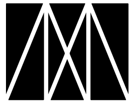

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POLICY BRIEF

Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?

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The Securities and Exchange Commission is planning to propose new mandatory disclosure rules on climate change and other topics in the environmental, social, and governance area (ESG) without further statutory authority from Congress. Possible disclosure rules could require companies to describe the corporate governance processes they have to assess climate-related risks, estimate and report their direct and indirect greenhouse gas emissions, report specific actions they are taking to mitigate risks, and identify the potential financial effects of climate change.

The purpose of this brief is to explain that the SEC does not currently have statutory authority to adopt mandatory disclosure rules on climate change. If the SEC acts to compel climate-related disclosures without additional enabling legislation, the rules face a significant chance of being set aside by a reviewing court.[†]

The concerns described in this brief are not secret or undiscovered. Reports from the House of Representatives, one for the Securities Act in 1933 and one for the Securities Exchange Act in 1934, explain that Congress deliberately enumerated categories of information for company disclosure and did not give the SEC or its predecessor a general power to order disclosures. One of the reports states that Congress did not want an administrative agency to have "unconfined authority to elicit any information whatsoever."[1] In 2016, the SEC itself acknowledged limitations on the scope of its authority to adopt climate-change disclosure rules. It concluded that it is generally not authorized to order disclosures relating to environmental, sustainability, or other matters of social concern except to further "a specific congressional mandate."[2] Those restrictions continue to exist. The SEC may not proceed to require climate-change disclosures without additional explicit legislative direction.

The views presented in this document do not represent official positions of the Mercatus Center or George Mason University.

This brief does not take a position on the desirability of requiring certain businesses to make public disclosures on topics related to climate change. Disclosure might be a good idea or a bad idea as a matter of public policy. The purpose of this brief is to question whether the SEC has legal authority under its current statutes to adopt mandatory climate-change disclosure rules. Congress, and not the SEC on its own, should decide whether and how the country should proceed on such mandatory public disclosures.

The SEC's effort to develop a mandatory disclosure system on a wide range of climate-change issues and questions about the SEC's statutory authority to do so suffer by comparison to a partial step Congress has already taken in the area. Congress authorized the Environmental Protection Agency (EPA) to collect reports from emission sources and make them available to the public,[3] and the EPA implemented an annual greenhouse gas reporting program that covers approximately 8,000 facilities that are large sources of greenhouse gas emissions.[4] The SEC should not act without equally clear statutory authority and without considering that the EPA already requires public disclosure of greenhouse gas emissions.

This brief begins with a reminder of why the SEC's need for a solid statutory basis for its actions matters to the US form of government. It then describes the usual but incomplete legal analysis of the SEC's power to issue rules that the SEC and proponents of climate-change disclosures use. The next sections look at the full picture of the statutory context surrounding the SEC's power to write disclosure rules and conclude that, with few exceptions, Congress limited that power to subjects closely bearing on the disclosing company's business, management, securities, and financial results. The brief then discusses the ways in which a set of mandatory disclosures on the effects of climate change differs from the type of company disclosures Congress permitted the SEC to require. The final section discusses materiality and attempts to respond to some of the misunderstandings of the role of materiality in the debate about climate-change disclosure rules.

THE SEC'S NEED FOR ESG STATUTORY AUTHORITY MATTERS

The need for the SEC to have an adequate statutory basis to adopt climate-change rules is not a legal technicality or a formalism. It is fundamental to the structure of the federal government. The absence of authority from Congress is fatal to agency regulations.

Responding to global warming and the effects of greenhouse gases on climate will test the institutions created in the Constitution. The key test will be for Congress. It must decide on the policies for the country and enact them into law with a reasonable level of detail and specificity. It must decide what approaches should be taken and which federal administrative agencies should have what powers.[5] Under the US system of self-government, a law attains its legitimacy and force because voters give their elected and accountable representatives in Congress the authority to pass binding rules.

Until Congress enacts appropriate legislation on climate change, federal agencies and courts will face their own tests. The president and federal agencies, frustrated by the lack of movement, direction, and progress in Congress, will feel an urge to act, but they must exercise restraint for the sake of democracy and ordered liberty. An agency that adopts a regulation before Congress has given explicit instructions in a statute acts on the personal views of a small number of unelected people and creates a high risk of implementing an arbitrary and subjective policy choice as law. It can preempt and prejudice the approach Congress might have wanted to take. It invites public criticism of partisanship and increases the risk of a see-saw of reversal and retaliation when a different political party takes control. Public confidence in government suffers.

To preserve the legitimacy and accountability of the lawmaking function, the SEC should respect the role of Congress in setting national policy and direction. A federal agency must stay within the bounds of its statutory authority.[6]

The courts, for their part, must be resolute in keeping the actions of agencies in check.[7] They must police the terms of the laws granting authority to administrative agencies. When an agency attempts to use a statutory power to address a problem, such as greenhouse gas emissions, the courts must fairly and objectively examine the statute to determine the scope of the powers Congress actually allowed. Sometimes an agency does have power from Congress to regulate or to require public reports of substances contributing to climate change, such as the EPA authority to regulate emissions of carbon dioxide as a greenhouse gas and to issue public reports of facility-level greenhouse gas emissions.[8] Agencies should be kept within those boundaries. The question for a reviewing court "is always whether the agency has gone beyond what Congress has permitted it to do."[9]

THE LEGAL ANALYSIS SUPPORTING THE SEC'S POWER TO ADOPT CLIMATE-CHANGE DISCLOSURES

The question of the SEC's statutory authority to issue new rules on climate-change disclosures therefore matters. Supporters of such disclosures assert that the SEC's rulemaking power is clear. This section reviews the legal basis for that position.

The Securities Act and the Securities Exchange Act have several provisions giving the SEC rulemaking power and, specifically, power to adopt rules for disclosures in registration statements or periodic reports. A registration statement is the main disclosure document for a company selling shares to the public,[10] and companies in various circumstances must provide periodic reports to the public.[11]

Those favoring broad SEC power to adopt disclosure rules claim the SEC may act when it follows two steps. First, the SEC must determine whether a disclosure rule is "necessary or appropriate in the public interest or for the protection of investors." That phrase is in two of the statutes authorizing SEC disclosure rules, section 7(a) of the Securities Act and section 12(b) of the Securities

Exchange Act.[12] Second, the SEC must comply with a statute requiring consideration of several factors: when the SEC must make a public interest determination, it must consider whether the rule will promote efficiency, competition, and capital formation.[13]

The SEC and supporters of additional climate-change disclosure rules have followed this approach when describing the legal prerequisites for issuing new disclosure obligations.[14] These proponents have not otherwise addressed the question of statutory authority. Based on that approach, petitioners for more SEC climate-change disclosures conclude that "the SEC has clear statutory authority to require disclosure of ESG information."[15] Without any analysis of the authority issue, some SEC officials appear to assume that the SEC's rulemaking power covers climate-change disclosure.[16]

Is that the end of the correct legal analysis? Does the SEC have the power and discretion to impose disclosure obligations related to securities on any topic and any subject as long as an acceptable case on public interest, investor protection, efficiency, and capital formation can be made? If so, the SEC's ability to require disclosures is nearly limitless because of the facial appeal of the claim that more information is better for investors. The SEC could approve a rule ordering filing companies to disclose the locations of dog parks near corporate properties or the average number of sunny days each year at corporate offices. The SEC could insert itself into areas regulated by other federal agencies, requiring, for example, the disclosures needed in a consumer credit transaction other than a mortgage transaction or the disclosure of policies against sex discrimination in federally supported education programs.[17]

A reviewing court is highly unlikely to accept that the SEC may adopt a disclosure rule on any topic even if the rule is in the public interest and promotes efficiency, competition, and capital formation. The appropriate legal analysis has two further steps. The first is to recognize that an agency's rulemaking power depends on the surrounding statutory language and the statutory context. The second is to investigate the statutory context and the instructions Congress provided for the SEC's authority to write disclosure rules for issuing or reporting companies.

THE NEED TO IDENTIFY THE APPROPRIATE STATUTORY CONTEXT

The SEC commissioners should not adopt mandatory disclosures on climate-change issues without a fuller and more careful consideration of the agency's statutory authority. Courts reviewing agency rulemaking powers stress that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. The full statutory picture gives content and meaning to general rulemaking authority and to the use of the words "public interest" in a statute.

The Supreme Court's normal and straightforward method of determining an agency's rulemaking power is to examine the surrounding statutory language and context. Examining a word or phrase in isolation is not sufficient:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole . . . . In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.[18]

An example of this approach occurred when the Court considered whether the Federal Power Commission (FPC) had the power to adopt a rule requiring power companies not to discriminate in their employment practices.[19] One argument in favor of the rule was that the FPC was charged with advancing the public interest and that ending employment discrimination was in the public interest.[20] The Court agreed that eliminating employment discrimination was an important national goal but concluded that Congress had not granted the FPC the necessary authority.[21]

The Court began its reasoning by observing that it had "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation," which were expressed in a provision of the relevant acts.[22] Those purposes "give content and meaning to the words 'public interest'" in the acts.[23] "The use of the words 'public interest' in the [acts] is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates."[24]

Just as general and vague statutory phrases such as "public interest" do not liberate an agency from the need to attend closely to statutory context and structure, the grant of general rulemaking authority does not either. The DC Circuit made this point recently in striking down an SEC rule:

> The controlling principle here is that [an] agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority. When an agency acts pursuant to its rulemaking authority, a reviewing court determines whether the resulting regulation exceeds the agency's statutory authority or is arbitrary and capricious. A court does not simply assume that a rule is permissible because it was purportedly adopted pursuant to an agency's rulemaking authority. Nor does a court presume that an agency's promulgation of a rule is permissible because Congress did not expressly foreclose the possibility.[25]

Statutory context and structure also often provide the congressional guidance and instructions to avoid an unconstitutionally indefinite delegation of legislative power. A court must construe the "statute to figure out what task it delegates and what instructions it provides."[26] General standards for agency action "derive much meaningful content from the purpose of [an] Act, its factual background and the statutory context in which they appear."[27] Reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.[28]

The statutes giving the SEC the authority to adopt disclosure rules for issuing and reporting companies must be examined under these standards. Statutory context and structure are essential to an accurate interpretation of the SEC's power to require public disclosures.

STATUTORY CONTEXT FOR SEC DISCLOSURE OBLIGATIONS

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. When listing the information an issuer or reporting company should disclose, Congress consistently has restricted the subjects to financial statements, core business information, directors and management, and a description of the securities being sold. Some exceptions exist, but Congress, not the SEC, has introduced those. As discussed in the final section of this brief, materiality is not an independent basis for an SEC disclosure rule.

The SEC usually claims expansive rulemaking authority and cites sections 7(a)(1) and 19(a) of the Securities Act and sections 12, 13(a), and 23(a)(1) of the Securities Exchange Act,[29] as well as a few provisions of less direct relevance, when promulgating company disclosure obligations.[30] A look at the context of the statutes reveals significant limitations rather than broad, unconfined rulemaking power.

Section 7(a)(1) of the Securities Act says that a registration statement for a public offer must contain the information and documents specified in Schedule A of the act.[31] The House report explaining the main bill that became law summarizes the disclosures required by the 32 items in Schedule A as essential facts about the property in which a person would be investing, "essential facts concerning the identity and the interests of the persons with whom he is dealing or to whom the management of his investment is entrusted," and "essential facts in regard to the price and cost of the security he is buying and its relation to the price and cost of earlier offerings."[32]

The report mentions in particular that Schedule A required disclosure of basic financial statements and hidden interests that usually have not been revealed to buyers. The requirements were "designed to reach items of distribution profits, watered values, and hidden interests that usually have not been revealed to the buyer despite their indispensable importance in appraising the

soundness of a security. A balance sheet that gives an intelligent idea of the assets and liabilities of the issuer and a profit and loss statement that gives a fair picture of its operations for the preceding 3 years, must be certified by an independent public accountant."[33] The report also says, "The 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.[34] The SEC has said the items "in Schedule A are largely financial in nature and were intended to help investors assess a security's value."[35]

Congress has added two qualifications to the disclosures required by Schedule A. First, the SEC may, by rule, exclude some of the information if it concludes that the information is not necessary for adequate disclosure to investors in particular classes of issuers. Second, the SEC also may adopt rules to require a registration statement to include other information or documents as "necessary or appropriate in the public interest or for the protection of investors."[36]

It is that second qualification that is often taken out of context to support broad SEC power to issue disclosure rules.[37] With an understanding of the detail and prominence of Schedule A and of the SEC's power to issue rules relieving a class of issuers of a Schedule A requirement, the sentence giving the SEC the ability to require additional disclosure takes on a different and much more circumscribed meaning: the SEC may supplement Schedule A for good reasons but should not stray far from it.

The House report warns that the exception was not to be the rule. "To assure the necessary knowledge for [an investor's] judgment, the bill requires enumerated definite statements. Mere general power to require such information as the Commission might deem advisable would lead to evasions, laxities, and powerful demands for administrative discriminations."[38]

Proponents of an expansive SEC disclosure rulemaking power also refer to the general rulemaking provision in section 19(a) of the Securities Act.[39] Those rules must be necessary "to carry out" the provisions of the Securities Act and, therefore, for purposes of disclosure in a registration statement, go no further than the more specific rulemaking provision in section 7(a)(1). The general rulemaking authority in section 23(a)(1) of the Securities Exchange Act is similarly limited and does not expand the specific disclosure rulemaking provisions in that act.[40]

In addition, those who rely on section 19(a) generally neglect to discuss and quote the long passage in the statute after the initial grant of rulemaking power. The long passage is quoted here,[41] and its overwhelming emphasis is on disclosures of financial information such as the balance sheet and earnings statement and the preparation of accounts. According to the statute, these items are "among other things" the SEC may require and therefore are examples rather than limitations, but Congress undeniably wanted the primary object of the SEC's authority to be financial statement information. That preoccupation should be given weight when interpreting the SEC's power to add disclosure obligations.

The relevant Securities Exchange Act provisions, sections 12 and 13,[42] also emphasize financial and essential company information. Section 12 requires disclosures by companies that register securities for trading on a stock exchange or that have a certain number of equity shareholders and meet an asset test.[43] The statute gives the SEC power to adopt rules governing the information a company must disclose, but this SEC rulemaking power is expressly limited to 13 categories of information and documents. It provides that an application for this type of registration shall contain such "information, in such detail" as the SEC may by rule require "as necessary or appropriate in the public interest or for the protection of investors, in respect of" the specified categories.[44] The categories include the nature of the business, the terms of outstanding securities, descriptions of directors, officers, and major shareholders, material contracts, balance sheets, profit and loss statements, and other financial statements.[45] The House report for the Securities Exchange Act said the bill was not to give the SEC "unconfined authority to elicit any information whatsoever."[46]

The periodic reporting obligations in section 13 apply to the companies that have registered their securities because of size or exchange trading or that have had a Securities Act registration statement go effective.[47] Section 13(a) requires companies to disclose, in accordance with rules the SEC "may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security," (1) the information needed to keep reasonably current the information supplied to register securities under section 12 and (2) annual reports, certified by independent public accountants if the SEC requires, and quarterly reports.[48]

The statutory language allowing the SEC to issue rules for periodic reports of companies has no subject-matter restriction, but it must be read together with section 13(b)(1). Section 13(b)(1) states that the rulemaking power granted to the SEC for periodic reports covers certain subjects.[49] The subjects are accounting items, such as the details for a balance sheet and the methods to be followed in the valuation of assets and liabilities. In fact, section 13(a)(2) hinted that this is the case for annual reports because it provides that the SEC may require annual reports to be certified by independent public accountants. The House report for the Securities Exchange Act emphasizes that periodic company reports would provide financial and accounting information "to give some assurance that reports will not hide the true condition of the company."[50]

Over time, the SEC has issued disclosure rules that have loosely adhered to the statutory authorizations but that also have grown considerably in detail and complexity. In 1977, the SEC began a project to meld the disclosures required by the Securities Act and the Securities Exchange Act and create a common source and description of disclosures required in the two acts.[51] The result was Regulation S-K and, later, a separate set of rules for accounting and financial reporting called Regulation S-X.[52] Schedule A of the Securities Act provides the basis for many of the disclosure requirements in Regulation S-K,[53] as can be seen in the table of contents of the regulation.[54] The main subparts are business and property, securities, financial information, management and security holders, and, in a registered offering, use of proceeds, pricing information, and plan of dis-

tribution. The obligatory disclosures are broad and cover the aspects of a company that are of significance to investors.[55]

Other statutes in the Securities Act provide further context for the extent of the SEC's power to issue rules on disclosure. In these statutes, Congress sets the terms for types of offerings other than public offerings and for certain resale transactions and specifies the disclosure topics along with a grant of some amount of rulemaking power to the SEC. Time and again, when Congress has spoken about a company's disclosure obligations, it has consistently singled out essential information about the company's business, securities, management, financial statements, and securities offering process.[56]

Congress has taken two other kinds of actions indicating limitations on the SEC's ability to adopt disclosure obligations related to climate-change issues. First, Congress has used statutory authorizations when it wanted to expand mandatory company disclosures beyond the topics already covered in the Securities Act and the Securities Exchange Act. Examples of such topics include corporate responsibility, corporate governance, and selected aspects of executive compensation.[57] Congress has required new disclosures on specific public policy concerns, such as conflict minerals and payments by resource extraction companies.[58] The SEC has therefore concluded that it is generally not authorized to order disclosures relating to environmental, sustainability, or other social goals except in response to "a specific congressional mandate."[59]

That conclusion is correct. 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. SEC adoption of climate-related disclosure rules in the absence of explicit enabling legislation would exceed the limitations on the rulemaking powers that the agency has itself recognized.

Second, Congress has not been entirely happy with what the SEC has done in Regulation S-K.[60] Congress used two enactments to express disapproval of the length and complexity of the disclosure rules and to instruct the SEC to modernize and simplify Regulation S-K. These actions are evidence that Congress does not favor unilateral SEC steps to expand the disclosure burdens of SEC-regulated companies. In the past 10 years, Congress has demanded fewer and simpler disclosure obligations, not more and more complicated ones.

The statutory context and structure and the other relevant evidence from Congress provide a strong basis for reliable conclusions about the scope of the subjects Congress wants to be part of SEC rules on mandatory company disclosures. Congress has been consistent in identifying essential information about a company's business; capital structure; directors, officers, and major shareholders; material contracts; balance sheets; profit and loss statements and other financial statements; the securities being sold; and other aspects of a securities offering. As the House report for the Securities Exchange Act says at one point, the SEC was not to have "unconfined authority to elicit any information whatsoever."[61]

Congress has also demonstrated that it prefers statutory mandates to authorize SEC disclosure rules in new policy areas and that it disfavors the growing burdens in the disclosure rules developed by the SEC. Those connected legislative concerns are further reasons that the SEC should not require new climate-related disclosures in SEC filings without explicit congressional direction.

This discussion of statutory context demonstrates that the SEC does not have statutory authority to adopt a disclosure rule resting solely on showings that a disclosure is necessary or appropriate in the public interest or for the protection of investors and promotes efficiency, competition, and capital formation. The federal securities laws impose subject-matter boundaries on the SEC's power to order company disclosures.

EXISTING STATUTES DO NOT AUTHORIZE SEC CLIMATE-CHANGE DISCLOSURES

Disclosures aimed at climate change would be different in several critical ways from traditional SEC disclosure rules that Congress has authorized. A discussion of four main differences follows.

Different Subject and Objective

A key distinction is that disclosures on climate-change issues would have a subject and objective different from the disclosures Congress requires under the federal securities laws. In the securities laws, Congress lists types of company-specific information to be made public to allow investors to value securities and direct capital resources. 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. This is the reality, notwithstanding the efforts of some advocates to fit a climate-change disclosure regime into the traditional justifications for public disclosures under the securities laws, an argument addressed a few paragraphs later.

The subject of the disclosures would be climate-change information and not a subject Congress lists for disclosures to address. The main subjects Congress authorizes for disclosure are the business, financial performance, securities, and management of the disclosing company.

In addition, climate-change disclosure rules would be a piece of the much larger effort to respond to the threats from climate change and global warming from greenhouse gases. The truth is that the objective of climate-change disclosures is predominately the policy goal of combating the causes of climate change and reducing fossil fuel emissions.[62] The disclosures would create incentives and disincentives to guide the behavior of corporations toward the policy goals of those advocating strong action against the effects of climate change.[63] Supporters of climate-change disclosures link the disclosures to reduced global emissions and "sustainable solutions":

- President Biden has issued an executive order connecting his policy for enhanced disclosures of climate-related financial risk with his policies to "act to mitigate that risk and its drivers" and "achieve our target of a net-zero emissions economy by no later than 2050."[64]
- The leading advocate on the SEC for climate-change disclosure rules has said that "investors want to and can help drive sustainable solutions on" climate change issues. The "issues do not observe artificial distinctions between society and financial markets."[65]
- A climate risk disclosure bill in the House of Representatives states that "requiring companies to disclose climate-related risk exposure and risk management strategies will encourage a smoother transition to a clean and renewable energy, low-emissions economy and guide capital allocation to mitigate, and adapt to, the effects of climate change."[66] The House passed that bill as part of a package in June 2021,[67] but the Senate has not yet passed such a bill.
- One group with recommendations on a broad range of economic, social, and environmental disclosures, including a company's greenhouse gas emissions, has said, "Sustainability reporting based on [its] Standards provides information about an organization's positive or negative contributions to sustainable development."[68]

This goal of mitigating the effects of climate change is a significant distinction between disclosures on climate change and the normal disclosures Congress has authorized the SEC to require. As already discussed, the objective of the statutes requiring disclosures by issuing and reporting companies is to make available to investors fundamental facts about the specific companies issuing securities.[69] Congress has judged that truthful statements about those facts would allow investors to evaluate the past and potential financial performance and value of individual companies and allocate capital accordingly.[70] The different purpose of climate-change disclosures indicates they do not fall within existing SEC authority for disclosure rules.

Some argue that climate-change disclosures would have the same subjects and objective as the standard, traditional SEC disclosure rules for issuing and reporting companies. One proponent has said that climate-related financial disclosures would provide "the information needed by investors, lenders, and insurance underwriters to appropriately assess and price climate-related risks and opportunities."[71]

These claims are often no more than efforts to persuade the SEC to use agency rulemaking to require the disclosures without further congressional authorization,[72] but they are also correct to some extent. Disclosure rules about the effects of climate trends on individual companies could be written to fall within the subject headings Congress has spelled out for disclosures in public filings, such as the need for capital, the effects on financial statement line items, or risk factors.

The problem with the claim is that existing SEC disclosure rules already cover a large portion of what new disclosure rules would address. The current disclosure rules for issuing and reporting companies in regulations S-K and S-X comprehensively cover the areas of company information of

interest to investors. When global warming or other environmental issues affect the operations or financial performance of a specific company, many of the existing disclosure rules require discussion of the effects. In 2010, the SEC issued guidance about the application of the disclosure rules to climate change matters and listed a variety of specific disclosure obligations that, depending on the particular circumstances of a company, could require disclosure of the effects of climate change developments.[73] For example, one item in Regulation S-K requires a company to disclose and discuss a trend or uncertainty that is reasonably likely to have a material positive or negative consequence for the company's liquidity, capital resources, or results of operations.[74] Another item requires disclosure of the role of the company's board of directors in risk oversight,[75] which is one of the recommended climate-change disclosures.[76]

Those who want more detailed and targeted climate-change disclosures have their criticisms of the 2010 guidance and current disclosure obligations.[77] Nonetheless, the analysis in the guidance is straightforward and sound, and the coverage of regulations S K and S X is sweeping. The genuine need for further climate-related disclosure rules to meet the aims of the federal securities laws is doubtful,[78] which reinforces the conclusion that the real reason for the demands for more climate-change disclosure is to use the SEC to implement a climate-change agenda without a mandate from Congress.

Additional Volume and Detail of Disclosures

Some of the templates for SEC climate-change disclosure rules propose extensive and detailed disclosure obligations that would be added to the already long set of disclosures developed over the years to implement congressional instructions. Those characteristics of proposed climate-change disclosures—volume, detail, single external subject, additive—distinguish them from the disclosures that Congress enables the SEC to require and that the SEC has implemented at length over many decades. Climate-change information would become a second, separate body of disclosures, which evidences the need for Congress to endorse them.

Several different organizations have offered approaches to climate-related disclosures. Three are the Task Force on Climate-Related Financial Disclosures (TFCD), the Global Reporting Initiative (GRI), and the Sustainability Accounting Standards Board (SASB).[79]

- The TFCD recommends disclosure in four main areas (governance, strategy, risk management, and metrics) and has specific suggested disclosure topics within each of the four. On top of those are guidance for all companies and suggestions and supplemental guidance for certain business sectors. The proposed metric disclosures are detailed. Companies should provide scope 1, scope 2, and possibly scope 3 greenhouse gas emissions "calculated in line with the GHG Protocol methodology" and should consider disclosing "industry-specific GHG efficiency ratios." Those concepts have definitions or explanations.[80]

- The GRI has modular, interrelated standards. Three, including general disclosures and management approach, apply to all companies. Companies then choose a material topic, such as environmental or social, and subtopics within a material topic. Subtopics for the environment include emissions and water and effluents. The emissions subtopic has recommended disclosures on, among other things, scopes 1, 2, and 3 greenhouse gas emissions and the production, importation, and exportation of ozone-depleting substances.[81]
- The SASB has five "sustainability dimensions" covering the environment, leadership and governance, and business model, among others. The dimensions embrace 26 sustainability issues. For example, the environment dimension includes greenhouse gas emissions, air quality, and water management. Those issues were the basis for the SASB's 77 industry-specific standards.[82]

The proposed disclosures are lengthy, detailed, and complicated, and they would take over public reports. New disclosure obligations could require companies to describe how they are organized to consider climate risks and opportunities and how climate issues affect business, strategy, and financial planning. Companies could need to develop standards on greenhouse gas emissions and water usage to measure and manage climate-related risks and opportunities and set up new management processes to prepare and verify the new disclosures. Climate-change information would become a lengthy, second set of disclosures separate from or interspersed with the information responsive to the current disclosure obligations.

Such a redirection from the traditional company disclosures is not necessarily a reason to oppose climate-change disclosures, but it is further evidence of the magnitude of the potential change from the current system. Changes of such significance raise a question about the SEC's current legal authority to adopt systematic climate-change disclosures and are a reason that Congress should first give the necessary rulemaking power in express terms to the SEC.

The concerns with a new set of regulations of this order of magnitude make it a candidate for the Supreme Court's major questions doctrine. Under the doctrine, courts look for clear authorization from Congress when an administrative agency embarks on a new and expansive regulatory mission that has economic and political significance. Congress must have spoken directly when an agency claims power to regulate a substantial policy area.[83]

Congress has not spoken directly and plainly to give the SEC the power to write regulations requiring disclosure of climate-related information. To the contrary, questions about the country's response to climate change and, specifically, the topic of climate-change disclosures by public companies are major and contentious policy areas. Congress has not resolved its disagreements on climate legislation and has not enacted a statute directing public companies to make specific types of climate-related disclosures. Many questions and choices about climate-change disclosures need to be settled (see later in this brief) and should be addressed by Congress as the primary

policy making institution in the government. If the SEC adopts such disclosure rules, it would be misusing general rulemaking powers that Congress provided decades ago for different purposes and possibly usurping or preempting decisions Congress would have made.

The failure of Congress to act on a serious and urgent matter, such as setting a national policy to respond to global warming issues, does not justify an administrative agency decision to assert its own regulatory power. As the Supreme Court said in *FDA v. Brown & Williamson Tobacco Corp.*,

> [N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And [in] our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.[84]

Disclosures That Look Outward, Not Inward

A third difference of climate-related disclosures from traditional issuing and reporting company disclosures is that many climate-related disclosures look outward rather than inward. Outward looking disclosures discuss the effect of the reporting company on the environment, markets, communities, and the like. Inward looking disclosures discuss the effect of external environmental or climate developments, such as reduced demand for fossil fuels or the increased losses from wildfires or floods, on the reporting company's business, financial results, and plans.

The types of disclosures Congress authorizes in the securities acts and the disclosure obligations currently in Regulation S-K mainly look inward. Some proposed climate-related disclosures also would call for discussion of climate effects on the company, but, as already discussed, Regulation S-K already largely covers that type of disclosure.

To a significant extent, several versions of proposed climate disclosures are outward looking. The GRI says that its "Standards help organizations understand their outward impacts: on the economy, environment, and society."[85] The TFCD says that companies "should provide their Scope 1 and Scope 2 GHG emissions and, if appropriate, Scope 3 GHG emissions and the related risks" and "should describe their key climate-related targets such as those related to GHG emissions, water usage, energy usage, etc."[86]

That difference in outlook is another reason to doubt that the SEC's current power to write disclosure obligations extends to the broad range of climate issues. Requiring companies to provide the markets with information about their greenhouse gas emissions or uses of resources might promote efforts to mitigate climate change, but it would be less directly relevant to the areas Con-

gress has permitted the SEC to cover with disclosure rules: the operations and financial condition of the companies.

Different Agency Expertise

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. As the Supreme Court said in *King v. Burwell*, 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.[87]

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. For an idea of the main types of expertise the SEC has in the standard disclosure area, one should read parts of the concept release on Regulation S-K. The SEC's effort is to design specific disclosures to help investors understand the workings and prospects of a company. For example, the SEC asks whether disclosure of the number of employees helps investors assess the size, scale, and viability of a company's operations and trends or shifts in operations.[88] Similarly, the SEC asks whether the important section titled "Management Discussion and Analysis" highlights the most significant aspect of the company's financial condition and whether it has parts that obscure significant information.[89]

Drafting disclosure rules related to climate issues would be different—not completely perhaps, but largely—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. The lack of expertise would not be as pertinent if the SEC were to follow the path set by the 2010 disclosure guidance or if it were to adopt principles at a high level of generality, such as requiring a company to disclose and discuss the three issues related to global warming that most affect its operations.

If the SEC aims for disclosure obligations at a reasonable level of detail, it needs a corresponding understanding of climate-change science, issues, and economics. That need is already clear from a list of questions on which one SEC commissioner requested comments from the public, including the following:

- What information related to climate risks can be quantified and measured?
- Are there specific metrics on which all registrants should report (such as, for example, scopes 1, 2, and 3 greenhouse gas emissions and greenhouse gas reduction goals)?
- How are markets evaluating and pricing externalities of contributions to climate change? How does the absence or presence of robust carbon markets impact firms' analysis of the risks and costs associated with climate change?

- What are the advantages and disadvantages of establishing different climate-change reporting standards for different industries, such as finance, oil and gas, and transportation?[90]

This commissioner is a proponent of the SEC requiring climate-change disclosures, but in her request for comments she does not discuss how the SEC staff and commissioners would acquire the ability to give educated answers to the questions.

Another SEC official concedes that creating an effective ESG disclosure system "is not likely to be simple, quick or easy." He says that the important and challenging questions include what disclosures are most useful, what the right balance between principles and metrics is, and how much standardization can be achieved across industries.[91]

Measurement standards seem particularly distant from SEC competence. What qualifies the SEC to decide whether to require disclosure of only scope 1 greenhouse gases or of scopes 2 and 3 also? What is the difference for investors? Should all companies disclose the same types of information, or should the types of information vary by industry or sector? Are investors likely to understand the disclosures? Is a baseline standard needed? Should the SEC require some or all companies to disclose ozone-depleting substances? What is the standard, and is a baseline standard needed?

The TFCD recommends disclosure of key metrics used to measure and manage risks associated with water, energy, land use, and waste management when relevant.[92] Similar questions exist about these standards.

How does the expertise of the SEC put it in a position to choose appropriate standards and answer these questions? The realistic response is that the SEC is not qualified to identify and describe in reasonable detail the topics a public company should address on the range of potential climate-change issues.[93] The decisions need to rest heavily on environmental science, data, and economics and on many policy choices. The need for specialized knowledge and experience other than those of the SEC is a further signal that the SEC does not currently have legal authority to adopt disclosures on climate change and should wait for further policy and legal guidance from Congress.

THE ROLE OF MATERIALITY

The final topic in this brief concerns the concept of materiality, which has been used loosely for various purposes in the debate about mandatory climate-change disclosure rules. Some writers cite investor demand for climate-change information, conclude the information is therefore material, and assert that the materiality of the information is a sufficient ground for the SEC to exercise its power to impose new obligations to disclose the information.[94] Others believe that the SEC's mandatory disclosure regime is based on the Supreme Court's longstanding definition of materi-

ality in the federal securities laws.[95] Another has equated the disclosure of material information with investor protection.[96]

The purpose of this section is to clarify the applicability of materiality in the climate-change disclosure discussion. First it gives a general definition of materiality. Then it addresses some of the misunderstandings about materiality.

As a general proposition, information is material if there is a substantial likelihood that a reasonable investor would consider it important or significant in deciding whether to buy or sell a security or how to vote as a shareholder. When a relevant event is contingent or speculative, materiality will depend on a balancing of the probability that the event will occur and the anticipated magnitude of the event to the company. The standard of materiality should not be set too low. The materiality standard filters out information that an investor would not consider significant, protects investors from being buried in an avalanche of trivial information, and protects the company from a duty to collect and disclose every minor detail about its operations.[97]

The materiality standard has variations. The definition in the preceding paragraph is from the Supreme Court in cases concerning a company's liability for a false or misleading statement, but lower courts apply the definition in different ways.[98] The SEC has several definitions of materiality.[99] The SASB has its own definition of materiality.[100] Europeans have weighed in with the concepts of "double materiality" and "dynamic materiality."[101]

Materiality remains an important concept in the disclosure area despite the variations, but it does not bear all the weight being assigned to it in the debate about climate-change disclosures. The following principles limit the function of materiality.

1. The SEC does not have authority to impose a disclosure obligation solely because information is material. As discussed earlier, a disclosure rule must fall into one of the subject areas Congress wants to address and must be in the public interest or for the protection of investors, and the SEC must consider the likely effects of the rule on efficiency, capital formation, and competition. The materiality of information is not a separate and independent basis for a disclosure rule. The statutes for the SEC do not say that the agency may issue a rule to require a company to disclose any information that is material to investors.
2. The SEC may require disclosure of immaterial information. When the statutes permit the SEC to order company disclosures, the statutes do not also demand that an SEC rule apply only to material information. Some mandatory disclosures in Regulation S-K do not have a materiality qualifier, such as certain executive compensation information.[102]
3. A disclosing company does not have an obligation to disclose information solely because the information is material. Commissioner Allison Herren Lee usefully made this point in a speech.[103]

The federal securities laws do not require a filing company to disclose all information material to potential investors. For the purposes of this brief, a company has a disclosure obligation when a federal securities statute or valid regulation specifies a particular subject or topic for disclosure or when a disclosure of additional (material) information is necessary to prevent another statement from being misleading.[104]

4. Many of the mandatory disclosure items in Regulation S-K specify a type of information and then add a materiality qualifier. For example, a company must disclose material physical properties, material pending legal proceedings, and material trends and uncertainties in liquidity and results of operations.[105]

   Materiality and the subjects for required disclosures are different. The subject and materiality of a disclosure are separate considerations. When a type of information that must be disclosed is modified with the word "material," two conditions must be satisfied: the discloser must have something to say about that item, and the information must be material.

5. Unless it has a good reason, the SEC should limit mandatory disclosures to material information. This is good disclosure policy because a materiality limitation protects investors from being inundated with irrelevant details. It also allows each company to tailor its disclosures to its own individual circumstances.

The principles operate in the following way. Say, for example, that reasonable investors want to know the number of dog parks within a half mile of the major properties of companies. For some reason, the investors think that information is extremely important to trading decisions. The companies would not be obliged to provide that information, even though it would satisfy a materiality test, unless a securities statute or valid disclosure rule were to require the company to address the number of proximate dog parks, and the SEC could not adopt a rule covering that subject because it is outside of the types of information the securities statutes list for required public disclosure.

CONCLUSION

Even if climate-change information is material to investors, the SEC does not currently have statutory authority to make rules requiring companies to disclose it. Climate-change information is outside the scope of the subjects Congress has allowed the SEC to cover in disclosure rules, and imposing a set of disclosure obligations, at least as envisioned by some proponents, would have a subject and objective different from the disclosure provisions in the federal securities laws. The requirements also would dominate the public disclosure process so much that they would, in effect, create a second disclosure regime.

None of this means that disclosure of climate-related risks or opportunities is a bad idea, and the purpose of this brief is not to take a position on the desirability of such disclosures. Disclosure

might be a good idea or a bad idea as a matter of public policy. What is indisputable, however, is that Congress should make that decision and not the SEC on its own.

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NOTES

† This policy brief is written in anticipation of the Securities and Exchange Commission (SEC), as a full commission, voting to request public comment on a climate-change disclosure proposal. A public interest comment will be filed with the SEC shortly after public comment has been requested.

1. H.R. Rep. No. 73-1383, at 23 (1934); *see also* H.R. Rep. No. 73-85, at 7 (1933) (stating that "the bill requires enumerated definite statements" from a company selling securities to the public because granting a "general power to require such information as the Commission might deem advisable would lead to evasions, laxities, and powerful demands for administrative discriminations").

2. Sec. and Exch. Comm'n, Concept Release, Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,970 & n.663 (April 22, 2016) (S-K Concept Release).

3. 42 U.S.C. § 7414.

4. *See Greenhouse Gas Reporting Program*, Env't Prot. Agency, https://www.epa.gov/ghgreporting (last updated July 16, 2021). The author is grateful to Joseph Grundfest for information about this program.

5. *See* Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting) (stating that the need for Congress to give more detail in legislation "is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions").

6. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, [2446] (2014) (stating that to avoid "a severe blow to the Constitution's separation of powers," an agency must act within the bounds established by Congress and may not rewrite statutory terms to suit its own sense of how a statute should operate); City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) ("No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.") (emphasis in original); Stark v. Wickard, 321 U.S. 288, 309 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."); California Independent Sys. Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004) (stating that a federal agency is a creature of statute, has no constitutional or common law existence or authority, and has "*only* those authorities conferred upon it by Congress") (italics in original).

7. *See* Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure* Act, 28 Geo. Mason L. Rev. 573, 597 (2021) (discussing judicial review as a key part of the protections in the Administrative Procedure Act against growing power in the executive).

8. *See* Massachusetts v. EPA, 549 U.S. 497 (2007); *but see* Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); *see also* Env't Prot. Agency, *supra* note 4.

9. City of Arlington v. FCC, 133 S. Ct. 1863, 1869 (2013).

10. 15 U.S.C. § 77e(a).

11. *Id.* §§ 78*l*(a)–(b), (g), 78m(a), 78*o*(d). This brief does not address other disclosure areas such as disclosures in proxy solicitations or by investment companies. *Id.* §§ 78n, 80a-24, 80a-29.

12. 15 U.S.C. §§ 77g(a)(1), 78l(b)(1). Section 13(a) of the Securities Exchange Act has a similar phrase: "as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." *Id.* § 78m(a). All three sections are discussed in more detail later.

13. *See* 15 U.S.C. §§ 77b(b), 78c(f); *see also id.* § 78w(a)(2).

14. *See* S-K Concept Release, *supra* note 2, at 23,921–22 ("The Securities Act and the Exchange Act authorize the Commission to promulgate rules for registrant disclosure as necessary or appropriate in the public interest or for the protection of investors."); Letter from Cynthia A. Williams, Osler Chair in Business Law, Osgoode Hall Law School, et al., to Brent J. Fields, Secretary, Sec. and Exch. Comm'n 3–6 (Oct. 1, 2018) (petitioning for rulemaking on ESG disclosures) (https://www.sec.gov/rules/petitions/2018/petn4-730.pdf); Madison Condon et al., Mandating Disclosure of Climate-Related Financial Risk 33–34 (2021); Virginia Harper Ho, *Modernizing ESG Disclosure*, Univ. of Ill. L. Rev. (forthcoming) (manuscript at 22–23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3845145 (finding that the SEC has broad power to adopt disclosure rules based on "economic rationales" but should have further congressional authority for disclosures with public policy or corporate behavioral goals); *see also* Allison Herren Lee, Comm'r, Sec. and Exch. Comm'n, Keynote Remarks at the 2021 ESG Disclosure Priorities Event: Living in a Material World: Myths and Misconceptions About "Materiality" (May 24, 2021) ("Indeed our statutory 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.").

15. Williams et al., *supra* note 14, at 3–6; *see also* Condon et al., *supra* note 14, at 33–34.

16. *See* Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*, Sec. and Exch. Comm'n (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures#_ftnref6 (asking for public comment on "how the Commission can best regulate climate change disclosures" based on the apparent assumption that the SEC had authority to adopt such disclosure requirements); John Coates, *ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets*, Sec. and Exch. Comm'n (Mar. 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121 (apparently assuming the SEC has the power to require environmental disclosures).

17. *See* 12 C.F.R. § 1026.18 (regulation issued by Bureau of Consumer Financial Protection); *see* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30573 (May 19, 2020) (discussing section 106.8(b) on policy dissemination).

18. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) (citations and quotation marks omitted); *see also* AMG Capital Management, LLC v. FTC, 141 S. Ct. 1341, 1348-49 (2021); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 318–20, 321 (2014); Texas v. United States, 809 F.3d 134, 179–84 (5th Cir. 2015).

19. NAACP v. FPC, 425 U.S. 662 (1976).

20. *Id.* at 666.

21. *Id.* at 665.

22. *Id.* at 669, 670 n.5.

23. *Id.* at 669.

24. *Id.* at 670.

25. NYSE LLC v. SEC, 962 F.3d 541, 546 (D.C. Cir. 2020) (citations and quotation marks omitted).

26. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

27. Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946); *see also* Gundy, 139 S. Ct. at 2123.

28. Gundy, 139 S. Ct. at 2126; Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321 (2014).

29. *See* 15 U.S.C. §§ 77g(a)(1), 77s(a), 78*l*, 78m(a), 78w(a)(1).

30. *See, e.g.*, Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2,080, 2,126 (Jan. 11, 2021) ("The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, 19(a), and 28 of the Securities Act of 1933, as amended, Sections 3(b), 12, 13, 14, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, and Sections 8, 24, 30, and 38 of the Investment Company Act of 1940, as amended."); Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,759 (Oct. 8, 2020) ("The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act, as amended, and Sections 3, 12, 13, 15, and 23(a) of the Exchange Act, as amended."); Executive Compensation Disclosure, 71 Fed. Reg. 78,338, 78,349 (Dec. 29, 2006) ("We are adopting rule amendments pursuant to Sections 3(b), 6, 7, 10, and 19(a) of the Securities Act, as amended, Sections 12, 13, 14, 15(d) and 23(a) of the Exchange Act, as amended, Section 38 of the Investment Company Act, and Section 3(a) of the Sarbanes-Oxley Act of 2002."); *see also* S-K Concept Release, *supra* note 2, at 23,921 n.50 (citing sections 7, 10, and 19(a) of the Securities Act, 15 U.S.C. §§ 77g(a)(10), 77j, and 77s(a); and sections 3(b), 12, 13, 14, 15(d), and 23(a) of the Securities and Exchange Act, 15 U.S.C. §§ 78c(b), 78*l*, 78m(a), 78n(a), 78*o*(d), and 78w(a)).

31. 15 U.S.C. § 77g(a)(1). A different schedule applies to securities sold by foreign governments.

32. H.R. Rep. No. 73-85, at 18–19 (1933).

33. *Id.* at 7.

34. *Id.* at 3.

35. S-K Concept Release, *supra* note 2, at 23,921.

36. 15 U.S.C. § 77g(a)(1).

37. *See supra* text accompanying notes 12–15 earlier.

38. *See* H.R. Rep. No. 73-85, at 7 (1933).

39. 15 U.S.C. § 77s(a) ("The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter.").

40. *See id.* § 78w(a)(1) ("The Commission [and certain other agencies] shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof.").

41. *Id.* § 77s(a) provides as follows:

> Among other things, the Commission shall have authority, for the purposes of this subchapter, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of

recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

42. *Id.* §§ 78*l*, 78m.

43. *Id.* § 78*l*(a)–(b), (g)(1).

44. *Id.* § 78*l*(b)(1).

45. *Id.*

46. H.R. Rep. No. 73-1383, at 23 (1934).

47. 15 U.S.C. § 78m(a); *id.* § 78*o*(d)(1).

48. 15 U.S.C. § 78m(a)(1)–(2).

49. *Id.* § 78m(b)(1) ("The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer . . . .").

50. H.R. Rep. No. 73-1383, at 11–13, 24 (1934). The DC Circuit reviewed most but not all the statutes discussed in the text and said that the SEC was "given very broad discretion to promulgate rules governing corporate disclosure." NRDC v. SEC, 606 F.2d 1031, 1050 & n.26 (D.C. Cir. 1979).

51. *See* S-K Concept Release, *supra* note 2, at 23,918–22.

52. 17 C.F.R. pt. 229; *id.* pt. 210.

53. S-K Concept Release, *supra* note 2, at 23,921.

54. The *Electronic Code of Federal Regulations* has a table of contents for Regulation S-K at 17 C.F.R. pt. 229.

55. S-K Concept Release, *supra* note 2, at 23,924.

56. See 15 U.S.C. § 77c(b)(2)(G)(i) (requiring a company selling a small issue to disclose audited financial statements, a description of the business operations, its financial condition, corporate governance principles, and use of investor funds); *id.* § 77c(b)(4) (requiring a company selling a small issue to make continuing periodic disclosures about its business operations, financial condition, corporate governance principles, and use of investor funds); *id.* § 77d(d)(3) (requiring, in a resale transaction from a buyer of securities to an accredited investor, disclosure of information about the issuing company, its business, securities, officers and directors, information about payments to sell the securities, and various financial statements); *id.* § 77d-1(b)(1) (requiring, in a crowdfunding transaction, disclosures of information about the issuing company, its business, securities being sold and capital structure, officers, directors, and major shareholders, and use of proceeds).

57. S-K Concept Release, *supra* note 2, at 23,922.

58. *Id.* at 23,969–70.

59. *Id.* at 23,970 & n.663.

60. Section 108 of the JOBS Act, Pub. L. No. 112-106, 126 Stat. 306 (2012), requires the SEC to review Regulation S-K to determine how it could be modernized and simplified and to reduce the costs and burdens of compliance for emerging growth companies. At the end of 2015, Congress ordered the SEC to revise Regulation S-K to reduce the disclosure

burden on emerging growth companies and small issuers. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 72002, 129 Stat. 1784, 1784 (December 4, 2015). Congress also ordered the SEC to conduct a study to determine "how best to modernize and simplify" the requirements in Regulation S-K "in a manner that reduces the costs and burdens on issuers while still providing all material information." *Id.* § 72003, 129 Stat. 1784, 1785 (2015).

61. H.R. Rep. No. 73-1383, at 23 (1934) (addressing the list of disclosure topics in section 12 for registration of securities for exchange trading).

62. *See* Harper Ho, *supra* note 14, at 20–21. One study notes that countries with higher per capita emissions might have introduced mandatory ESG disclosures in part as "a disciplinary tool through which countries hope to reduce their firms' carbon footprints" and finds that mandatory ESG disclosure reduced negative ESG incidents. Philipp Krueger et al., *The Effects of Mandatory ESG Disclosure Around the World* 2, 4 (Eur. Corp. Governance Inst., Financial Working Paper No. 754/2021, 2021), http://ssrn.com/abstract_id=3832745.

63. Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 Wash. U. L. Rev. (forthcoming 2021) (manuscript at 25) ("[A]dvocates for ESG disclosure clearly see it as a mechanism for promoting certain types of corporate behavior and discouraging others."), https://ssrn.com/abstract=3805814.

64. Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 20, 2021).

65. Allison Herren Lee, then Acting Chair, Sec. and Exch. Comm'n, Keynote Address at A Climate for Change: Meeting Investor Demand for Climate and ESG Environmental, Social and Governance Information: A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC (Mar. 15, 2021).

66. Climate Risk Disclosure Act of 2021, H.R. 1187, 117th Cong. § 402(8) (2021).

67. *Id.*

68. *GRI Standards English Language*, Global Reporting Initiative, https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/ (last visited July 29, 2021). A petition to the SEC for more environmental disclosures cites the Global Reporting Initiative approach to ESG reporting "as the clear global benchmark." Williams et al., *supra* note 14, at 9. *See also* Task Force on Climate-Related Financial Disclosures, Recommendations of the Task Force on Climate-Related Financial Disclosures iii (June 2017) (arguing that better disclosures would "help investors engage with companies on the resilience of their strategies and capital spending, which should help promote a smooth rather than an abrupt transition to a lower-carbon economy").

69. Jay Clayton, *Statement on Proposed Amendments to Modernize and Enhance financial Disclosures*, Sec. and Exch. Comm'n (Jan. 30, 2020), https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30 ("[O]ur disclosure-based regulatory regime is built largely around the provision by issuers of currently verifiable and largely historic issuer-specific information.").

70. *See* H.R. Rep. No. 73-85, at 2, 3 (1933).

71. Task Force on Climate-Related Financial Disclosures, *supra* note 68, at iii; *see also About Us*, Sustainability Acct. Standards Bd., https://www.sasb.org/about/ (last visited July 29, 2021) (describing mission to improve industry specific disclosure of "financially material sustainability information" because "sustainability issues are global business issues that impact the financial condition, operating performance, and enterprise value of companies"); Williams et al., *supra* note 14, at 3–6 (arguing that additional disclosures on ESG issues would help protect investors and promote market efficiency, competition, and capital formation).

72. *See* Ann M. Lipton, *Not Everything Is about Investors: The Case for Mandatory Stakeholder Disclosure*, 37 Yale J. on Reg. 499, 531–57 (2020) (observing that advocates for disclosures on social issues such as climate change seek to accomplish particular policy goals but conceal that motivation and cast the demands in the language of investor protection and financial return to fit within the federal securities laws).

73. Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290 (Feb 8, 2010).

74. 17 C.F.R. § 229.303(a).

75. *Id.* § 229.407(h).

76. *See* Task Force on Climate-Related Financial Disclosures, *supra* note 68, at 14.

77. *See* Lee, *supra* note 16 (questioning whether the current disclosure approach is adequate and sufficiently consistent); Williams et al., *supra* note 14, at 2 (arguing that ESG disclosure in required SEC filings is episodic, incomplete, incomparable, and inconsistent).

78. *See* Hester M. Peirce, Comm'r, Sec. and Exch. Comm'n, Remarks at Meeting of the SEC Investor Advisory Committee (May 21, 2020) (asserting that a new ESG disclosure framework is an "unnecessary response" when the current framework "is very good at handling all types of material information").

79. SEC Commissioner Lee has called out the TCFD and SASB frameworks in her request for public comment on climate-change disclosures. Lee, *supra* note 16.

80. Task Force on Climate-Related Financial Disclosures, *supra* note 68, at 13, 22.

81. Global Reporting Initiative, *supra* note 68; Global Reporting Initiative, GRI Standard 305: Emissions 2016 (2016).

82. *Materiality Map*, Sustainability Acct. Standards Bd., https://www.sasb.org/standards/materiality-map/ (last visited July 29, 2021).

83. *See* King v. Burwell, 576 U.S. 473, 485–86 (2015) (Roberts, C.J.) (holding that the relevant statute does not authorize the IRS to determine that tax credits were available for certain health insurance exchanges); Util. Air Regul. Grp v. EPA, 573 U.S. 302, 324 (2014) (holding that the relevant statute does not authorize the EPA to require permits for motor-vehicle greenhouse gas emissions); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 159–60 (2000) (holding that the relevant statute does not authorize the FDA to regulate tobacco products); Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (requiring express and specific delegation of authority from Congress for an agency to exercise regulatory authority over a major policy question of great economic and political importance); Indus. Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in judgment) (stating that major national policy decisions must be made in the legislative process and not by an agency); Am. Lung Ass'n v. EPA, 985 F.3d 914, 959 (D.C. Cir. 2021) (collecting cases).

84. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) (quotation marks and citations omitted).

85. *How to use the GRI Standards*, Global Reporting Initiative, https://www.globalreporting.org/how-to-use-the-gri-standards/ (last visited July 29, 2021).

86. Task Force on Climate-Related Financial Disclosures, *supra* note 68, at 22–23.

87. *See* King v. Burwell, 576 U.S. 473, 486 (2015) (Roberts, C.J.); *see also* Gonzales v. Oregon, 546 U.S. 243, 266–67 (2006).

88. S-K Concept Release, *supra* note 2, at 23,936.

89. *Id.* at 23,942–43.

90. Lee, *supra* note 16.

91. Coates, *supra* note 16.

92. Task Force on Climate-Related Financial Disclosures, *supra* note 68, at 22.

93. *See* Hester M. Peirce, Comm'r, Sec. and Exch. Comm'n, Remarks at the 17th Annual SEC Conference, Center for Corporate Reporting and Governance: My Beef with Stakeholders (Sept. 21, 2018) (arguing that regulators do not "have the requisite expertise to assess how well companies adhere to ESG standards and properly disclose whether their practices conform to those standards").

94. *See* Lee, *supra* note 16; Allison Herren Lee, *Statement on the Review of Climate-Related Disclosure* (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure ("It is our responsibility to ensure that [investors] have access to material information" on climate-related issues). Commissioner Lee has also discussed myths and misconceptions about materiality. *See* Lee, *supra* note 14.

95. Chamber of Com. of the U.S., Comment Letter on Request for Information on Climate Change Disclosure, 2–4 (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8907271-244249.pdf; *see also* Condon et al., *supra* note

14, at 12 (“The core standard for determining whether a piece of information must be disclosed under Regulation S-K is materiality.”).

96. Williams et al., *supra* note 14, at 3, 6.

97. *See* Basic Inc. v. Levinson, 485 U.S. 224, 231–32, 234, 238 (1988); *see also* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011); TSC Industries, Inc. v. Northway, Inc.,426 U. S. 438, 448–49 (1976).

98. *See, e.g.*, City of Pontiac Policemen’s and Firemen’s Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014) (stating that general statements about reputation, integrity, and compliance with ethical norms are immaterial puffery); Litwin v. Blackstone Group, 634 F.3d 706, 717 (2d Cir. 2011) (rejecting a formulaic approach to assessing materiality and stating that courts must consider quantitative and qualitative factors); *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 (3d Cir. 1997) (stating that, in an efficient market, information is material when it alters the price of a company’s stock).

99. *See* 17 C.F.R. § 210.1-02(*o*) (“material” means “those matters about which an average prudent investor ought reasonably to be informed”); 17 C.F.R. § 230.405 (“material” means “those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered”); 17 C.F.R. § 240.12b-2 (“material” means “those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered”); SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (1999) (quantitative and qualitative factors for financial statement materiality); Management’s Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 6835, 43 SEC Docket 1330, at *6 n.27 (May 18, 1989) (stating that the probability and magnitude test does not apply to disclosure under item 303 of Regulation S-K).

100. *See* Sustainability Acct. Standards Bd., Proposed Changes to the SASB Conceptual Framework & Rules of Procedure 7 (2020).

101. *See* David A. Katz & Laura A. McIntosh, *Corporate Governance Update: “Materiality” in America and Abroad*, Harvard Law School Forum on Corporate Governance (May 1, 2021), https://corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/#more-137820.

102. *See* Lee, *supra* note 14, (stating that SEC disclosure rulemaking authority is “not qualified by ‘materiality’”); Letter from Jill E. Fisch, Saul A. Fox Distinguished Professor of Bus. L., Univ. of Pennsylvania L. Sch., & Cynthia A. Williams, Osler Chair in Bus. L., Osgoode Hall L. Sch., to Gary Gensler, Chair, Sec. and Exch. Comm’n, 13–14 (June 11, 2021) (https://www.sec.gov/comments/climate-disclosure/cll12-8911728-244385.pdf).

103. *See* Lee, *supra* note 14, (“There is no general requirement under the securities laws to reveal all material information.”).

104. *See, e.g.*, 17 C.F.R. § 240.12b-20.

105. *See id.* §§ 229.102, 229.103, 229.303(a)(1)–(3).