V. Preparing for New SEC Climate-Related Disclosure Rules

A. Introduction

Motivated by strong investor demand, the Securities and Exchange Commission ("SEC") is expected to announce new rules for climate-related disclosures at the end of 2021.[1] SEC Chair Gary Gensler noted, "[t]oday, investors increasingly want to understand the climate risks of the companies whose stock they own or might buy. Large and small investors, representing literally tens of trillions of dollars, are looking for this information to determine whether to invest, sell, or make a voting decision one way or another."[2] Growing demand is motivated by several factors, most notably the growing threat that climate change poses on the planet and on U.S. businesses.[3] This Article will examine the SEC's considerations for new climate-related disclosures, the SEC's problems with the current regulatory framework, the arguments in favor of SEC climate-related disclosures, the arguments against climate-related disclosures, along with the public response to the SEC's potential climate-related disclosure mandate.

B. Considerations for New Climate-Related Disclosures

Gensler set forth several considerations for mandated climate-related disclosures.[4] Gensler noted that investors benefit the most when disclosures are decision useful.[5] Additionally, Gensler asserted that the

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[1] Gary Gensler, Chairman, Sec. and Exch. Comm'n, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (July 28, 2021) ("[Gensler] asked SEC staff to develop a mandatory climate risk disclosure rule proposal for the Commission's consideration by the end of the year").

[2] *Id.*

[3] Alexandra Thornton & Tyler Gellasch, *The SEC Has Broad Authority to Require Climate and Other ESG Disclosures*, CENTER FOR AMERICAN PROGRESS (June 10, 2021), https://www.americanprogress.org/article/sec-broad-authority-require-climate-esg-disclosures/ [perma.cc/CH94-K77F] (acknowledging the growing number of investors who want more information on companies' ESG factors and exposure to climate risks).

[4] *Id.*

[5] *Id.*

SEC will be guided by principles of consistency and comparability.[6] Gensler distinguished the consistency and comparability that mandatory disclosures can provide to investors with the inconsistency and incomparability of voluntary disclosures.[7] The SEC will consider whether climate-related disclosures should be filed, or if they should be furnished.[8] The SEC will consider a variety of both qualitative and quantitative disclosures.[9] Qualitative disclosures might include how a company's leadership addresses climate-related risks and opportunities.[10] In terms of quantitative disclosures, the SEC will observe scope 1, 2, and 3 greenhouse gas emission disclosures.[11] While some companies already voluntarily provide information on their scope 1 and scope 2 emissions, the SEC will consider whether to mandate scope 3 disclosures as well.[12] Scope 1 and Scope 2 emissions include direct emissions, as well as indirect emissions from the reporting organization's purchase of energy.[13] Scope 3 emissions are those emissions that a reporting organization indirectly impacts through its value chain.[14] The SEC will also consider whether industry specific

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[6] *Id.* (stating that the SEC is required to "ensure that market participants have reliable, consistent, and comparable climate-and ESG-related information that is important to their business decision-making").

[7] *Id.* ([T]he lack of standardization of metrics, underlying data, assumptions, and methodologies, combined with the voluntary nature of the frameworks, still has not resulted in ... consistent, and comparable disclosures.").

[8] *See* Gensler, *supra* note 1 (requesting that SEC staff "consider whether these disclosures should be filed in the Form 10-K, living alongside other information that investors use to make their investment decisions").

[9] Thornton & Gellasch, *supra* note 3 ("SAB 99 confirms that material factors may also be qualitative in nature …").

[10] *Id.* (arguing that "many reasonable investors care deeply about climate-related risks and request detailed information from companies," and that this information is best presented through qualitative disclosures).

[11] Gensler, *supra* note 1.

[12] *Id.*

[13] EPA Center for Corporate Climate Leadership, *Scope 1 and Scope 2 Inventory Guidance,* EPA (Sept. 29, 2021), https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance [perma.cc/U5AN-AZ6G]

[14] EPA Center for Corporate Climate Leadership, *Scope 3 Inventory Guidance*, EPA (Sept. 29, 2021), https://www.epa.gov/climateleadership/scope-3-inventory-guidance [perma.cc/5R4B-HEX6] ("Scope 3 emissions are the result of activities from assets not owned or controlled by the reporting organization, but that the organization indirectly impacts in its value chain.").

disclosures are necessary.[15] Related to the SEC's consideration of industry specific disclosures, Chairman Gensler suggested that the SEC will mandate more specific disclosures from investment funds that market themselves as environmentally friendly.[16] Gensler asserted that funds that market themselves as environmentally friendly should provide objective statistics that support their marketing.[17] Furthermore, the SEC will consider mandating that companies provide scenario analysis on how they will address future climate-related challenges.[18] Scenario analyses may address physical risks, as well as transition risks associated with a company's commitments.[19] Finally, the SEC is looking to existing standards to determine its own climate-related disclosure standard, particularly to the Task Force on Climate-Related Financial Disclosures ("TCFD").[20] The overwhelming majority of SEC commenters support establishing a mandatory disclosure framework that resembles the TCFD's framework.[21]

Critical to the SEC's determination on how to structure mandatory climate-related disclosures is an analysis of the SEC's current requirements.[22] Currently, climate-related disclosures are

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[15] Gensler, *supra* note 1.
[16] *Id.* (stating that there is "a growing number of funds [that] market themselves as 'green'" and Gensler has "directed staff to consider recommendations about whether fund managers should disclose the criteria and underlying data they use" to support this marketing).
[17] *Id.*
[18] *Id.* ("Another question is whether companies might provide scenario analyses on how a business might adapt to the range of possible physical, legal, market, and economic challenges ... in the future.").
[19] *Id.* ("[P]hysical, legal, market, and economic changes ... could mean the physical risks associated with climate change ... [or the] transition risks associated with stated commitments by companies …").
[20] *Id.* (stating that many public commenters "referred to the Task Force on Climate-related Financial Disclosures (TCFD) framework" and that Gensler has "asked staff to learn from and be inspired by these external standard-setters").
[21] Lee Reiners & Mario Olczykowski, *Summary of Comment Letters for the SEC's Climate Risk Disclosure RFI*, GLOB. FIN. MKTS. CTR. FINREG BLOG (July 9, 2021), https://sites.law.duke.edu/thefinregblog/2021/07/09/summary-of-comment-letters-for-the-secs-climate-risk-disclosure-rfi/ [perma.cc/FX76-T46J] ("Nearly all letters . . . express support for modeling mandatory disclosures on Task Force on Climate-Related Financial Disclosures (TCFD) recommendations.").
[22] Thomas L. Strickland et al., *SEC Redoubles Focus on Climate Change, ESG Disclosures*, WILMERHALE (Mar. 15, 2021),

guided by the principle of materiality.[23] The SEC does not expressly require companies to make climate-related disclosures, but instead indirectly requires such disclosures by mandating that reporting companies report non-financial information that is material to investors.[24] Such disclosure is mandated under Regulation S-K.[25] Particularly, items 101, 103, and 503(c) under Regulation S-K are relevant for material climate-related disclosures.[26] Item 101 requires the reporting company to disclose any material developments of the business and expressly requires that companies disclose costs associated with complying with environmental laws.[27] Item 103 requires the reporting company to describe any pending material legal proceedings.[28] Item 503(c) requires reporting companies to disclose material risks factors that could make an investment in the registrant risky.[29] In 2010, the SEC provided guidance on Regulation S-K climate change related disclosures and identified several events that might trigger disclosure requirements.[30] The SEC identified that developments

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https://www.wilmerhale.com/en/insights/client-alerts/20210315-sec-redoubles-focus-on-climate-change-esg-disclosures [https://perma.cc/63G2-VA45] ("Climate and ESG Task Force will begin by analyzing material gaps or misstatements in public companies' climate change statements under existing disclosure rules …").

[23] *Id.* ("[C]ompanies need only disclose those matters that are material under the securities laws …").

[24] SEC Staff Accounting Bulletin Nos. 33-9106, 34-61469, 82 Fed. Reg. 1221(Feb. 2, 2010) (describing "the most pertinent non-financial statement disclosure rules that may require disclosure related to climate change").

[25] *Id.* at 12 (stating that when a company "is required to file a disclosure document with the Commission, the requisite form will largely refer to the disclosure requirements of Regulation S-K and Regulation S-X").

[26] Strickland et al., *supra* note 22 (specifically referencing items 101 and 103 in their discussion of environmental disclosure requirements).

[27] SEC Staff Accounting Bulletin Nos. 33-9106, 34-61469, 82 Fed. Reg. 12-13 (Feb. 2, 2010) ("Item 101 of Regulation S-K requires a registrant to describe its business ... [and] expressly requires disclosure regarding certain costs of complying with environmental laws.").

[28] *Id.* at 13 ("Item 103 of Regulation S-K requires a registrant to briefly describe any material pending legal proceeding to which it or any of its subsidiaries is a party.").

[29] *Id.* at 15 ("Item 503(c) of Regulation S-K requires a registrant to provide ... a discussion of the most significant factors that make an investment in the registrant speculative or risky.").

[30] *Id.* at 21 (discussing "some of the ways climate change may trigger disclosure required by these rules and regulations").

in legislation and regulation can trigger disclosures, specifically because the costs and risks associated with complying with new environmental regulations obligates a company to report material costs and risks under items 101 and 503(c).[31] The SEC commented that reporting companies should at least factor risks that are within the current fiscal year along with the following year.[32] Second, international accords might trigger climate-related disclosures to the extent that they are material under Regulation S-K.[33] Third, along with the direct effects of complying with new environmental laws, the indirect consequences of regulation can also trigger climate-related disclosures.[34] Disclosures on the indirect effects of climate change legislation and regulation should account for changes in consumer demand.[35] Finally, the SEC asserted that companies should disclose the material risks related to the physical impacts of climate change.[36]

C. The SEC's Problems with the Current Regulatory Framework

Former SEC commissioner Allison Herren Lee, in a keynote speech, provided several reasons that the current regulatory framework is not sufficient to induce climate-related disclosures.[37] Particularly,

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[31] *Id.* at 22 ("Item 101 requires disclosure of any material estimated capital expenditures for environmental control facilities … Item 503(c) may require risk factor disclosure regarding existing or pending legislation or regulation that relates to climate change.").

[32] *Id.* ("Item 101 requires disclosure of any material estimated capital expenditures for environmental control facilities for the remainder of a registrant's current fiscal year and its succeeding fiscal year …").

[33] *Id.* at 24 ("Registrants also should consider, and disclose when material, the impact on their business of treaties or international accords relating to climate change.").

[34] *Id.* at 25 (listing some of the indirect consequences that climate change regulations cause, which may trigger disclosure obligations).

[35] *Id.* (stating that a possible indirect consequence that could require disclosure is "decreased demand for goods that produce significant greenhouse gas emissions").

[36] *Id.* at 27 ("Registrants whose businesses may be vulnerable to severe weather or climate-related
events should consider disclosing material risks of, or consequences from, such events in their publicly filed disclosure documents.").

[37] Allison Herren Lee, Comm'r, Sec. and Exch. Comm'n, Living in a Material World: Myths and Misconceptions about "Materiality" (May 24, 2021) ("The

Commissioner Lee asserted that without express disclosure requirements "climate information important to a reasonable investor is not necessarily required to be disclosed simply because it is material."[38] Under securities laws, an omission of information is not actionable absent a duty to disclose.[39] A duty to disclose arises only from an express SEC disclosure requirement or if necessary to make other disclosures accurate.[40] Furthermore, under the current regulatory framework, reporting companies often incorrectly determine what information is material.[41] Not only are companies incorrectly determining materiality, but their varied approaches to reporting climate-related disclosures have led to inconsistency and incomparability in SEC reporting, to the harm of investors.[42]

D. Arguments In Support of SEC Mandates

Mandating climate-related disclosures has largely been met with positive responses from the public.[43] Many parties, including former SEC Commissioner Lee, believe that the SEC has broad authority to mandate climate disclosures.[44] Additionally, many parties, such as the Center for American Progress, believe that mandating climate-related disclosures is necessary given the significant threats that climate change poses.[45]

One of the most pressing questions surrounding the anticipation of the SEC's new climate-related disclosure requirements is whether the

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securities laws currently include little in the way of explicit climate or other sustainability disclosure requirements.").

[38] *Id.*

[39] *Id.* (stating that "under the securities laws, an omission of information—even material information—is not actionable absent a duty to disclose," and a duty to disclose arises "by virtue of an explicit SEC disclosure requirement ... [or] to make other statements made by a company materially accurate or not misleading").

[40] *Id.*

[41] *Id.* ("Studies of restatements and the obligation to disclose material loans ... suggest that material information may be incorrectly characterized as immaterial.").

[42] *Id.* ("[I]f SEC disclosure rulemaking authority were artificially circumscribed by both an item-by-item, and company-by-company, analysis of materiality, comparability would be sacrificed almost completely.").

[43] Reiners & Olczykowski, *supra* note 21

[44] Lee, *supra* note 37.

[45] Thornton & Gellasch, *supra* note 3.

SEC can legally mandate that public companies make climate-related disclosures.[46] Many commentators have argued that the SEC has broad authority to mandate such disclosures, regardless of materiality.[47] Former SEC Commissioner Lee vigorously defended the authority of the SEC to require climate-related disclosures beyond those disclosures that are material.[48] Under the Securities and Exchange Act of 1933 the SEC has the authority to require disclosures "as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors."[49]

Former Commissioner Lee asserted that under Section 7 of the Securities Act of 1933, the SEC possesses rulemaking authority to require disclosures to protect investors without any qualification based on materiality.[50] Additionally, Commissioner Lee provided some examples of how the SEC already requires disclosures that are not material.[51] For example, related party transactions along with stock buybacks are required to be reported without regard for materiality.[52] Others, such as Senator Elizabeth Warren, have emphasized that climate-related disclosures can be mandated because climate risks are material to investors.[53]

The Center for American Progress has taken the position that

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[46] *Id.* ("Increasing demand for companies to provide enhanced disclosures on climate-related and other environmental, social, and governance matters has raised questions about the Securities and Exchange Commission's authority to require disclosures.").

[47] *Id.* (stating that the SEC's authority is "broad and not limited to materiality").

[48] *Id.* (paraphrasing former SEC commissioner Allison Lee's statement that "materiality limits anti-fraud liability but does not limit the commission's disclosure rulemaking").

[49] 15 U.S.C. § 77g.

[50] Lee, *supra* note 37 ("[The SEC's] rulemaking authority under Section 7 of the Securities Act of 1933 gives the SEC full rulemaking authority to require disclosures in the public interest and for the protection of investors. That statutory authority is not qualified by 'materiality.'").

[51] *Id.* (discussing mandatory executive compensation disclosures and how "[i]t was not determined that each individual metric [of executive compensation] is material to each and every public company subject to the rule").

[52] *Id.* (Discussing how "with respect to disclosures of related party transactions ... [and] share repurchases ... Regulation S-K has ... required periodic reports to include information that is important to investors but may or may not be material in every respect to every company making the disclosure.").

[53] Reiners & Olczykowski, *supra* note 21 (quoting Senator Elizabeth Warren's position that "[c]limate change is one of, if not the single-largest systemic risk to our global financial system").

mandating climate-related disclosures is not only within the authority of the SEC but is an essential move because of the growing threat that climate change poses to the world.[54] While the Center for American Progress believes that the SEC's authority is not limited by materiality, they also believe that climate-related disclosures are material to investors.[55] As evidence, they point to the growing number of companies that have started making climate-related disclosures, along with the growing number of climate-related shareholder proposals in 2020.[56] Thus, according to the Center for American Progress, the market has signaled that climate-related disclosures are material.[57] Furthermore, the Center for American Progress argued that unless the SEC mandates climate-related disclosures, the lack of comparability and consistency across companies' voluntary disclosures would be detrimental to investors.[58] These beliefs were echoed by a Ceres-led group of 500 investors managing $2.7 trillion of assets, who stated "climate change poses a variety of material risks to companies of all sizes in all industries across our nation."[59] Additionally, the investors argued that the cost of failing to mandate climate-related disclosures would outweigh the costs of coming into compliance with such disclosure mandates.[60]

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[54] Thornton & Gellasch, *supra* note 3 ("[T]he climate crisis ... now unquestionably pose[s] clear and present risks, not just to American or U.S.-based multinational businesses but also to the U.S. financial system and economy.").
[55] *Id.* (stating that "institutional investors believe climate and ESG-related disclosures are material to them").
[56] *Id.* (stating that "[during the 2020 proxy season, investors filed at least 140 climate-related shareholder proposals at U.S. companies," and that six of these proposals "won majority votes in favor, up from only one in 2019").
[57] *Id.*
[58] *Id.* ("[T]he lack of standardization of metrics, underlying data, assumptions, and methodologies, combined with the voluntary nature of the frameworks, still has not resulted in reliable, consistent, and comparable disclosures.").
[59] Letter from Ceres et al., to Sec. and Exch. Comm'n (May 18, 2021) (on file with author).
[60] *Id.* ("While there will be a cost for compliance with SEC climate disclosure rules, it is far less costly to companies and their investors than ignoring the risk.").

E. Arguments Against SEC Mandates

While most SEC commenters would support a climate-related disclosure mandate, many notable parties oppose such a mandate.[61] Some parties, such as the Mercatus Center believe that the SEC lacks the authority to mandate climate-related disclosures; while others, such as SEC Commissioner Elad Roisman believe that mandating climate-related disclosures would be unnecessary and impractical.

One of the biggest opponents to climate-related disclosures is the Mercatus Center, a prominent free market think tank based at George Mason University.[62] Opposing the SEC mandate, Andrew Vollmer of the Mercatus Center argues that the SEC would need separate statutory authorization to mandate climate-related disclosures.[63] Vollmer argues that the scope of the SEC's statutory authorization is limited to requiring financial disclosures that are closely related to the company's value and prospects for financial success.[64] As support, Vollmer points to the House Report on Section 7(a) of the Securities Act of 1933, which explains that the items required to be disclosed under Section 7(a) are items that are indispensable for making an accurate judgement of a security's value.[65] Because Vollmer finds that climate-related disclosures are not indispensable to such

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[61] Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?*, MERCATUS CTR.: FIN. REGUL. (Aug. 19, 2021), https://www.mercatus.org/publications/financial-regulation/does-sec-have-legal-authority-adopt-climate-change-disclosure [https://perma.cc/98QU-JEMP] ("[T]he SEC lacks the expertise, knowledge, and experience to set the terms for climate disclosures").

[62] MERCATUS CENTER, https://www.mercatus.org/about [https://perma.cc/T3PJ-AX2T] (last visited Nov. 14, 2021) (describing the Mercatus Center as a research center that "advances knowledge about how markets work to improve people's lives by training graduate students, conducting research, and applying economics to offer solutions to society's most pressing problems").

[63] Vollmer, *supra* note 61 ("[T]he SEC does not currently have statutory authority to adopt mandatory disclosure rules on climate change.").

[64] *Id.* ("The statutory context of the Securities Act and the Securities Exchange Act limits the SEC's power to issue disclosure rules to specific types of information closely related to the disclosing company's value and prospects for financial success.").

[65] *Id.* (quoting the House Report, which states that "'[t]he items required to be disclosed, set forth in detailed form, are items indispensable to any accurate judgment upon the value of the security' and to the proper direction of capital resources.").

judgements, he believes Congress has not authorized the SEC to mandate them.[66]

Related to the statutory argument, Vollmer also argues that Congressional intent precludes the SEC from mandating climate-related disclosures.[67] Vollmer argues that "[t]he main subjects Congress authorizes for disclosure are the business, financial performance, securities, and management of the disclosing company."[68] Thus, "A new set of disclosure obligations for climate change issues adopted by the SEC would have climate issues as a common subject and would seek to use the securities disclosure system to advance a public policy goal extraneous to the federal securities laws without congressional approval."[69]

Furthermore, "an agency's claim to regulate an area beyond its expertise is an indicator that the claim is not consistent with statutory purposes and design."[70] According to Vollmer, the SEC's expertise in corporate disclosures is focused on specific corporate information that helps investors evaluate a company's potential for financial success.[71] "Drafting disclosure rules related to climate issues would be different ... especially if the SEC were to attempt to write disclosure rules comparable in detail and coverage to the GRI, TFCD, or SASB models that have been mentioned."[72] Thus, Vollmer argues that the SEC's lack

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[66] *Id.* ("The SEC's disclosure rulemaking power is limited. Congress must act to expand public and issuing company disclosures beyond the fundamental areas covered in the Securities Act and the Securities Exchange Act before the SEC may promulgate implementing regulations.").
[67] *Id.* (stating that when Congress has used statutory authorizations to "expand mandatory company disclosures beyond the topics already covered in the Securities Act and the Securities Exchange Act," it did not include disclosures on climate, the environment, or sustainability).
[68] *Id.*
[69] *Id.*
[70] *Id.* (citing King v. Burwell, 576 U.S. 473, 486 (2015) (finding it unlikely that Congress would have delegated a health insurance policy decision to the IRS because of the IRS's lack of expertise in the area)).
[71] Vollmer, *supra* note 61 ("The main experience and prowess of the SEC in the corporate disclosure area are specifying the types and details of a company's business and finances that help investors evaluate the company's likelihood of successful financial performance.").
[72] *Id.*

of expertise in climate-related disclosures signals that they lack the authority to mandate climate-related disclosures.[73]

While not denying the authority of the SEC to mandate disclosures, former SEC commissioner Elad Roisman asserted that the current SEC disclosure framework sufficiently provides for material climate-related disclosures.[74] The commissioner has also expressed concerns that the costs of a mandatory climate-related disclosure framework would impose high costs on companies that would be difficult to manage.[75]

The U.S Chamber of Commerce echoed similar beliefs to Commissioner Roisman.[76] The Chamber of Commerce believes that any new climate disclosure standard should be focused on materiality as defined by the Supreme Court in TSC Industries, Inc. v. Northway, Inc.[77] "The longstanding materiality standard — namely, what is important to a reasonable investor focused on investment returns — has instilled in investors and issuers alike a confidence in the relevancy of information that promotes market efficiency, competition, liquidity, and price discovery."[78] Furthermore, the U.S chamber of Commerce emphasized that new climate-related disclosure mandates should be

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[73] *Id.* ("A fourth difference between climate-change disclosures and traditional company disclosures that helps show that the SEC does not currently have legal authority to adopt disclosures on climate change is that the SEC lacks the expertise, knowledge, and experience to set the terms for climate disclosures.").

[74] Elad Roisman, Comm'r, Sec. & Exch. Comm'n*,* Putting the Electric Cart before the Horse: Addressing Inevitable Costs of a New ESG Disclosure Regime (June 3, 2021) ("I feel like a broken record, but our disclosure framework already requires public issuers to provide information that is material to investors, including information one might categorize as 'E,' 'S,' or 'G.'").

[75] *Id.* ("Costs of obtaining and presenting new disclosures will be proportionally greatest for smaller companies that have scarce resources and are trying to grow.").

[76] Letter from Tom Quaadman, Exec. Vice President, U.S. Chamber of Com., to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n. (June 11, 2021) (on file with author) (stating that the current "disclosure requirements demonstrate that companies are already required to disclose material ESG information").

[77] *Id.* (citing TCS Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) ("The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.")).

[78] Letter from Tom Quaadman to Vanessa Countryman, *supra* note 76.

highly flexible rather than proscriptive, and that new disclosures should be furnished instead of filed to limit liability for public companies.[79]

F. Public Response to the Potential SEC Mandates

On March 15, 2021, then SEC Acting Chair Allison Herren Lee submitted a request for public input from SEC registrants, investors, and other market participants on climate change disclosures.[80] Afterwards, members of the public had 90 days to respond to the request by submitting comments online.[81]

After issuing a request for public input, the SEC received 297 comments from institutional commenters on the potential climate-related disclosures mandate.[82] Commenters ranged from asset managers, including BlackRock and Vanguard, financial institutions, including Bank of America, standard setting organizations including the Sustainability Accounting Standards Board, large tech companies, including Microsoft, Uber, and Apple, and government officials, including Senator Elizabeth Warren.[83] Most comments made to the SEC supported mandatory disclosure requirements.[84] Additionally, most commenters expressed support for modeling mandatory disclosures on

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[79] *Id.* ("Disclosure mandates should not be prescriptive but, rather, should continue to be flexible ... [and] the SEC should allow the information to be 'furnished' and not 'filed' ... [because] there is not a practical justification to subject that information to additional legal liability.").

[80] Public Statement, Allison Herren Lee, Acting Chair, Sec. & Exch. Comm'n, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021) ("In light of demand for climate change information and questions about whether current disclosures adequately inform investors, public input is requested from investors, registrants, and other market participants on climate change disclosure.").

[81] *Id.* (requesting that members of the public "please submit comments within 90 days of this statement").

[82] Adam Bryla et al., *Commenters Weigh In on SEC Climate Disclosures Request for Public Input*, DAVIS POLK (July 6, 2021), https://www.davispolk.com/insights/client-update/commenters-weigh-sec-climate-disclosures-request-public-input [https://perma.cc/AK7U-C9CG] ("As of June 24, 2021, 297 comment letters from institutional commenters filed by the June 13 deadline had been posted by the SEC on its website.").

[83] Reiners & Olczykowski, *supra* note 21 (listing the various respondents to the SEC's request for public comment).

[84] *Id.* (stating that "most commenters support the SEC's effort to develop mandatory climate-related disclosures").

the TCFD's recommendations.[85] Furthermore, most commenters expressed agreement that the SEC has the authority to mandate climate-related disclosures.[86] A couple of contentious issues that were addressed through the SEC's request for public comment include what information should be disclosed and whether disclosures should be furnished or filed.[87]

What should be disclosed?

Most commenters agreed that the SEC should mandate climate-related disclosures; however, they disagree over whether reporting companies should be required to disclose quantitative data along with qualitative data.[88] Many commenters believe that the SEC should only require qualitative disclosures, believing that climate data would be too difficult to quantify.[89] Particularly, many commenters believe that scope 3 emissions would be costly and difficult to quantify and disclose because those emissions are outside of a reporting company's direct control.[90] Many other commenters believe that requiring quantitative disclosures would reinforce the goal of providing consistent and comparable financial reports.[91] For example, requiring companies to make scope 3 emissions disclosures would build consistency and

[85] *Id.* ([n]early all letters, regardless of commenter type, express support for modeling mandatory disclosures on Task Force on Climate-Related Financial Disclosures (TCFD) recommendations.").
[86] *Id.* ("Most commenters recognize the SEC's legal authority to mandate climate-related disclosures …").
[87] Bryla et al., *supra* note 82 (asking the following two questions: (1) "[i]f the SEC mandates climate disclosures, what information should the SEC require to be disclosed?" [and] (2) "[s]hould the SEC provide protection from liability ... [by] having climate disclosures be furnished rather than filed …?").
[88] *Id*. (stating that "commenters took opposing views" when asked "whether climate risk information can and should be quantified and disclosed").
[89] *Id.* ("Some commenters maintained that the SEC should require only qualitative climate disclosures, noting the difficulty of quantifying climate data …").
[90] *Id.* (Emphasizing "the difficulty of quantifying ... Scope 3 emissions — those emissions that 'are the result of activities from assets not owned or controlled by the reporting organization, but that the organization indirectly impacts in its value chain …'").
[91] *Id.* ("Others stressed that it is feasible and appropriate to require quantitative disclosures, which would allow for greater standardization and comparability across companies.").

comparability because many reporting companies disclose that data already.[92]

Furnished or Filed?

While most SEC commenters supported mandated climate disclosures, many industry leaders would prefer to furnish climate-related disclosures instead of filing in annual or quarterly statements to protect themselves from liability.[93] Companies such as Blackrock, Bank of America, Facebook, and Uber support furnishing disclosures outside of annual or quarterly statements such as the 10-K.[94] Those companies believe that filing climate-related disclosures in a similar fashion as to traditional financial disclosures would inappropriately expose them to liability.[95] "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."[96] Many democratic politicians, along with environmental NGOs, would like to see climate-related disclosures filed in annual or quarterly statements, such as the 10-K.[97] They believe that by filing climate-related disclosures instead of furnishing, companies will be properly motivated to make disclosures completely and accurately.[98]

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[92] *Id.* ("Some commenters already voluntarily disclose quantitative climate information, including Scope 3 emissions …").
[93] *Id.* (referencing Alphabet Inc.'s and Facebook, Inc.'s position that "to avoid subjecting issuers to undue liability ... the SEC should permit climate disclosures to be furnished in separate climate reporting to the SEC, outside of annual, quarterly and other filings").
[94] *Id.* (providing the listed companies' views on whether climate-related disclosures should be furnished or filed).
[95] *Id.* ("To avoid subjecting issuers to undue liability, including from private parties, the SEC should permit climate disclosures to be furnished in separate climate reporting to the SEC, outside of annual, quarterly and other filings.").
[96] Letter from Alphabet Inc. et al., to Gary Gensler, Chair, U.S. Sec. and Exch. Comm'n (June 11, 2021) (on file with author).
[97] Reiners & Olczykowski, *supra* note 21 ("Most environmental NGOs and Democratic politicians want disclosures filed in audited financial statements.").
[98] *See Id.* (stating that NGOs and Democratic politicians are "generally more optimistic about the science behind quantitative disclosures and less supportive of a phased in approach or the creation of safe harbors").

G. Conclusion

In conclusion, before the end of 2021, the SEC will likely adopt a new climate-related disclosure framework. The SEC will consider several factors, such as where disclosures should be located, what information should be disclosed, should there be specific disclosures by industry, should companies provide forward looking scenario analysis, and should a new SEC framework resemble an existing framework such as the TCFD. The SEC has asserted its authority to mandate climate-related disclosures through the broad statutory powers of the Securities and Exchange Act of 1934. Opponents of the SEC's potential climate-related disclosure mandate argue that climate-related disclosures are outside of the scope of the authority that Congress has delegated to the SEC. Opponents also argue that mandatory climate-related disclosures would violate the first amendment. Public comments to the SEC have mostly been positive; however, commenters were divided on what exactly should be included in disclosures and whether disclosures should be furnished or filed. Depending on how the SEC ultimately tailors its climate-related disclosure rules, I expect SEC registrants will challenge the SEC. Particularly, I would expect SEC registrants to fiercely oppose mandated scope 3 emission disclosures and furnished climate-related disclosure statements.

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