climate-related financial disclosure "should contain both qualitative disclosures and quantitative metrics."[38] Qualitative information "provides essential context to investors, helping them more fully understand the company's current position, future prospects, and the relevant circumstances under which performance has been achieved."[39] Examples of qualitative information include less tangible aspects of business, like goodwill. Quantitative metrics "shed light on the effectiveness of a company's governance practices, its strategy, its approach to risk management, and its progress toward key performance targets."[40] Examples of quantitative metrics include measurement of a company's GHG emissions, which can trend more broad or more narrow depending on which measurement metric is used. For example, the GHG Protocol, which is the most widely-used international tool for accounting and categorizing GHG emissions, categorizes GHG emissions into three scopes: Scope 1 includes a company's fuel combustion, Scope 2 encompasses emissions generated by a company's purchase and use of power, and Scope 3 covers "all other indirect emissions that occur in a company's value chain."[41]

II. FORMER, CURRENT, AND FUTURE TIMELINE FOR SEC-MANDATED CLIMATE RISK AND OTHER ESG DISCLOSURE REGULATION

A. *Where ESG Fits in the Corporate Governance World: ExxonMobil Shareholder Litigation*

In November 2016, ExxonMobil Corp. (Exxon) investors filed a class action against the company and three Exxon officers alleging that the company's

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[37] *Id.*, citing Proposed Changes to the SASB Conceptual Framework & Rules of Procedure – Bases for Conclusions & Invitation to Comment on Exposure Drafts, SASB (Aug. 28, 2020).

[38] HOW DO SASB STANDARDS COMPLEMENT THE TCFD RECOMMENDATIONS?, VALUE REPORTING FOUNDATION, SASB STANDARDS, https://help.sasb.org/hc/en-us/articles/360059913732-How-do-SASB-Standards-complement-the-TCFD-recommendations- (last visited Feb. 13, 2022).

[39] *Id.*

[40] *Id.*

[41] BRIEFING: WHAT ARE SCOPE 3 EMISSIONS?, CARBON TRUST, https://www.carbontrust.com/resources/briefing-what-are-scope-3-emissions (last visited Feb. 13, 2022).

failure to disclose climate risks amounted to securities fraud.[42] In that case, the plaintiffs accused Exxon of making materially false and misleading public statements during an eight-month period in 2016 for failing to disclose information from internal reports that showed the company's knowledge of adverse impacts to the company as a direct result of risk associated with climate change.[43] The plaintiffs alleged that such positive misleading public statements artificially inflated Exxon's common stock price, which eventually led to investors' monetary loss when the stock dropped in value following the company's announcements of "the results for its third quarter of 2016, disclosing it may be forced to de-book almost 20% of its oil and gas reserves . . . the biggest accounting revision of reserves in ExxonMobil's history."[44]

Under federal securities laws, plaintiffs initiating a private action for securities fraud based on an allegation that the defendant either "made an untrue statement of material fact" or "omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading," must specify in the complaint "each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed."[45]

In Exxon, in the United States District Court for the Northern District of Texas found in favor of the plaintiffs and held that Exxon had made material misstatements concerning the financial impacts of climate risk in violation of the Securities Exchange Act.[46] The case shows that climate risk can fall under the category of material information that could impact a company and that an investor would likely find important when making investment decisions.

B. SEC Timeline Regarding ESG Disclosures

The origins of investor demand for socially responsible investments and consumer demand for ethical and transparent business practices are difficult to trace back to any single event or era. Some have suggested that the concept of responsible business dealings has faith-based origins. For example, some suggest the concept of transacting business in a socially responsible way can be

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[42] *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832 (N.D. Tex. 2018).
[43] *Id.* at 840.
[44] *Id.* at 858.
[45] 15 U.S.C. § 78u-4(b)(1).
[46] *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832, 859–60 (N.D. Tex. 2018).

traced back to the ethical foundations of Islam and found in Hadith—the writings detailing the deeds and sayings of the Prophet Muhammad.[47] Further, the founder of the Methodist Church, John Wesley, "called on his followers to avoid profiting from businesses harmful to one's neighbors" in an eighteenth-century sermon.[48] Some suggest the concept of transacting business in a socially responsible way can be traced back to the ethical foundations of Islam and found in Hadith—the writings detailing the deeds and sayings of the Prophet Muhammad.[49] Sustainable investing has grown and evolved dramatically over centuries, but according to MSCI, Inc., the largest ESG rating company, "[t]he practice of ESG investing began in the 1960s as socially responsible investing, with investors excluding stocks or entire industries from their portfolios based on business activities such as tobacco production or involvement in the South African apartheid regime."[50]

Such an evolution has prompted scrutiny over the general lack of regulatory guidance on ESG, but in 2010, the SEC issued interpretive guidance suggesting that a registrant's disclosure of climate risk factors might be required in certain circumstances.[51] The SEC's actions marked the Commission's first indication that it was considering how climate change risk could apply to existing disclosure requirements.[52]

Regarding a company's potential disclosure requirements, the 2010 guidance suggested that companies should:

1. "[C]onsider whether the impact of certain existing laws and regulations regarding climate change is material";
2. "[C]onsider and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change";

[47] Dr. Mohamed Ramady, ESG: Deeply rooted in Islamic economics and ethics, ARAB NEWS (July 31, 2021), https://www.arabnews.com/node/1903011.

[48] Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381 (2020).

[49] Dr. Mohamed Ramady, ESG: Deeply rooted in Islamic economics and ethics, ARAB NEWS (July 31, 2021), https://www.arabnews.com/node/1903011.

[50] The Evolution of ESG Investing, MSCI, https://www.msci.com/esg-101-what-is-esg/evolution-of-esg-investing#:~:text=The%20practice%20of%20ESG%20investing,the%20South%20African%20apartheid%20regime (last visited Feb. 13, 2022).

[51] SEC, Commission Guidance Regarding Disclosures Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010).

[52] *Id.*

3. "[C]onsider, for disclosure purposes, the actual or potential indirect consequences it may face due to climate change related regulatory or business trends"; and

4. "[E]valuate for disclosure purposes the actual and potential material impacts of environmental matters on their business."[53]

However, the 2010 guidance was not quite effective, in part because of its reliance on principles-based materiality.[54] In the years following 2010 guidance, and prior to the Commission's action on ESG disclosures in the Biden era, the SEC took little official action toward exploring what mandatory climate risk disclosure rules could look like. After 2010, companies began gathering and loosely reporting information pertaining to climate change risks material to their operation, typically by providing such information in voluntary CSR reports. Following the inauguration, the Biden Administration announced that sustainability issues were at the forefront of its regulatory agenda, prompting the SEC to take official action.

On February 24, 2021, then SEC Acting Chair Allison Herren Lee issued a statement directing the Division of Corporation Finance "to enhance its focus on climate-related disclosure in public company filings."[55] The following week, on March 3, the SEC's Division of Examinations announced its Examination Priorities for 2021, which included enhanced vigilance and "consideration of [ESG] matters in light of market developments and increasing awareness" in the space, and prioritization of "emerging risks, including those relating to climate and ESG[.]"[56] The next day, the SEC announced the creation of a 22-member Climate and ESG Task Force in the SEC's Division of Enforcement, signaling increased scrutiny "on climate and ESG-related disclosure and investment," and vowing to "develop initiatives to proactively identify ESG-related misconduct."[57]

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[53] Press Release, SEC, SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change (Jan. 27, 2010), https://www.sec.gov/news/press/2010/2010-15.htm.

[54] George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602, 662–64 (2017).

[55] Statement, Allison Herren Lee, Acting Chair, SEC, Statement on the Review of Climate-Related Disclosure (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure.

[56] *2021 Examination Priorities*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/files/2021-exam-priorities.pdf.

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

In his March 2, 2021 nomination hearing before the Senate Committee on Banking, Housing, and Urban Affairs, current SEC Chair Gary Gensler signaled, consistent with SEC indications prior to Gensler's confirmation, that ESG disclosure regulation will be top of mind for the Commission, starting with climate change disclosures.[58] In his nomination hearing, Gensler testified that "investors are looking for consistent, comparable, and decision-useful disclosures around climate risk, human capital, and cybersecurity," adding that "[c]ompanies and investors alike would benefit from clear rules of the road" as it pertains to disclosure requirements.[59]

On March 15, Lee delivered a speech at the Center for American Progress to address the SEC's increased interest in ESG, citing "the magnitude of the shift in investor focus . . . toward the analysis and use of climate and other ESG risks and impacts in investment decision-making."[60]

Lee concurrently issued a statement welcoming public input on climate change disclosures as a prelude to SEC rulemaking.[61] The statement cited dramatic growth in "investor demand for, and company disclosure of information about, climate change risks, impacts, and opportunities," and concern over whether the current disclosure requirements adequately inform investors.[62] Lee requested input regarding, for example, how the Commission could "best regulate, monitor, review, and guide climate change disclosures in order to provide more consistent, comparable, and reliable information for investors while also providing greater clarity to registrants as to what is expected of them," and "the advantages and disadvantages of developing a single set of global standards applicable to companies around the world . . . versus multiple standard setters and standards[.]"[63]

The SEC's focus on ESG was only intensified by President Biden's May 20, 2021, Executive Order on Climate-Related Financial Risk, which declared that

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[58] Nomination Hearing, Gary Gensler and The Honorable Rohit Chopra, Before the Senate Comm. on Banking, Housing, and Urban Affairs 117th Cong. (March 2, 2021), https://www.banking.senate.gov/hearings/02/22/2021/nomination-hearing.

[59] Testimony, Gary Gensler, SEC Chair, Testimony Before the United States Senate Committee on Banking, Housing and Urban Affairs (Sept. 14, 2021), https://www.sec.gov/news/testimony/gensler-2021-09-14.

[60] Speech, Allison Herren Lee, Acting Chair, SEC, A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC (March 15, 2021), https://www.sec.gov/news/speech/lee-climate-change.

[61] Statement, Allison Herren Lee, Acting Chair, SEC, Public Input Welcomed on Climate Change Disclosures (March 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[62] *Id.*

[63] *Id.*

he viewed it as a responsibility of his Administration "to advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk."[64]

In his September 1, 2021, remarks before the European Parliament Committee on Economic and Monetary Affairs, Gensler alluded that the Commission was paying attention to corporate greenwashing, stating that he had "directed staff to review current practices and consider recommendations about whether fund managers should disclose the criteria and underlying data they use" to "brand themselves as 'green,' 'sustainable,' 'low-carbon,' and so on."[65]

Notably, the SEC included "[d]isclosure relating to climate risk, human capital, including workforce diversity and corporate board diversity, and cybersecurity risk" in its Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions.[66] The Climate Change Disclosure remained on the Commission's Fall 2021 agenda, noting that the SEC's Division of Corporation Finance was "considering recommending that the Commission propose rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities."[67]

On September 22, 2021, the SEC's Division of Corporation Finance released a sample letter to companies regarding climate change disclosures, stating that "information related to climate change-related risks and opportunities may be required in disclosures related to a company's description of business, legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations."[68] In light of that potential requirement, the letter prepared companies to answer questions regarding things like discrepancies in information between a company's voluntary CSR report and

[64] White House Briefing Room Fact Sheet: President Biden Directs Agencies to Analyze and Mitigate the Risk Climate Change Poses to Homeowners and Consumers, Businesses and Workers, and the Financial System and the Federal Government Itself (May 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/20/fact-sheet-president-biden-directs-agencies-to-analyze-and-mitigate-the-risk-climate-change-poses-to-homeowners-and-consumers-businesses-and-workers-and-the-financial-system-and-federal-government/.

[65] Speech, Gary Gensler, SEC Chair, Remarks before the European Parliament Committee on Economic and Monetary Affairs (Sept. 1, 2021), https://www.sec.gov/news/speech/gensler-remarks-european-parliament-090121.

[66] Press Release, SEC, SEC Announces Annual Regulatory Agenda (June 11, 2021) https://www.sec.gov/news/press-release/2021-99.

[67] *Id.*

[68] Sample Letter to Companies Regarding Climate Change Disclosures, U.S. Securities and Exchange Commission, https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures (last visited Feb. 13, 2022).

SEC filings, a company's "material litigation risks related to climate change," and capital expenditures for climate-related projects.[69]

In summary, the SEC issued its proposed rule that would mandate certain climate risk disclosures over a year after it first loosely requested public input on the issue. It seems a long time coming, but the Commission has had to weigh input from environmental advocates and socially responsible investors with that of corporate interests.[70] On one side, activists stress the need for companies to disclose their own greenhouse gas emissions *and* those generated by their suppliers.[71] On the other side, corporate groups seek a narrow rule to limit corporate liability for inaccurate disclosures and decrease costs spent in preparing and reporting emissions data.[72]

III. RESPONSES TO THE SEC'S RFPI

Lee's March 15, 2021, RFPI asked that comments be submitted within 90 days of the date of the statement, which would have been June 13, 2021, but the SEC has continued to receive and publish public comments to the RFPI, even into April 2022.[73] Comments responsive to the *proposed rule* should be received on or before May 20, 2022.[74] The release of the proposed rule has caused another influx of public comments on the webpage for comments responding to the RFPI.[75] The SEC received over 700 unique comments on climate change disclosures in total; 422 of those were submitted on or before the RFPI deadline for review.[76]

The comments received spanned thousands of pages and included a breadth of perspectives and depth of evidence and information. Companies, environmental groups, and sustainable investment activists responded with detailed information regarding both the corporate burden and potential

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69 *Id.*

70 Katanga Johnson, Companies worry U.S. SEC climate rule may require broad emissions disclosures, REUTERS (Jan. 19, 2022), https://www.reuters.com/markets/commodities/companies-worry-us-sec-climate-rule-may-require-broad-emissions-disclosures-2022-01-19/.

71 *Id.*

72 *Id.*

73 Comments on Climate Change Disclosures, U.S. Securities and Exchange Commission, https://www.sec.gov/comments/climate-disclosure/cll12.htm (last visited April 6, 2022).

74 The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042 & 34-94478 (proposed March 21, 2022) (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, and 249) https://www.sec.gov/rules/proposed/2022/33-11042.pdf.

75 Comments on Climate Change Disclosures, U.S. Securities and Exchange Commission, https://www.sec.gov/comments/climate-disclosure/cll12.htm (last visited April 6, 2022).

76 *Id.*

environmental and investor impact of mandatory climate change disclosures. Multiple policy analysts for the Heritage Foundation, a well-known conservative think tank and advocate of "free enterprise" and "limited government" submitted comments criticizing the SEC's move toward climate change disclosures altogether.[77] Such a massive interest in the RFPI indicates the likelihood of extensive response to the proposed rule, as the SEC has now elevated its disclosure aspirations to a formal proposal, initiating notice-and-comment rulemaking on the issue.

Under the Administrative Procedure Act (APA), notice-and-comment rulemaking requires agencies to give the public notice of impending agency action and the opportunity to participate by providing feedback.[78] Agencies must then consider the feedback received and incorporate into their adopted rules a concise statement of their basis and purpose.[79] However, the APA section on public rulemaking proceedings initiated by agencies explicitly excepts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from APA rulemaking guidelines.[80]

With respect to the APA, the SEC's RFPI was just that; the Commission had no duty to consider and respond to comments at the RFPI stage as they will during notice-and-comment rulemaking. Comments received in response to the RFPI and excerpted below were only considered by the SEC as an overview of the many issues to consider before they introduced the proposed rule; however, they do reflect a basis for the SEC's new proposed rule, and they indicate how the proposed rule might change before becoming an official agency directive to public companies.

A. SEC Letter Type Responses

In addition to unique comments, the SEC received over 5,800 submissions of any of the four form letter type comments from individuals and entities whose identities were not published on the SEC's website.[81]

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[77] David R. Burton, Senior Fellow in Economic Policy, The Heritage Foundation, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 13, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8914466-244728.pdf; Katie Tubb, Senior Policy Analyst, Energy and Environment, The Heritage Foundation, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8907322-244259.pdf.

[78] 5 U.S.C. § 553(c).

[79] *Id.*

[80] 5 U.S.C. § 553(b).

[81] Comments on Climate Change Disclosures, U.S. Securities and Exchange Commission, https://www.sec.gov/comments/climate-disclosure/cll12.htm (last visited Feb. 13, 2022).

1. *Letter Type A*

Letter type A suggests that climate change disclosures be required, standardized, and certified to help reduce corporate climate impacts:

> I request that disclosure requirements be streamlined to follow verified scientific methods shown to reduce a brand's climate impact, such as the standards set forth by the Science Based Targets initiative, in an effort to make measuring a company's disclosure consistent and simple to understand for consumers and investors.[82]

2. *Letter Type B*

Letter Type B advocates for expanded corporate CSR reports and mandated disclosures to encourage corporate transparency:

> The Securities and Exchange Commission should require that corporate managers be more transparent with shareholders regarding their long-term plans. When I think about where to invest my money, I want to know which companies are serious about a just, green future. It is the SEC's job to keep corporations from hiding their contribution to the climate crisis and environmental destruction or from lying to the public about their role. Corporations also need to be honest about what they're doing to stop climate change and how they are planning for a future affected by an accelerating climate crisis.[83]

3. *Letter Type C*

Letter Type C encourages SEC rules mandating climate change disclosures, including disclosures regarding a company's suppliers' greenhouse gas emissions:

> Climate change poses potentially catastrophic risks to the environment, communities, and the financial system. As a result, it is vital for you to require climate-related disclosures in order to meet the SEC's mandate to protect investors; ensure fair, orderly, and efficient markets; and facilitate capital formation.[84]

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[82] Letter Type A, Comments on Climate Change Disclosures, U.S. Securities and Exchange Commission, https://www.sec.gov/comments/climate-disclosure/cll12-lettertype-a.htm last visited Feb. 13, 2022).

[83] Letter Type B, Comments on Climate Change Disclosures, U.S. Securities and Exchange Commission, https://www.sec.gov/comments/climate-disclosure/cll12-lettertype-b.htm last visited Feb. 13, 2022).

[84] Letter Type C, Comments on Climate Change Disclosures, U.S. Securities and Exchange Commission, https://www.sec.gov/comments/climate-disclosure/cll12-lettertype-c.htm last visited Feb. 13, 2022).

4. *Letter Type D*

Letter Type D reflects a desire for corporate climate change disclosures as well as increased scrutiny of other corporate ESG initiatives:

> The SEC should require companies and banks to reveal information about their climate risks, contribution to climate change (including total direct and indirect greenhouse gas emissions), and other sustainability issues like fair treatment of workers and communities, diversity, equity, and inclusion, environmental and economic benefits and harms, and political spending.[85]

B. *Public Comments Received in Response to SEC's RFPI Regarding Climate Change Disclosures*

1. *Corporations*

a. *Alphabet Inc., Amazon.com Inc., Autodesk, Inc., eBay Inc., Facebook, Inc., Intel Corporation and Salesforce.com, Inc.*[86]

Some of the largest leading American tech and e-commerce companies, including Alphabet Inc., Amazon.com Inc., Autodesk, Inc., eBay Inc., Facebook, Inc., Intel Corporation and Salesforce.com, Inc., issued a joint letter in response to the RFPI, acknowledging the need for mandatory corporate climate disclosures, but warned against requiring such disclosures in annual, quarterly, and other documents filed with the SEC.[87] The letter states: "Given that climate disclosures rely on estimates and assumptions that involve inherent uncertainty, it is important not to subject companies to undue liability, including from private parties."[88]

The letter also called for "a principles-based framework, guided by SEC's longstanding definition of materiality, and designed for climate reporting."[89] The companies called for the adherence to a disclosure framework such as that

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[85] Letter Type D, Comments on Climate Change Disclosures, U.S. Securities and Exchange Commission, https://www.sec.gov/comments/climate-disclosure/cll12-lettertype-d.htm last visited Feb. 13, 2022).

[86] Alphabet Inc., Amazon.com Inc., Autodesk, Inc., eBay Inc., Facebook, Inc., Intel Corporation and Salesforce.com, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8907252-244227.pdf.

[87] *Id.*

[88] *Id.*

[89] *Id.*

employed by the Task Force on Climate-Related Financial Disclosures (TCFD) to accommodate potential disclosures from companies across many industries.[90]

b. Chevron[91]

In 2021, Chevron ranked 27 in the Fortune 500 list of top U.S. companies by revenue and is one of the largest oil companies in the world.[92] In response to the SEC's RFPI, Chevron submitted a five-page letter stating it "supports efforts to enhance the consistency and comparability of climate-related information," noting that it has reported its U.S. greenhouse gas emissions to the EPA since 2011.[93]

The letter asks for the SEC's flexibility in rulemaking, and specifically requests a phased approach to climate change disclosure requirements, and "measures to appropriately address liability considerations, such as safe harbor protections and allowing the information to be furnished, and not filed, for purposes of the Securities Exchange Act of 1934."[94]

c. Delta[95]

In its letter, Delta states that it supports "the Commission's ongoing efforts to address decision-useful climate change disclosure," and adds that its 2020 inaugural voluntary ESG report came about after "more than 200 calls with investors" and responses to "more than 100 other shareholder inquiries" regarding the company's sustainability matters, signaling heightened investor interest in ESG reporting.[96]

Consistent with many other corporate responses to the RFPI, Delta acknowledged that "clear, transparent communication of important information

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[90] *Id.*

[91] David A. Inchausti, Vice President and Controller, Chevron Corporation, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906904-244215.pdf.

[92] Chevron, Fortune, https://fortune.com/company/chevron/fortune500/ (last visited Feb. 13, 2022).

[93] David A. Inchausti, Vice President and Controller, Chevron Corporation, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906904-244215.pdf.

[94] *Id.*

[95] Peter W. Carter, Executive Vice President, Chief Legal Officer, & Corporate Secretary, Delta Air Lines, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 16, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8971396-245949.pdf.

[96] Peter W. Carter, Executive Vice President, Chief Legal Officer, & Corporate Secretary, Delta Air Lines, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 16, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8971396-245949.pdf.

about [its] climate change efforts is valued by [its] investors," but encouraged the Commission to allow companies to *furnish* their climate-change metrics to the SEC rather than make the metrics available in public filings.[97] Further, Delta requested a liability safe harbor for climate change metrics, "given inherent calculation difficulties and the rapid pace at which climate change analyses and disclosures have developed."[98] Finally, the letter added that "a disclosure framework that incorporates existing standards (subject to financial materiality considerations . . .) . . . that have been thoroughly vetted and are widely accepted by both public companies and their investors . . . could enhance the consistency, comparability, and reliability of climate change disclosure."[99]

The letter states that by adhering to a standardized, widely adopted disclosure framework, companies can reduce the cost burden of gathering and reporting climate disclosure information by using the same metrics, like those employed by the Sustainability Accounting Standards Board (SASB) and the TCFD, across the board.[100]

d. Walmart[101]

Walmart is the largest company in the world by revenue, ranking number one on the Fortune 500 list of top corporations in 2021.[102] The company has reported climate-related information for 15 years, according to its letter in response to the RFPI, and Walmart representatives have met with SEC officials in the Division of Corporation Finance at least twice to discuss climate change disclosures, according to memoranda available on the SEC website.[103]

Straying from the tone of the corporate comments *requesting* that climate metrics be furnished rather than filed, Walmart's letter states with confidence the company's belief that ESG reporting "will continue to be reported outside filings under the federal securities laws for a number of years to come because its relevance and materiality are not universal or well-established."[104] The letter

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97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 Walmart, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8911753-244396.pdf.

102 Walmart, Fortune, https://fortune.com/company/walmart/#:~:text=Walmart%20is%20the%20world's%20largest,grocery%20stores%20in%2024%20countries (last accessed Feb. 13, 2022).

103 Comments on Climate Change Disclosures, U.S. Securities and Exchange Commission, https://www.sec.gov/comments/climate-disclosure/cll12.htm (last visited Feb. 13, 2022).

104 Walmart, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8911753-244396.pdf.

suggests that allowing metrics to be furnished rather than filed will allow companies to adjust to ESG disclosure requirements free from liability and pave the way "for potential future integration of ESG information into . . . filings as appropriate."[105]

The letter also states that several potential climate-change impacts may be relevant and material to the business of companies, though which factor "is most financially relevant or material for a company [for disclosure purposes] depends on that company's industry, business model, strategy, and other factors."[106] Because of potential differences, Walmart supports the Commission adhering to a "principles-based disclosure" model, like those employed by the SASB and Global Reporting Initiative (GRI).[107]

2. *Investment Managers*

a. *BlackRock*[108]

BlackRock is the world's largest investment and asset management corporation, with a portfolio of nearly $10 trillion in assets.[109] In 2022, BlackRock Chairman and CEO Larry Fink released his "2022 Letter to CEOs" on "The Power of Capitalism."[110] In his letter, Fink described the shift toward stakeholders' expectation that "companies play a role in decarbonizing the global economy."[111] Further, Fink explained, climate risk and investment risk go hand in hand, and companies must make sustainability and net zero commitments in order to compete.[112] Regarding BlackRock, Fink noted: "We focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients."[113]

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105 *Id.*

106 *Id.*

107 *Id.*

108 BlackRock, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906794-244146.pdf.

109 Dawn Lim, BlackRock Closes In on the Once Unthinkable, $10 Trillion in Assets, THE WALL STREET JOURNAL (July 14, 2021), https://www.wsj.com/articles/blackrock-now-has-close-to-10-trillion-under-management-11626259550.

110 Larry Fink, Chairman and Chief Executive Officer, BlackRock, Larry Fink's 2022 Letter to CEOS: The Power of Capitalism, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter (last accessed Feb. 13, 2022).

111 *Id.*

112 *Id.*

113 *Id.*

In its comment letter to the SEC, BlackRock asserted that "it is essential to work towards a single, globally applicable, mandatory disclosure framework and set of standards [for disclosures] . . . aligned with the TCFD framework and sector-specific metrics."[114] The asset manager also suggested ramping up disclosure metrics over time and emphasized the importance of both qualitative and quantitative reporting.[115] BlackRock supported a disclosure framework that would provide investors with quantitative measures, including Scope 1 and Scope 2 GHG emissions data.[116] Noting that Scope 3 GHG emissions data may require a phased approach, BlackRock also asserted the need for a temporary safe harbor "where data and methodologies are still emerging."[117]

b. The Vanguard Group, Inc.[118]

The Vanguard Group, Inc. (Vanguard) is the second largest investment group in the world,[119] and markets products that lessen investor exposure to ESG risks or "companies that don't align with [an investor's] values."[120]

Like BlackRock, Vanguard called for a proposal adhering to ESG frameworks already established by the TCFD and the SASB.[121] By working within such "widely respected investor-oriented frameworks," the comment states, climate risk disclosures may be more easily compared over time.[122] Further, Vanguard advocates for a phase-in of climate disclosure requirements and suggests that "the SEC provide flexibility to issuers to disclose through the 10-K or website, or other voluntary means, to address companies' liability concerns associated with providing climate change information via Form 10-K."[123]

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114 BlackRock, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906794-244146.pdf.

115 *Id.*

116 *Id.*

117 *Id.*

118 John Galloway, Principal and Investment Stewardship Officer, The Vanguard Group, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906800-244148.pdf.

119 World's Top Asset Management Firms, ADV Ratings, https://www.advratings.com/top-asset-management-firms (last accessed Feb. 13, 2022).

120 Our approach to ESG investing: Engage, allocate, and avoid, Vanguard (June 17, 2021), https://advisors.vanguard.com/insights/article/ourapproachtoesginvestingengageallocateandavoid (last accessed Feb. 13, 2022)

121 John Galloway, Principal and Investment Stewardship Officer, The Vanguard Group, Inc., Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906800-244148.pdf.

122 *Id.*

123 *Id.*

3. *Sustainability Accounting Standards Setter, the Sustainability Accounting Standards Board (SASB)*

While companies and investors have called for the adoption of uniform standards like SASB Standards in climate disclosure rulemaking, the SASB itself has also responded to the RFPI.[124] As a standard-setter, SASB argues for adherence to disclosure frameworks companies are already working within to ease the transition into mandatory disclosures and enhance the transparency and timeliness of disclosure.[125] SASB says, by adopting an existing framework like SASB Standards, the SEC can "focus its resources and expertise on implementation, evaluation. . . and enforcement activities," and investment companies can cut down on costs associated with disclosures, as many already rely on standards set by SASB and others.[126]

SASB notes that adopting an existing framework would not preclude the SEC from requiring additional or more specific disclosures where "necessary or appropriate."[127] Further, the SEC should consider international rulemaking that is ongoing in this area, as the EU's potential adoption of specific standards could have implications for multinational corporations.[128] Finally, SASB asks that the SEC should consider a limited safe harbor to protect companies from private plaintiff liability, as such a safe harbor would "facilitate the development and dissemination of sustainability disclosures that are more decision-useful than boilerplate disclosures."[129]

4. *Other Interested Parties*

a. *Natural Resources Defense Council (NRDC)*[130]

In its comment letter, environmental advocacy nonprofit organization NRDC suggests, "[i]n considering enhanced climate-related disclosures, the SEC must recognize that its mission is not simply to protect investors . . . [r]ather, the SEC's mission also includes the promotion of 'fair, orderly, and

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124 Janine Guillot, Chief Executive Officer, Sustainability Accounting Standards Board, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (May 19, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8819945-238161.pdf.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 Natural Resources Defense Council, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8911361-244299.pdf.

efficient' markets, capital formation, and protection of the public interest."[131] The environmental organization suggests far stricter requirements than requested by most companies, and urges the SEC to promulgate strong rules that require public filing of Scope 1, Scope 2, and Scope 3 GHG emissions and adhere to standards set by the TCFD and others with the consideration of stronger, updated requirements where appropriate.[132]

The letter urges the SEC to adopt climate-related disclosures that "require public companies to file public disclosures regarding their emissions of greenhouse gases, their vulnerability to the physical and transition risks of climate change, their process for identifying climate-related risks and opportunities, and their corporate governance structure for sustainability."[133] NRDC's comment generally argues against a "comply or explain" framework, which "would allow an issuer to either (1) comply with the disclosures regulated by the commission; or (2) explain why it will not,"[134] as it could "enable some issuers to dodge disclosures and reduce the effectiveness of a mandatory reporting regulation.[135]

b. Society for Corporate Governance[136]

The Society for Corporate Governance (the "Society") is a business trade association comprised of corporate secretaries, in-house counsel, and other governance professionals "responsible for supporting the work of corporate boards of directors and the executive managements of their companies on corporate governance and disclosure matters."[137] The Society, in its letter, advocated for no change to "the SEC's existing principles-based disclosure scheme rooted in materiality," as, it argues, the existing scheme already encompasses climate risk disclosures and provides investors with enough information to make informed decisions about their investments.[138]

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131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*, citing to Report of the Committee on the Financial Aspects of Corporate Governance (Dec. 1992), https://www.sec.gov/comments/climate-disclosure/cll12-8911361-244299.pdf.

135 Natural Resources Defense Council, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8911361-244299.pdf.

136 Darla C. Stuckey, President and Chief Executive Officer, Society for Corporate Governance, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8914283-244663.pdf.

137 *Id.*

138 *Id.*

Further, the Society advocates that, in the event the SEC does mandate climate disclosures, companies be allowed to post their disclosure information to their websites or otherwise furnish the information to the SEC as opposed to including it within public filings.[139] Corporations are required only to publish or provide accurate information, the Society argues, and including climate risk information in public securities filings does nothing more than expose companies to the unnecessary risk of private plaintiff litigation.[140]

Finally, the Society makes a few additional points that diverge from the views expressed by some companies, investment groups, and environmental groups.[141] First, to avoid substantial costs and burdens to companies, the SEC should not require an accounting of "prescriptive, quantitative disclosures" by third-party auditing firms.[142] Next, the SEC should consider a "disclose or explain" framework that permits companies to either comply with a requested disclosure, "or explain why they have not (for example, if the measure has not yet been implemented, if they do not yet have the data available, or if the metric is not material to the company)."[143] Lastly, if the SEC does proceed with climate disclosure mandates, "[a]ny new climate or sustainability-related disclosure requirements . . . should be governed by the [APA], i.e., undertaken only with proper notice of proposed and final rulemaking and with ample opportunity for public comment."[144] The Society favors the Commission's development of climate disclosure standards, rather than the adoption of an already widely-accepted framework.[145]

c. PriceWaterhouseCoopers LLP[146]

Accounting firm PriceWaterhouseCoopers, LLP (PWC) highlighted Lee's statement in the RFPI, noting that "while existing Regulation S-K rules require issuers to make certain climate disclosures, questions arise about whether these disclosures adequately inform investors about known material risks, uncertainties, impacts, and opportunities, and whether greater consistency could be achieved."[147]

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139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 PriceWaterhouseCoopers, LLP, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 10, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8905928-244100.pdf.
147 *Id.*

PWC advocates for SEC rulemaking mandating and expanding climate disclosures, and argues that requiring companies to include climate disclosures in their 10-K Forms will increase the "quality and consistency" of reported metrics.[148] Further, as "[a]lmost all audit reports on financial statements filed with the SEC must be issued by independent accountants registered with the PCAOB [the Public Company Accounting Oversight Board], and those audits must be conducted under PCAOB standards," PWC asserts that "reports on climate change disclosures should be subject to the same requirements."[149] By requiring companies to incorporate their climate disclosures into public filings, they will be held to the higher standard of ensuring their metrics through vetted accounting procedures and audits.[150]

IV. Criticism of ESG, Other Issues, and Considerations

A. *Current Lack of Consistent Measurement Standards, Metrics, and Expectations*

While third-party ESG disclosure standards setters help inform companies about what types of disclosures they should or could be required to provide, third-party accounting firms help companies measure and calculate the numbers that go into those frameworks. However, without adherence to one uniform framework across the board, accounting firms hired by companies to crunch ESG numbers are left to decide which standards to use on their own.

Not only do third-party verifiers of ESG reporting use inconsistent metrics to analyze and value ESG numbers—some companies do not employ private verifiers at all. According to a December 2021 article in Bloomberg Tax, "[o]nly half of big companies hire a third party to review their sustainability disclosures, and almost none choose an accounting firm to provide that scrutiny."[151] This lack of oversight and consistency in measuring and reporting is not surprising given that the SEC has only just issued its long-promised proposed rule on climate change disclosures.

In December 2021, Bloomberg Businessweek released a study on the methodologies employed by MSCI, Inc., revealing that their ESG statistics are

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148 *Id.*

149 *Id.*

150 *Id.*

151 Amanda Iacone, Untested ESG Reporting Draws Scrutiny as SEC Readies Rules, BLOOMBERG LAW (Dec. 15, 2021), https://news.bloombergtax.com/financial-accounting/untested-esg-reporting-draws-scrutiny-as-sec-readies-rules.

not based on "a company's impact on the Earth and society. In fact, they gauge the opposite: the potential impact of the world on the company and its shareholders."[152] The firm's website states that "MSCI offers a suite of tools to help institutional investors benchmark, measure and manage *portfolio exposure to climate risk*," among other targets.[153]

The Bloomberg Businessweek story goes on to highlight that the ratings factored in initiatives that companies were already doing, or were already required to do, like adopting "bans on things that are already crimes, such as money laundering and bribery."[154] In the environmental category, for example, ratings factored in "Water Stress", which "measures whether the local community has enough water for the company, not whether the company is stressing the local water supply."[155]

B. Republican Criticism of ESG Disclosure Mandates

1. Republican Members of U.S. House Committee on Financial Services[156]

The twenty-two Republican members of the Congressional committee tasked with overseeing all components of housing and financial services sectors submitted a comment in response to the RFPI arguing that the SEC's focus on mandating climate disclosures goes beyond the scope of the Commission's authority entirely.[157] However, the Representatives argue, in moving forward with disclosure mandates, the SEC should avoid adopting the framework of third-party standards setters and regulate only through APA notice-and-comment rulemaking.[158] Even further, the Representatives allege that SEC attention to climate change is overstepping its political insulation as an

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152 Saijel Kishan, Akshat Rathi, & Cam Simpson, The ESG Mirage, BLOOMBERG BUSINESSWEEK (Dec. 10, 2021), https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/.

153 ESG 101: What is Environmental, Social, and Governance?, MSCI, https://www.msci.com/esg-101-what-is-esg (last accessed Feb. 13, 2021).

154 Saijel Kishan, Akshat Rathi, & Cam Simpson, The ESG Mirage, BLOOMBERG BUSINESSWEEK (Dec. 10, 2021), https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/.

155 *Id.*

156 Republican Members of U.S. House Committee on Financial Services, Comment Letter on SEC Request for Public Input on Climate Change Disclosures, https://www.sec.gov/comments/climate-disclosure/cll12-8873201-240110.pdf

157 *Id.*

158 Republican Members of U.S. House Committee on Financial Services, Comment Letter on SEC Request for Public Input on Climate Change Disclosures, https://www.sec.gov/comments/climate-disclosure/cll12-8873201-240110.pdf.

independent financial regulator, insinuating that climate change is merely a political issue.[159]

2. *Republican Members of U.S. Senate Committee on Banking, Housing, and Urban Affairs*[160]

In the Senate, the twelve Republicans tasked with oversight of US financial services sectors argued that, because extensive disclosures are already required under federal securities laws, there are no updates needed regarding climate change disclosure.[161] Further, they argue, employing the framework set forth by a third-party standards setter would be an unlawful delegation of authority under the APA, and the SEC should craft its own rules in moving forward with mandatory climate disclosure.[162]

3. *Georgia Attorney General Christopher M. Carr*[163]

In line with his fellow Republicans, Georgia Attorney General Christopher M. Carr issued a letter stating that "the Commission should stay in its legally authorized lane," and that "businesses are up to the task of disclosing relevant information about environmental issues without additional climate-change-focused disclosure requirements."[164]

C. *International Action*

The European Union (EU) has developed and codified its Sustainable Finance Disclosure Regulation (SFDR),[165] for the purpose of incentivizing sustainability-oriented investments and requiring public disclosures regarding how firms are "incorporating sustainability considerations [in] their investment decisions," including the way climate change is expected to impact investment performance.[166]

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159 *Id.*

160 Republican Members of U.S. Senate Committee on Banking, Housing, and Urban Affairs, Comment Letter on SEC Request for Public Input on Climate Change Disclosures (June 13, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8911330-244285.pdf.

161 *Id.*

162 *Id.*

163 Christopher M. Carr, Attorney General, Georgia Department of Law, (Comment Letter on SEC Request for Public Input on Climate Change Disclosures, https://www.sec.gov/comments/climate-disclosure/cll12-8928848-245352.pdf.

164 *Id.*

165 Council Regulation 2019/2088 O.J. (L 317).

166 Alicia Karspeck, New ESG Regulation Out of Europe Redefines Investment Risk, TRIPLE PUNDIT (Aug. 1, 2021), https://www.triplepundit.com/story/2021/new-esg-regulation-europe/726291.

Alessandro d'Eri, a senior policy officer at the European Securities and Markets Authority (ESMA), the EU's securities markets regulator, was quoted in an October 2020 story in CNBC that highlighted several challenges presented by ESG and impact investing.[167] D'Eri stressed that there is a growing number of ESG rating providers, despite ESG rating being a largely unregulated and nonuniform area.[168] Further, he states that there is a "mismatch" between investor demand for more ESG funds and the availability of certified ESG products in the market.[169] In the same story, Kristen Sullivan, a partner and US sustainability and ESG services leader at Deloitte explained that, while American companies are voluntarily moving forward in calculating ESG data absent regulation or uniform standards, there is a "regulatory momentum" on ESG certification taking place in Europe.[170]

On February 3, 2022, ESMA published a Call for Evidence for ESG ratings, which invited stakeholders to submit responses to a questionnaire "to develop a picture of the size, structure, resourcing, revenues and product offerings of the different ESG rating providers operating in the EU."[171] The Call for Evidence indicates ESMA's intent to regulate the market for ESG rating providers operating in the EU and "follows ESMA warning to European Commission that the lack of regulation of ratings and data assessments pose a risk to investors."[172] In the coming months, regulators could look to responses to the ESMA Call for Evidence to inform disclosure rulemaking in the US.

D. ESG Criticism from Former BlackRock Official

In August 2021, Tariq Fancy, the former CIO of Sustainable Investing at BlackRock, published a three-part essay on Medium detailing his experience at the asset manager and his critiques of ESG investments.[173] Fancy's critique, "The Secret Diary of a 'Sustainable Investor,'" sets the stage for an investment

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[167] Silvia Amaro, Unregulated 'greenwashing'? ESG investing is under the microscope as the money rolls in, CNBC (Oct. 14, 2020), https://www.cnbc.com/2020/10/14/esg-investing-meaning-is-under-the-microscope-as-the-money-rolls-in.html

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] Press Release, European Securities and Markets Authority, ESMA Launches Call for Evidence on ESG Ratings (Feb. 3, 2022), https://www.esma.europa.eu/press-news/esma-news/esma-launches-call-evidence-esg-ratings.

[172] Frances Schwartzkopff, EU Takes Step Toward Possible Regulation of ESG-Rating Providers, BLOOMBERG LAW (Feb. 3, 2022), https://news.bloomberglaw.com/environment-and-energy/eu-takes-step-toward-possible-regulation-of-esg-rating-providers.

[173] Tarik Fancy, The Secret Diary of a 'Sustainable Investor'—Part 1, MEDIUM (Aug. 20, 2021), https://medium.com/@sosofancy/the-secret-diary-of-a-sustainable-investor-part-1-70b6987fa139.

landscape that recognizes market demand for sustainability and social responsibility, yet falls short of providing solutions that please investors and enhance social change or responsibility.[174]

Fancy argues that much of the effort in ESG investing is "focused on integrating ESG considerations" into existing frameworks, funds, and companies, "which for many seems to be a proxy for overlaying 'purpose' onto traditional models to extract profits."[175] Fancy summarizes interactions he had with colleagues while at BlackRock as signaling to a widespread belief in the asset management world that ESG consisted of checking regulatory boxes and drumming up hype in otherwise mundane or even failing companies.[176] Finally, Fancy makes the point that "[s]ustainable investing is becoming a deadly distraction" by convincing shareholders, investors, and the general public that ESG was leading to a more sustainable economy without ensuring the reliability of ESG data, ratings, and contributions.[177]

Other professionals in the investment world have challenged Fancy's critique, highlighting Fancy's conflation of ESG funds (focused on managing risk) and impact investing (focused on creating a positive social impact on the world).[178] In a Forbes Magazine interview, Clara Miller, an ESG professional with decades of nonprofit experience in the world of sustainable finance, argued that Fancy's critique fell short of showing that ESG presents irreparable problems or conflicts of interest with the aims it claims to accomplish.[179] Investment professionals, Miller says, have been keenly aware of the problems with ESG that Fancy raised in his critique for years now—the difference is that others have been working to fix the present issues rather than paint ESG as completely doomed and unable to make any impact whatsoever.[180]

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174 *Id.*

175 *Id.*

176 Tarik Fancy, The Secret Diary of a 'Sustainable Investor'—Part 2, MEDIUM (Aug. 20, 2021), https://medium.com/@sosofancy/831a25cb642d.

177 Tarik Fancy, The Secret Diary of a 'Sustainable Investor'—Part 3, MEDIUM (Aug. 20, 2021), https://medium.com/@sosofancy/3c238cb0dcbf.

178 Seb Beloe, Is ESG a waste of time?, WHEB (Sept. 9, 2021), https://www.whebgroup.com/is-esg-a-waste-of-time/.

179 Robert G. Eccles, A Critique of Tariq Fancy's Critique of ESG Investing: An Interview with Clara Miller, FORBES (Oct. 1, 2021), https://www.forbes.com/sites/bobeccles/2021/10/01/a-critique-of-tariq-fancys-critique-of-esg-investing-an-interview-with-clara-miller/?sh=473fd99f390d.

180 *Id.*

CONCLUSION: WHAT DO THE COMMENTS, CRITICISMS, AND RULEMAKING INTENTIONS THEMSELVES TELL US ABOUT WHERE ESG IS HEADING?

ESG disclosure is an emerging field composed of many stakeholders with differing views as to what ESG should be, whether and how we should measure ESG metrics, and whether companies and investment managers can promote social progress through a capitalist financial framework. Before the release of the proposed rule, this Comment posed:

> As a case study, responses to the SEC's RFPI highlighted in this Comment illustrate a lack of agreement on what the SEC should require if climate or other ESG disclosures are mandated, which standards it should require companies to use to vet and disclose their metrics, whether the RFPI has gone far enough to prime regulatory action on ESG, and even whether the Commission can conduct rulemaking on climate and other ESG disclosures at all. Without notice-and-comment rulemaking by the SEC, there will be no change to the current guidance allowing companies to disclose what they find material when and where they choose, and companies will be allowed to make voluntary pledges to sustainability without facing the public scrutiny and private liability that would hold them accountable if disclosures were made in public filings.

Although we now have a proposed rule, discrepancies between voluntary CSR reports and disclosures in filings will likely remain an issue unless there is a uniform measurement framework for disclosure values.

For example, although Delta has made a net zero pledge, its commitment requires the company to purchase many corporate offsets to reach its goal.[181] Therefore, underneath a qualitative commitment like carbon neutrality lies a multitude of other issues and considerations; carbon offsets, for example, require stringent certification and verification in order to ensure they are actually offsetting the amount of carbon they claim to be. Delta is an illustrative example of how climate disclosures will require significant vetting if we ever want to be sure that they are aiding progress toward environmental change. For other ESG metrics, the amount of work required on the back end will increase as metrics and their impact become more difficult to measure.

If companies, investors, and the public want ESG to matter, there need to be standardized reporting requirements and a solid trajectory toward regulation.

[181] Delta, *New campaign shines light on Delta's carbon neutrality*, BLOG (Sept. 13, 2021, 12:00 PM), https://news.delta.com/new-campaign-shines-light-deltas-carbon-neutrality#:~:text=Airline%20sets%20vision%20for%20meaningfully,31%202020.

Note that a year passed between the SEC's indication that it planned to focus on climate disclosure regulation and its release of a proposed rule. The SEC has now delivered on its promise to propose a rule that would mandate climate change disclosures in securities filings. As companies and investors begin to participate in rulemaking on the proposal, this Comment poses: How might the proposal change over the rulemaking process? Would even the most stringent of disclosure frameworks actually bring about positive social change through market regulation? And how might such a new rule forever change the role of the American corporation in society?