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Financing Our Future's Health: Why the United States Must Establish Mandatory Climate-Related Financial Disclosure Requirements Aligned with the TCFD Recommendations

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NOTE

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I. INTRODUCTION

Securities law has emerged as an area of law not typically associated with traditional public environmental law.[1] However, securities law has begun to permeate into environmental law.[2] As the catastrophic physical and financial effects of climate change become more apparent every day, shareholders and institutional investors have demanded that publicly traded companies analyze and address the risks and opportunities associated with climate change and disclose them in their annual filings.[3] These demands have only increased with the release of the Intergovernmental Panel on Climate Change ("IPCC") report, which warned of the catastrophic effects associated with a 1.5 degrees Celsius rise in global temperature.[4] Many countries have begun encouraging, or even requiring, climate-related disclosures; many organizations have begun to voluntarily disclose their risks.[5] Although climate-related issues can be viewed as a material issue that triggers disclosure, the United States Securities and Exchange Commission ("SEC") has been lax with regulation and enforcement of mandatory

[1] *See* Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 140 (2019) (discussing how anti-trust, bankruptcy, corporate, and securities laws are the areas that roadblock environmental progress).

[2] *Id.* at 165–71

[3] Jeffrey M. McFarland, *Warming Up to Climate Change Risk Disclosure*, 14 FORDHAM J. CORP. & FIN. L. 281, 284 (2009); *see generally* California Public Employees' Retirement System et al., Petition for Interpretive Guidance on Climate Risk Disclosure 6 (Sept. 18, 2007), https://www.sec.gov/rules/petitions/2007/petn4-547.pdf [https://perma.cc/83F5-BDJV] [hereinafter California Petition].

[4] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), SUMMARY FOR POLICYMAKERS 4 (2018) [hereinafter IPCC REPORT].

[5] *See, e.g.*, TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES (TCFD), 2018 STATUS REPORT i (2018), https://www.fsb-tcfd.org/wp-content/uploads/2018/08/FINAL-2018-TCFD-Status-Report-092518.pdf [https://perma.cc/8XSR-9ST6].

reporting as it relates to climate change.[6] As one of the world's largest greenhouse gas emitters,[7] the United States ("U.S.") must take steps to address emissions concerns. In addition to companies voluntarily taking action against climate change, government action will play a vital role as the world transitions to a low-carbon economy.[8]

This Note argues that new legislation calling for mandatory reporting on climate-related risks and opportunities – aligned with the Task Force on Climate-Related Financial Disclosures ("TCFD") Recommendations – is required to fill the informational gap that is hindering the transition to a low-carbon economy. Part II provides a history of financial disclosures and how climate change has been interpreted under current law. Part III discusses the current and expected financial consequences arising from physical climate risks and global action, and provides an overview of the ways institutional investors can make a significant impact on the shift to a low-carbon economy. Part IV provides an overview of the TCFD and their Recommendations.[9] Part V discusses why climate-related financial disclosures have failed thus far – namely, by only having an interpretive rule, which does not carry the "force of law," clarify mandatory reporting requirements as it relates to climate-related information.

Part VI recommends that Congress pass new legislation requiring mandatory climate-related financial disclosures aligned with the TCFD Recommendations, using the body of the Climate

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[6] *See* David Gelles, *S.E.C. is Criticized for Lax Enforcement of Climate Risk Disclosure*, N.Y. TIMES (Jan. 23, 2016), https://www.nytimes.com/2016/01/24/business/energy-environment/sec-is-criticized-for-lax-enforcement-of-climate-risk-disclosure.html [https://perma.cc/CF6E-Y7BB].

[7] *Global Greenhouse Gas Emissions Data*, ENVTL. PROTECTION AGENCY, https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data [https://perma.cc/E669-6MYB].

[8] *See* Letter from Larry Fink, Chairman and CEO, BlackRock, to CEOs (Jan. 14, 2020), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/MH7N-WZP3]. ("Over the next few years, one of the most important questions we will face is the scale and scope of government action on climate change, which will generally define the speed with which we move to a low-carbon economy.") [hereinafter Letter from Larry Fink].

[9] TCFD, FINAL REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES iii–v (June 29, 2017), https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf [https://perma.cc/W2BA-3EFE] [hereinafter TCFD RECOMMENDATIONS]; *see infra* Part IV.

Risk Disclosure Act of 2019 ("CRDA")[10] as a starting point. The TCFD Recommendations should be adopted because other countries and organizations have already expressed their support for the Recommendations.[11] This new legislation will allow U.S. regulators to take control of climate-related disclosures for the U.S. capital markets before other jurisdictions can impose disclosure regimes on U.S. issuers and investors. Support from the U.S. will also encourage more nations and businesses to support the Recommendations. Furthermore, new legislation is better than a regulation or another interpretive rule because of potential presidential influence on the SEC.[12] The CRDA does not go far enough because it primarily focuses on the climate risks companies are exposed to and how those companies intend to manage those risks. The Act fails to fully account for the opportunities a company may gain from the resulting market changes caused by climate change, such as entry into new markets, creation of new products and technologies, and less energy consumed by fossil-fuel sources during business operations through the adoption of renewable energy.

Part VII provides three administrative alternatives that achieve similar results to passing new legislation: (1) use a more forceful interpretation of current securities law, then translated into a new interpretive rule, to clarify existing climate-related disclosure obligations, (2) amend Regulation S-K, and (3) promulgate a new regulation. The SEC stated in its 2010 Climate Guidance that disclosure of climate-related risks and opportunities is

[10] The bill has been introduced in both chambers of Congress. S. 2075, 116th Cong. (2019); H.R. 3623, 116th Cong. (2019).

[11] TCFD, 2019 STATUS REPORT 110 (2019), https://www.fsb-tcfd.org/wp-content/uploads/2019/06/2019-TCFD-Status-Report-FINAL-053119.pdf [https://perma.cc/WZ5F-9FUR] [hereinafter 2019 STATUS REPORT].

[12] Although there is a long-held understanding that the SEC is an independent agency and its Commissioners enjoy removal protection, its independence has never been fully established. The Exchange Act is silent on the question of Commissioner removal and the Court in *Free Enterprise Fund v. Public Co. Accounting Oversight Board.*, 561 U.S. 477 (2010), sidestepped the question by deciding the case using the parties' stipulation that SEC Commissioners enjoy removal protection. *See* Note, *The SEC is Not an Independent Agency*, 126 HARV. L. REV. 781, 781–82 (2013). Because this question has not been answered, legislation is the better implementing tool for climate-related financial disclosures, rather than regulation, because of the partisan politicking surrounding the issue of climate change.

already mandated under current law;[13] however, the SEC did not interpret and clarify current laws as forcefully as it should have when it released the Guidance. This conclusion is supported by the purpose of the Securities Act, accompanying regulations, and the fact that many investors state that climate-related risks and opportunities are material. New guidance, in addition to further and more forcefully clarifying existing reporting requirements, would give management less discretion when determining what risks and opportunities are material to their company. Amending Regulation S-K or promulgating a new regulation are both feasible options but will take time to complete because it requires compliance with notice and comment rulemaking. This Note concludes that full disclosure of both climate-related risks *and* opportunities is essential to providing investors with the necessary information required to finance our future's health and to ensure a swift transition to a low-carbon economy. This is best achieved by new climate risk legislation that aligns with the TCFD Recommendations.

II. HISTORY AND CURRENT CLIMATE RISK DISCLOSURE REQUIREMENTS IN THE UNITED STATES

Disclosure requirements are primarily regulated by two acts: (1) the Securities Act of 1933 ("Securities Act");[14] and (2) the Securities Exchange Act of 1934 ("Exchange Act").[15] The SEC has determined, that when enacting the Securities Act, "Congress recognized that investors must have access to accurate information important to making investment and voting decisions in order for the financial markets to function effectively."[16] The Securities Act does not set out specific disclosure requirements; rather, Section 7 of the Act gives the SEC full authority to determine what information issuers must submit, stating that "[t]he Commission shall adopt regulations under this subsection requiring each issuer of an

[13] *See* SECURITIES & EXCHANGE COMM'N, COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, 11–12 (2010), https://www.sec.gov/rules/interp/2010/33-9106.pdf [https://perma.cc/8XLF-56XW] [hereinafter 2010 CLIMATE GUIDANCE].

[14] Securities Act of 1933, 15 U.S.C. §§ 77a–mm (2018).

[15] Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–qq (2018).

[16] Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,921 (Apr. 22, 2016) (to be codified at 17 C.F.R. pts. 201, 229, 230, 232, 239, 240 and 249) [hereinafter 2016 Concept Release].

asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security."[17] The Exchange Act created the SEC – whose mission is to "protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation"[18] – and empowers the SEC to require periodic reporting of information by companies with publicly traded securities.[19] The reports are either annual (Form 10-K), quarterly (Form 10-Q), or on a current basis when a number of specified events occur.[20] Regulation S-X[21] and Regulation S-K[22] outline the forms most often used when a registrant is required to file a disclosure form with the SEC. Regulation S-X defines the form, content, and requirements for financial disclosures.[23] Regulation S-K provides instructions for filing forms.[24]

Despite neither regulation expressly requiring climate disclosures, the SEC requires, for both registration (Rule 408) and reporting (Rule 12b-20), that, in addition to information expressly required by regulation, the disclosure of "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading."[25] The term "material" has caused much confusion since it was first introduced into federal securities law in 1933. Although still vague and ambiguous, it can be defined as a trigger for when there is a legal obligation to disclose facts or information.[26] To clear confusion around the term (although to little or no avail), the Supreme Court, in *TSC Industries, Inc. v. Northway, Inc.*, held that, for facts or information to be considered "material," "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having

[17] *See* 15 U.S.C. § 77g(c)(1).

[18] *About the SEC*, SECURITIES & EXCHANGE COMMISSION, https://www.sec.gov/about.shtml [https://perma.cc/CR8D-6KTD].

[19] 15 U.S.C. § 78m; *See, e.g.*, *Form 8-K*, SECURITIES & EXCHANGE COMMISSION, https://www.sec.gov/fast-answers/answersform8khtm.html [https://perma.cc/TT6Z-DV6X].

[20] 15 U.S.C. § 78m.

[21] *See generally* 17 C.F.R. pt. 210 (2020).

[22] *See generally id.* pt. 229.

[23] *Id.* § 210.1–01(a).

[24] *Id.* § 229.10(a).

[25] *Id.* §§ 230.408(a), 240.12b-20.

[26] Dale Oesterle, *The Overused and Under-defined Notion of "Material" in Securities Law*, 14 U. PA. J. BUS. L. 167, 167 (2011).

altered the 'total mix' of information made available." This definition applies to Section 14 of the Exchange Act (in the proxy-solicitation context).[27] The SEC then adopted this reasonable investor standard in its 1982 amendments to the regulatory definition of "material" in Rules 408 and 12b-20.[28] Six years later, in *Basic Inc. v. Levinson*, the issue of materiality in federal securities law returned to the Supreme Court, this time for application to Section 10 of the Exchange Act.[29] The Court chose to adopt the reasonable investor standard from *TSC Industries*.[30] The reason the Court had to define "material" for these two Sections is because the SEC does not include a definition for "material" in those accompanying regulations.[31]

The confusion surrounding "material" has continued since the Court attempted to shed light on the term, and the term particularly sparks confusion when applied to climate-related issues. Investor groups, curious about how climate change affects the businesses in which they have invested, have been calling for voluntary disclosure of companies' environmental policies since the 1990s.[32] In 2007, a consortium of environmental groups, institutional investors, and state officials – believing that climate change is a material issue and should be disclosed[33] – petitioned the SEC to release guidance on how climate-related issues are interpreted under existing mandatory disclosure rules and regulations.[34] This call was answered in 2010 when the SEC issued an interpretive release providing guidance on the subject.[35] The SEC interpreted four non-financial statement provisions within Regulation S-K that could

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[27] 426 U.S. 428, 449 (1976).

[28] "The term 'material,' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered." 17 C.F.R. § 240.12b-2. The definition in Rule 405 is practically identical. *See id.* § 230.405. For the 1982 amendments, *see* Adoption of Integrated Disclosure System, 47 Fed. Reg. 11,380, 11,436 (Mar. 16, 1982) (for Rule 405), and *see id.* at 11,465 (for Rule 12b-2).

[29] 485 U.S. 224 (1988).

[30] *Id.* at 232.

[31] *See* 17 C.F.R §§ 240.10b-1 to -21, 240.14a-1 to -21.

[32] McFarland, *supra* note 3, at 284.

[33] California Petition, *supra* note 3, at 6.

[34] McFarland, *supra* note 3, at 284.

[35] *See generally* 2010 CLIMATE GUIDANCE, *supra* note 13.

trigger climate-related disclosures: Item 101, "Description of Business," which requires disclosure of compliance with federal, state, and local provisions that relate to the protection of the environment and have a material effect on capital expenditures, earnings, and competitive position[36]; Item 103, "Legal Proceedings," which requires disclosure of any material pending legal proceedings to which the company, any of its subsidiaries, or its property, is a party);[37] Item 303, "Management's Discussion and Analysis," which requires disclosure of known trends, events, demands, commitments, and uncertainties reasonably likely to have a material effect on financial condition or operating performance[38]; and Item 505(c), "Risk Factors," which requires "a discussion of the most significant factors that make an investment speculative or risky."[39] Items 101 and 103 require express disclosure of compliance with, and litigation arising from, environmental law, whereas Items 303 and 505(c) leave it to management to determine how environmental issues are implicated.

After stating what four Items could trigger a climate-related disclosure obligation, the 2010 Guidance focused on four business factors management should consider. The first is the impact of legislation and regulation.[40] This requires a company to determine the likelihood that a legislative or regulatory body will enact climate-related laws, and, if so, whether those laws will have a material effect on the company's operations or financial condition.[41] The second are the impacts from treaties or international accords.[42] This requires a company to determine the effect of international agreements, such as the Paris Agreement or EU Emissions Trading System.[43] The third factor involves the indirect consequences of

[36] 17 C.F.R. § 229.101(c)(1)(xii).

[37] *Id.* § 229.103.

[38] *Id.* § 229.303.

[39] *Id.* § 229.503(c).

[40] 2010 CLIMATE GUIDANCE, *supra* note 13, at 22–24.

[41] FATIMA MARIA AHMAD, BEYOND THE HORIZON: CORPORATE REPORTING ON CLIMATE CHANGE 5 (2017), https://www.c2es.org/site/assets/uploads/2017/09/beyond-horizon-corporate-reporting-climate-change.pdf [https://perma.cc/75YH-G3UR]. An example of an act triggering climate disclosures under this provision of the 2010 Climate Guidance would be the Climate Risk Disclosure Act of 2018. *See, e.g.*, Climate Risk Disclosure Act of 2018, S. 3481, 115th Cong. (2018).

[42] 2010 CLIMATE GUIDANCE, *supra* note 13, at 24.

[43] AHMAD, *supra* note 41, at 5.

regulation or business trends.[44] This could include demand-side effects of legal, technological, political, and scientific developments regarding climate change, as well as reputational impacts.[45] The fourth are the physical impacts of climate change.[46] This focuses on the effects climate change has on a company's operations and performance, such as impacts from increased weather severity, sea-level rise, and water availability and quality.[47] In the 2010 Climate Guidance, the SEC also recognized that, because the Exchange Act is designed to protect investors and disclosure is within management's discretion, doubts as to materiality should be resolved in favor of the investors.[48]

Although this interpretative guidance seemed to signal a much-needed change in the financial disclosure realm, minimal improvements were made. In 2014, Ceres,[49] a sustainability focused non-governmental organization ("NGO"), released a report which found that the SEC was not prioritizing the financial risks and opportunities of climate change and showed a lack of commitment to the 2010 Guidance when issuing comment letters.[50] Similar to the events that led to the SEC releasing the 2010 Climate Guidance, proponents of improved requirements and enforcement began sending letters to the SEC, calling for "greater scrutiny of climate-related disclosures."[51] In response, the SEC issued a Concept Release on "Business and Financial Disclosure Required by Regulation S-K," which sought public comments on whether the

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[44] 2010 CLIMATE GUIDANCE, *supra* note 13, at 25–26.

[45] AHMAD, *supra* note 41, at 5–6.

[46] 2010 CLIMATE GUIDANCE, *supra* note 13, at 26–27.

[47] *Id.* at 26–27.

[48] 2010 CLIMATE GUIDANCE, *supra* note 13, at 11 (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 428, 448 (1976)).

[49] "Ceres is a sustainability nonprofit organization working with the most influential investors and companies to build leadership and drive solutions throughout the economy. Through powerful networks and advocacy, Ceres tackles the world's biggest sustainability challenges, including climate change, water scarcity and pollution, and inequitable workplaces." *About Us*, CERES (last visited Apr. 24, 2020), https://www.ceres.org/about-us.

[50] *See* JIM COBURN & JACKIE COOK, CERES, COOL RESPONSE: THE SEC & CORPORATE CLIMATE CHANGE REPORTING, 4, 25–27 (2014), https://www.ceres.org/resources/reports/cool-response-sec-corporate-climate-change-reporting?report=view [https://perma.cc/4D2Z-QB8N].

[51] These proponents included shareholders and lawmakers, comprised of an alliance of sixty-two institutional investors, New York City and New York State comptrollers, and thirty-five members of Congress. Gelles, *supra* note 6.

SEC should consider sustainability-related line-item disclosure, as well as materiality standards for sustainability issues.[52] The SEC received comments from various NGOs and investor groups advocating for mandatory reporting requirements and increased enforcement, as well as from industry groups opposed to having further regulation on climate risk disclosure.[53] Although the current SEC Chair, Jay Clayton, expressed support for the 2010 Climate Guidance during his Senate confirmation hearing,[54] no action has been taken since receiving the public comments.[55] Furthermore, since the 2010 Climate Guidance was issued, Republican Congressman Bill Posey has spearheaded efforts opposing the guidance and other climate change regulation. For example, in an appropriations bill passed by the U.S. House of Representatives in July 2016, Congressman Posey introduced an amendment that prohibits the SEC from using funds provided by the bill to administer, enforce, or codify into regulation, specified guidance for public companies regarding disclosures related to climate change.[56]

[52] 2016 Concept Release, 81 Fed. Reg. at 23,916; Natalie Nowiski, *Rising Above the Storm: Climate Risk Disclosure and Its Current and Future Relevance to the Energy Sector*, 39 ENERGY L.J. 1, 8 (2018).

[53] Nowiski, *supra* note 52, at 8–9. The arguments by industry groups included that: "(1) environmental, social and governance (ESG) issues were sufficiently addressed in the 2010 Guidelines; (2) the SEC lacked authority to require such disclosures; (3) materiality in the context of fiduciary duties only could extend to financial interests; (4) further regulation would unfairly burden reporting entities; and (5) the disclosure of such information would be advantageous to competitors." *Id.*

[54] Linda M. Lowson, *Global Climate Change and Sustainability Financial Reporting: An Unstoppable Force with or without Trump*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 30, 2017), https://corpgov.law.harvard.edu/2017/04/30/global-climate-change-and-sustainability-financial-reporting-an-unstoppable-force-with-or-without-trump/ [https://perma.cc/ECK6-4N3C].

[55] In January 2020, the SEC released a proposed rule for aimed at modernizing Regulation S-K. Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 85 Fed. Reg. 12,068 (proposed Feb. 28, 2020) (to be codified at 17 C.F.R. pts. 210, 229, 239, 240, and 249) (2020). However, these proposed amendments made no attempt to "address investors' needs for standardized disclosure on climate change risk. Public Statement, Allison Herren Lee, "Modernizing" Regulation S-K: Ignoring the Elephant in the Room (Jan. 30, 2020), https://www.sec.gov/news/public-statement/lee-mda-2020-01-30 [https://perma.cc/8QMA-2YFC].

[56] H. Amendment 1261 to H.R. 5485, 114th Cong. (2016); *see* Alex Kotch & David Sirota, *Despite Irma, Florida Congressman Aims to Let Companies Hide Climate-Change Risks*, INT'L BUS. TIMES (Sept. 11, 2017), https://www.ibtimes.com/political-capital/despite-irma-florida-congressman-aims-let-companies-hide-climate-change-risks [https://perma.cc/7X8X-UH8X].

The SEC's lack of commitment to, and the effects of Congressman Posey's opposition efforts to, the 2010 Guidance are reflected in a February 2018 report by the Government Accountability Office.[57] The report highlights multiple constraints that the SEC faces in reviewing climate-related disclosures. One constraint is that the SEC does not always have access to the information companies use to support what they consider to be climate-related risks in their businesses and the information those companies rely on in determining materiality.[58] Another constraint is that disclosures vary in format and specificity.[59] The report notes that the SEC has mechanisms, tools, and resources to help its staff consistently review filing disclosures, including internal supervisory control testing, two-level review process, regulations and guidance, internal and external data, and staff training.[60] However, with respect to internal supervisory control testing and staff training, senior staff members have neither conducted review specific to climate-related disclosures nor had training focused on the (1) materiality of climate-related issues, (2) industry-specific climate-related disclosures, and (3) general climate-related disclosures.[61]

With the SEC not committed to its interpretation in the 2010 Guidance, U.S. Senator Elizabeth Warren, in September 2010, sought to bring climate-related financial disclosures back to headlines by introducing the "Climate Risk Disclosure Act of 2018."[62] The Act directed:

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[57] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-188, CLIMATE-RELATED RISKS: SEC HAS TAKEN STEPS TO CLARIFY DISCLOSURE REQUIREMENTS (2018) [hereinafter CLARIFY DISCLOSURE REQUIREMENTS]. The GAO released another report in March 2019, discussing a lack of leadership from the White House on managing climate risks, the need for the federal government to develop a comprehensive plan to manage climate change, and that information on climate risks is urgently needed. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-157SP, HIGH-RISK SERIES: SUBSTANTIAL EFFORTS NEEDED TO ACHIEVE GREATER PROGRESS ON HIGH-RISK AREAS 110–22 (2019).

[58] CLARIFY DISCLOSURE REQUIREMENTS, *supra* note 57, at 16–17.

[59] Some companies report their climate-related disclosures in the business description section of its filing, while others may disclose a similar item in the risk factors section. This makes it difficult for SEC reviewers to compare companies within the same industry. *Id.* at 18–19.

[60] *Id.* at 20–24.

[61] *Id.* at 21, 23.

[62] Climate Risk Disclosure Act of 2018, S. 3481, 115th Cong. (2018).

> the SEC, in consultation with climate experts at other federal agencies, to issue rules within one year that require every public company to disclose: [i]ts direct and indirect greenhouse gas emissions[;] [t]he total amount of fossil-fuel related assets that it owns or manages[;] [h]ow its valuation would be affected if climate change continues at its current pace or if policymakers successfully restrict greenhouse gas emissions to meet the Paris accord goal [;] [i]ts risk management strategies related to the physical risks and transition risks posed by climate change.[63]

The Act also directed the SEC to create specific disclosure requirements for different industries, with additional disclosure requirements imposed on fossil fuel companies.[64] Senator Warren's bill did not get movement at the end of 2018, and died with the 115th Congress.[65]

The Bill, however, was revived when Senator Warren reintroduced the bill to the 116th Congress as the "Climate Risk Disclosure Act of 2019."[66] The latest action on this Bill occurred on July 10, 2019, when it was referred to the Committee on Banking, Housing, and Urban Affairs.[67] U.S. Representative Sean Casten also introduced a companion bill in the House.[68] The latest action on the

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[63] Press Release, Elizabeth Warren, Warren, Colleagues Unveil Bill to Require Every Pub. Co. to Disclose Climate-Related Risks (Sept. 17, 2018), https://www.warren.senate.gov/newsroom/press-releases/warren-colleagues-unveil-bill-to-require-every-public-company-to-disclose-climate-related-risks [https://perma.cc/5C2D-82V4].

[64] *Id.*

[65] A bill becomes "dead" when it has not made it through the entire legislative process and signed into law by the end of the two-year Congressional cycle. *Frequently Asked Questions*, OFF. OF THE CLERK, http://clerk.house.gov/legislative/legfaq.aspx, [https://perma.cc/42H8-6K3V] (referencing FAQ #11). The CRDA did not make it past its referral committee. *See* S. 3481, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/senate-bill/3481/actions?KWICView=false [https://perma.cc/YDX4-ZYPY] (providing tracking information for the bill).

[66] Climate Risk Disclosure Act of 2019, S. 2075, 116th Cong. (2019); Press Release, Elizabeth Warren, Senator Warren, Representative Casten Lead Colleagues Introducing a Bill to Require Every Pub. Co. to Disclose Climate-Related Risks (July 10, 2019), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-representative-casten-lead-colleagues-introducing-a-bill-to-require-every-public-company-to-disclose-climate-related-risks [https://perma.cc/G472-BUYA] [hereinafter Warren 2019 Press Release].

[67] S. 2075, 116th Cong., https://www.congress.gov/bill/116th-congress/senate-bill/2075/actions?KWICView=false [https://perma.cc/8T4Z-453V] (*see* link for bill tracking information).

[68] Climate Risk Disclosure Act of 2019, H.R. 3623, 116th Cong. (2019).

companion bill occurred on July 16, 2019, when it was ordered to be reported (amended).[69] The reintroduced Bill is substantively the same as the previous version.[70] Despite this reintroduction, passage of a progressive climate bill is a long shot under the current political gridlock, although Republicans who once doubted climate change are now beginning to support mitigation efforts.[71]

III. CLIMATE CHANGE AND THE ROLE OF INSTITUTIONAL INVESTORS

A. The Financial Impact of Climate Change

Many organizations are aware of the traditional implications of climate change (i.e., extreme weather, sea level rise, drought, and property damage) but incorrectly perceive these as long-term implications rather than relevant to present day decisions.[72] World leaders recognized the catastrophic effects of climate change that could occur within this century when nearly 200 countries signed the Paris Agreement in December 2015, agreeing to reduce greenhouse gas emissions and to accelerate the transition to a lower-carbon economy.[73] Parties to the Paris Agreement agreed to hold the global average temperature to well below 2 degrees Celsius above pre-industrial levels with a goal to limit the increase to 1.5 degrees Celsius above pre-industrial levels.[74] Although the U.S. began the process to withdraw from the Paris Agreement,[75] no other

[69] *See* H.R. 3623, 116th Cong., https://www.congress.gov/bill/116th-congress/house-bill/3623 [https://perma.cc/UZ6M-QYZC] (providing tracking information for the bill).

[70] *Compare* S. 2075, 116th Cong., *with* S. 3481, 115th Cong.

[71] Arian Campo-Flores, *Some Republican Lawmakers Break With Party on Climate Change*, WALL ST. J. (June 12, 2019), https://www.wsj.com/articles/some-republican-lawmakers-break-with-party-on-climate-change-11560337010 [https://perma.cc/G2CV-3CT5].

[72] TCFD RECOMMENDATIONS, *supra* note 9, at ii.

[73] *Id.* at 1.

[74] Paris Agreement to the United Nations Framework Convention on Climate Change art. 2(1)(a), Dec. 12, 2015 T.I.A.S. No. 16-1104.

[75] Press Release, U.S. Dep't of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/ [https://perma.cc/Z4EJ-HEQT]; *see also Climate Change: China Vows to Defend Paris Agreement*, BBC (May 9, 2017), https://www.bbc.com/news/world-asia-china-39861589 [https://perma.cc/WK7U-262Q].

countries have withdrawn, and those countries continue to express their support of adhering to the 2 degrees Celsius Scenario and the transition to a low-carbon economy.[76] Despite this extraordinary agreement, the IPCC issued a new report in October 2018, finding that, at current greenhouse gas emission rates, warming of 1.5 degrees Celsius above pre-industrial levels will occur between 2030 and 2052.[77] The report determined that the world economy will have to transform within just a few years to avoid the most serious damage, which they estimate would cost $54 trillion.[78]

Following the IPCC report, in November 2018, the U.S. Global Change Research Program released a report highlighting the economic damage that the U.S. is vulnerable to by the end of this century because of the impacts of climate change.[79] The report focuses on detrimental impacts to numerous sectors, including: (1) communities, (2) the economy, (3) water quality and availability, (4) health, (5) indigenous peoples, (6) ecosystems and ecosystem services, (7) agriculture, (8) infrastructure, (9) oceans and coasts, and (10) tourism and recreation.[80] The report also states that without substantial efforts to combat climate change, America's economic growth will be hindered.[81] There will be disruptions to labor productivity, power generation (through reduced generation efficiency and increased energy demand), and overseas operations and

[76] Lisa Friedman, *Syria Joins Paris Climate Accord, Leaving Only U.S. Opposed*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/climate/syria-joins-paris-agreement.html [https://perma.cc/BH2G-JD96]; *Macron Defends Iran Deal, Paris Climate Accord at UN General Assembly*, FRANCE 24 (Sept. 19, 2017), https://www.france24.com/en/20170919-french-president-macron-response-trump-un-general-assembly-iran-deal-climate [https://perma.cc/56DM-QCHZ] (noting that Macron refuses to renegotiate the Paris Agreement). *But see* Emily Schultheis, *German Parties Agree to Drop 2020 Climate Goal: Report*, POLITICO (Jan. 8, 2018), https://www.politico.eu/article/report-german-parties-agree-to-drop-2020-climate-goal/ [https://perma.cc/ZYS3-4GM2].

[77] IPCC REPORT, *supra* note 4, at 6.

[78] Coral Davenport, *Major Climate Report Describes a Strong Risk of Crisis as Early as 2040*, N.Y. TIMES (Oct. 7, 2018), https://www.nytimes.com/2018/10/07/climate/ipcc-climate-report-2040.html [https://perma.cc/A7K7-A564].

[79] U.S. GLOB. CHANGE RES. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT VOLUME II: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES (Reidmiller, D.R. et al. eds., 2018).

[80] *Id.* at 25–32.

[81] *Id.* at 25.

supply chains.[82] Losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century.[83] Larry Fink, Chairman and CEO of BlackRock—the world's largest money-management firm[84]—in his 2020 annual letter to CEOs, simply stated how climate risk will impact the global system that finances economic growth:

> Will cities, for example, be able to afford their infrastructure needs as climate risk reshapes the market for municipal bonds? What will happen to the 30-year mortgage – a key building block of finance – if lenders can't estimate the impact of climate risk over such a long timeline, and if there is no viable market for flood or fire insurance in impacted areas? What happens to inflation, and in turn interest rates, if the cost of food climbs from drought and flooding? How can we model economic growth if emerging markets see their productivity decline due to extreme heat and other climate impacts?[85]

Although climate change and the transition to a low-carbon economy pose significant financial risks, there are also opportunities that are relevant both near-term and in the future.[86] As the world transitions away from fossil fuels and its related physical assets, there is a significant risk to organizations not prepared to handle such a change.[87] New opportunities will arise from this transition because of the annual $1 trillion worth of investments it is expected to require for the foreseeable future.[88] Those organizations focused on climate change mitigation and adaptation

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[82] *Id.* at 25–26.

[83] *Id.* at 26.

[84] In 2019, Blackrock was the world's largest asset manager with $6.52 trillion in AUM. *See* M. Szmigiera, *Largest Asset Management Companies Worldwide as of March 2019, by Managed Assets*, STATISTA (Sept. 20, 2019), https://www.statista.com/statistics/431790/leading-asset-management-companies-worldwide-by-assets/ [https://perma.cc/DAZ8-J33G]. At the beginning of 2020, BlackRock has increased its total assets under management to $7.4 trillion AUM. Blackrock Inc., Current Report (Form 8-K) (Jan. 16, 2020).

[85] Letter from Larry Fink, *supra* note 8.

[86] TCFD RECOMMENDATIONS, *supra* note 9, at ii.

[87] *Id.*

[88] *Id.* (citing INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK SPECIAL BRIEFING FOR COP21 4 (2015)).

solutions are presented with significant opportunities for investments.[89]

B. The Role of Institutional Investors in the Shift to a Low-Carbon Economy

Although government has the most important role to play in the transition, investors also have a very important role.[90] Increasingly, investor groups have become vocal about the financial impacts of climate change as they begin to realize the seriousness of the situation. In December 2018, a group of 415 investors overseeing $32 trillion in assets signed a letter asking governments to make changes that could slow further climate change.[91] The group believes that climate change will cause permanent economic damage that is up to four times the scale of the impacts of the 2008 Global Financial Crisis.[92]

With this growing awareness of the significant economic impact of climate change, banks have begun to change their lending practices. For example, five international banks have vowed to align their corporate lending practices with the Paris Agreement's 2 degrees Celsius goal and have taken steps to lessen their exposure to financial losses caused by climate change.[93] Institutional investors, utilizing the power of the capital they control, can assist in the transition to a low-carbon economy by investing in renewable energy projects, as well as divesting from fossil fuel projects. For example, HSBC pledged to invest $329 million into renewable

[89] *Id.*; *see also* Alice Ross, *Tackling Climate Change – an Investor's Guide*, FIN. TIMES (Sept. 20, 2019), https://www.ft.com/content/fa7a4400-d940-11e9-8f9b-77216ebe1f17 [https://perma.cc/A9E5-6K4W].

[90] *See* Letter from Larry Fink, *supra* note 8.

[91] *See generally* IIGCC, 2018 GLOB. INV'R STATEMENT TO GOV'TS ON CLIMATE CHANGE (2018), https://www.iigcc.org/download/global-investor-statement-to-governments-on-climate-change/?wpdmdl=1826&refresh=5eab3c6ea63c11588280430 [https://perma.cc/N73T-S4DG].

[92] *At COP24: Group of 415 Investors Call on World Leaders to Address Climate Change*, UNITED NATIONS ENV'T PROGRAMME (Dec. 10, 2018), https://www.unepfi.org/news/industries/investment/the-largest-ever-investor-statement-to-governments/ [https://perma.cc/5U45-DKBV].

[93] *Banks Join ING in Aligning Loan Portfolios to Fight Climate Change*, ING WHOLESALE BANKING, https://www.ingwb.com/insights/news/2018/banks-join-ing-in-aligning-loan-portfolios-to-fight-climate-change [https://perma.cc/7H48-PNYY].

energy infrastructure for wind and solar.[94] Citigroup Inc. ("Citi") has vowed to phase out support to the coal industry to accelerate the shift to a low-carbon economy.[95] Additionally, the Dutch bank ING Group plans to analyze how a company's efforts against climate change will impact its debt payment ability.[96] The bank will also evaluate how companies perform and whether they are meeting the targets of the Paris Agreement.[97]

Banks have also begun to use various other mechanisms to address climate change and sustainability. One mechanism is a green mortgage. Almost 40 European banks are testing this new type of mortgage under which borrowers are required to have their properties meet certain energy efficiency standards.[98] Discounted mortgages will also be offered to customers who spend extra on new buildings or property upgrades that save power or natural gas costs.[99] Another mechanism is "sustainable improvement loans," which ING has been offering to companies.[100] Companies receive a higher credit rating if targets are met.[101] A third mechanism is green bonds, a mechanism which Citi will use to fund renewable energy and conservation efforts.[102]

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[94] Jeremy Hodges, *HSBC Pledges $329 Million Investment in British Green Energy*, RENEWABLE ENERGY WORLD (Oct. 16, 2018), https://www.renewableenergyworld.com/2018/10/16/hsbc-pension-pledges-329-million-investment-in-green-energy/#gref [https://perma.cc/G64G-SPNG].

[95] Dan Ennis, *Citi Pledges to Stop Thermal Coal-Mining Financing by 2030*, BANKING DIVE (Apr. 21, 2020), https://www.bankingdive.com/news/citibank-pledge-stop-thermal-coal-mining-financing/576451/ [https://perma.cc/C5HG-K77E].

[96] Emily Chasan, *ING Eyes How Companies It Lends to Will Weather Climate Change*, BLOOMBERG ENV'T (Sept. 14, 2018), https://news.bloombergenvironment.com/environment-and-energy/ing-eyeshowcompanies-it-lends-to-will-weather-climate-change [https://perma.cc/6UYE-KJMG].

[97] *Id.*

[98] Matthew Carr, *Green Mortgages on Tap from Banks Funding Climate Investment*, BLOOMBERG (Sept. 24, 2018,), https://www.bloomberg.com/news/articles/2018-09-24/green-mortgages-on-tap-from-banks-funding-climate-investment [https://perma.cc/6BA6-CZWQ].

[99] *Id.*

[100] Chasan, *supra* note 96.

[101] *Id.*

[102] Darcy Reddan, *Citi Issues €1B Inaugural Green Bond to Fund Enviro Goals*, LAW360 (Jan. 22, 2019), https://www.law360.com/environmental/articles/1120840/citi-issues-1b-inaugural-green-bond-to-fund-enviro-goals?nl_pk=41832e84-4975-4bd1-af11-63f9f82f62b4&utm_source=newsletter&utm_medium=email&utm_campaign=environmental.

Banks are also embarking on broader campaigns to combat climate change. For example, in 2015, Citi announced a $100 billion environmental finance goal over ten years to help accelerate the global transition to a low-carbon economy,[103] but is planning to reach that goal four years early.[104] Citi also became the first major U.S. bank to support the of United Nation Principles for Responsible Banking.[105] In these principles, banks commit to strategically align their business with the goals of the Paris Agreement and the United Nations Sustainable Development Goals.[106] Banks collectively worth $47 trillion in assets have already signed up.[107] Lastly, in one of the most significant efforts so far, BlackRock announced at the beginning of 2020 that it would place sustainability at the center of its investment approach by exiting investments in thermal coal producers and releasing disclosures aligned with the TCFD Recommendations.[108] These examples demonstrate how financial institutions can play a key role in the reallocation of capital to steer the transition to a low-carbon economy.

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[103] *Id.*

[104] Jennifer Surane, *Citi to Reach $100 Billion Environmental Goal Four Years Early*, BLOOMBERG (July 3, 2019), https://www.bloomberg.com/news/articles/2019-07-03/citi-to-reach-100-billion-environmental-goal-four-years-early [https://perma.cc/6NWA-Y5WH].

[105] *Id.*

[106] *Banks Worth $47 Trillion Adopt New UN-backed Climate, Sustainability Principles*, UN NEWS (Sept. 22, 2019), https://news.un.org/en/story/2019/09/1046982 [https://perma.cc/S5VS-Q4S4].

[107] *Id.*

[108] *See* Letter from Larry Fink, *supra* note 8.

IV. OVERVIEW OF THE RECOMMENDATIONS BY THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (TCFD)

A. What is the TCFD?

In April 2015, the Group of 20 ("G20") Finance Ministers[109] requested that the Financial Stability Board ("FSB")[110] "convene public- and private-sector participants to review how the financial sector can take account of climate-related issues."[111] In December 2015, the FSB responded by establishing the TCFD – chaired by Michael Bloomberg – to develop a voluntary climate-related disclosure framework that those in the business and financial industry can use to better understand material risks.[112] Through consulting with global leaders in business and finance, the TCFD was to create recommendations that would assist companies' understanding of what climate-related information is sought after by investors so companies can align their disclosures with those investor needs.[113] By December 2016, after soliciting input and comments from the public and from business and financial leaders, the TCFD released its Draft Report of the Recommendations.[114] After the release of the Draft Report, the TCFD conducted another consultation to

[109] The G20 consists of the Finance Ministers (US equivalent: Secretary of the Treasury) and Central Bank Governors (US equivalent: Chairman of the Federal Reserve) from the twenty largest economies in the world who gather periodically to discuss financial and socioeconomic issues. *About the G20*, G20, https://g20.org/en/about/Pages/whatis.aspx [https://perma.cc/B8RM-7RAK].

[110] "The [FSB] is an international body that monitors and makes recommendations about the global financial system." *About the FSB*, FSB, https://www.fsb.org/about/ [https://perma.cc/4GLQ-Y4C9].

[111] G20, COMMUNIQUÉ – G20 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS MEETING 5 (Apr. 16-17, 2015), http://www.g20.org.tr/wp-content/uploads/2015/04/April-G20-FMCBG-Communique-Final.pdf [https://perma.cc/3K65-K9X5].

[112] TCFD RECOMMENDATIONS, *supra* note 9, at iii; *see also About the Task Force*, TCFD, https://www.fsb-tcfd.org/about/# [https://perma.cc/SGF8-UPSC].

[113] *About the Task Force*, *supra* note 112.

[114] TCFD, DRAFT REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES (Dec. 14, 2016), https://www.fsb-tcfd.org/wp-content/uploads/2016/12/16_1221_TCFD_Report_Letter.pdf [https://perma.cc/DB25-W7GD].

gather feedback on its initial recommendations.[115] The TCFD released its Final Report in June 2017.[116]

B. TCFD Recommendations

The TCFD created the Recommendations in a manner such that all organizations can align their financial disclosures with them and that they can provide organizations with decision-useful information relating to the financial risks and opportunities of the low-carbon transition.[117] Although voluntary, the TCFD created the Recommendations to be "ambitious, but also practical for near-term adoption," and "expects that reporting of climate-related risks and opportunities will evolve over time as organizations, investors, and others contribute to the quality and consistency of the information disclosed."[118]

The TCFD Recommendations address four core elements of climate-related financial disclosures: (1) governance ("[t]he organization's governance around climate-related risks and opportunities"); (2) strategy ("[t]he actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning"); (3) risk management ("[t]he processes used by the organization to identify, assess, and manage climate-related risks"); and (4) metrics and targets ("[t]he metrics and targets used to assess and manage relevant climate-related risks and opportunities").[119] For purposes of analyzing climate-related risks under these elements, the Recommendations categorizes risks into transition risks[120] and physical risks.[121] When analyzing climate-related opportunities, the opportunities are categorized into five types: resource efficiency, energy source, products and services, markets, and resilience.[122]

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115 TCFD RECOMMENDATIONS, *supra* note 9, at 48.

116 *Id.* at i.

117 *Id.* at iii fig.1.

118 *Id.* at 3.

119 *Id.* at iv–v fig.2.

120 Transition risks include law, technology, market, and reputation. *Id.* at 10 tbl.1.

121 Physical risks include those classified as acute ("[i]ncreased severity of extreme weather events") and chronic (rising temperatures and sea levels, extreme weather pattern variability, and changes in precipitation patterns). *Id.*

122 *Id.* at 11 tbl.2.

Aside from the four core elements, there are various other recommended guidelines. A main focus of the Recommendations, in order to foster broader use of climate-related financial disclosures, is to include them in annual public financial filings[123] with adherence to seven principles for effective disclosures.[124] In addition to adhering to the seven principles, the Task Force also recommends that companies implement scenario analysis[125] to test the resilience of an organization's strategy against different climate-related scenarios.[126] Lastly, the TCFD also provides supplemental guidance to the financial sector[127] and to the non-financial sector.[128]

According to the TCFD 2019 Status Update, the TCFD Recommendations have gained support from various governments, numerous multinational corporations, financial institutions, accounting boards, insurance companies, and pension funds.[129] As of December 2019, 930 organizations have expressed their support for the TCFD Recommendations,[130] including fourteen of the world's top fifteen largest institutional investors.[131] Ernst & Young ("EY") created a guide for businesses on how to implement the TCFD Recommendations and found there are benefits to both

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[123] *Id.* at iv.

[124] Disclosures should be representative of relevant information; specific and complete; clear, balanced, and understandable; consistent over time; comparable among companies within a sector, industry, or portfolio; reliable, verifiable, and objective; provided on a timely basis; and should represent relevant information. *Id.* at 18 fig.6.

[125] Scenario analysis is a useful tool for considering effects on future performance because it is a process that analyzes alternative possible future outcomes. GLOB. INV'R COAL. ON CLIMATE CHANGE, INVESTOR EXPECTATIONS OF OIL AND GAS COMPANIES: TRANSITION TO A LOWER CARBON FUTURE 6 (2016), http://www.iigcc.org/files/publication-files/IIGCC_2016_Oil_and_Gas_report_v17_WEB.PDF [https://perma.cc/UG2Y-8E35]. Scenario analysis is also intended to be used as a "business tool to stress test the resilience of a company's strategy and portfolio." AHMAD, *supra* note 41, at 18.

[126] TCFD RECOMMENDATIONS, *supra* note 9, at v.

[127] The financial sector includes banks, insurance companies, asset owners, and asset managers. *Id.* at 15.

[128] The non-financial sector includes energy; transportation; materials and buildings; and agriculture, food, and forest products. *Id.*

[129] *See* 2019 STATUS REPORT, *supra* note 11, at 110–16.

[130] *TCFD Supporters*, TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, https://www.fsb-tcfd.org/tcfd-supporters/ [https://perma.cc/R7A6-H6HH] [hereinafter *TCFD Supporters*].

[131] Szmigiera, *supra* note 84 (listing largest asset management companies); *see also TCFD Supporters*, *supra* note 130.

investors and businesses who opt do so.[132] These benefits include improved risk management; familiarization with scenario analysis; consistent external communication; a shift of focus of external stakeholders towards forward looking assumptions, methodologies, opportunities, and strategies; as well as an increased awareness of directors' fiduciary duty,[133] which the Business Roundtable recently stated applies to all stakeholders.[134]

V. WHY CLIMATE-RELATED FINANCIAL DISCLOSURES HAVE BEEN UNSUCCESSFUL THUS FAR

A primary reason why the 2010 Climate Guidance failed to make a significant impact on climate-related financial disclosures is because the guidance is an interpretive rule rather than a legislative rule. Interpretive rules, a type of "guidance document" that does not go through notice and comment rulemaking,[135] "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."[136] Guidance documents include interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice.[137] Interpretive rules are merely an agency's present interpretation of a statue and have no "power to control,"[138] and an "agency remains free in any particular case to diverge from whatever outcome the policy statement or interpretive rule might suggest."[139] A legislative rule, on the other hand, is binding policy, created through rulemaking that constitutes

[132] EY, REPORTING CLIMATE CHANGE RISK 11 (2017), https://www.ey.com/Publication/vwLUAssets/ey-at-reporting-climate-change-risk-2017/$FILE/ey-reporting-climate-change-risk.pdf [https://perma.cc/Z84C-S5UZ].

[133] *Id.*

[134] *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/GG83-Q4A6].

[135] Administrative Procedure Act, 5 U.S.C. § 553(b)(A) (2018).

[136] Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 97 (2015) (quoting Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995)).

[137] 5 U.S.C. § 553(b)(A); *see* Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 788 (2010).

[138] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[139] Viet. Veterans of Am. v. Sec'y of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988).

binding precedent and carries the force of law.[140] The Second Circuit, in *White v. Shalala*, found that legislative rules are those that create laws, rights, or duties, whereas interpretive rules are those that clarify an existing statute or regulation.[141] Although the SEC interpreted that current securities laws require material risks posed by climate change to be disclosed, the fact that it is an interpretive rule provides the SEC with the ability to diverge from and not enforce its interpretation and leaves significant discretion to management.

Despite the SEC not enforcing its interpretation, climate skeptics and industry advocates may argue that the 2010 Climate Guidance is really a legislative rule disguised as an interpretive rule – hoping to entirely eliminate the "rule" for failure to go through notice and comment rulemaking– but that argument would most likely fail.[142] "[A] rule has such force only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule."[143] *American Mining Congress v. Mine Safety and Health Administration* provided three instances where intent to exercise can be found, but these are also red flags that a legislative rule is disguised as an interpretive rule: (1) whether, in the absence of a legislative rule, the basis for agency enforcement would be inadequate; (2) whether it was published in the Code of Federal Regulations (CFR); and (3) where an amendment conflicts with a legislative rule, the amendment must be legislative.[144] The second instance, publication in the CFR, was deemed to be not determinative alone by *Health Insurance Association of America, Inc. v. Shalala*.[145] However, *American Mining Congress* did not address whether the absence of a red flag is sufficient to show that a rule is not legislative.

Paralyzed Veterans of America v. D.C. Arena L.P. helped fill this void.[146] *Paralyzed Veterans* stated that a rule is more likely to

140 *See* 5 U.S.C. § 553.

141 White v. Shalala, 7 F.3d 296, 303–04 (2d Cir. 1993).

142 *See* Am. Mining Cong. v. Mine Safety and Health Admin., 995 F.2d 1106, 1110 (D.C. Cir. 1993).

143 *Id.* at 1109.

144 *Id.*

145 23 F.3d 412, 423 (D.C. Cir. 1994).

146 117 F.3d 579 (D.C. Cir. 1997), *abrogated by* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92 (2015). This case was abrogated on the grounds that, "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial

be an interpretive rule and therefore exempt from notice and comment rulemaking if its content: (1) is fairly encompassed within the preexisting statute or legislative rule that it purports to construe; (2) it is tightly drawn linguistically from the actual language of the preexisting rule; or (3) is not distinct or additive to the preexisting regulation or statute.[147] Typically, the more tethered the interpretive rule is to the language of the statute or legislative rule, the more likely the rule is an interpretation.

In considering the 2010 Climate Guidance, neither red flag is raised. For the first red flag, Regulation S-K is the implementing regulation, and the guidance document is interpreting Regulation S-K. Without Regulation S-K, the SEC would not have an adequate basis for enforcing the Guidance. For the second red flag, the 2010 Guidance is not an amendment to Regulation S-K and does not purport to be an amendment. Filling in the *American Mining Congress* gaps with the factors from *Paralyzed Veterans*, it is quite clear that the Guidance is an interpretive rule rather than a legislative rule. For the question of whether the content is "fairly encompassed" within Regulation S-K, the Guidance discusses what Items of Regulations S-K may trigger disclosure of climate change-related information in order to satisfy an issuers obligation to disclose "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading."[148] This is "fairly encompassed" because the SEC is simply spelling out that issuers have a duty to disclose climate-change information if it is deemed material and that failure to disclose such information would make the disclosure misleading. The second factor of the analysis is also satisfied. After the Guidance explains what Items may trigger disclosure obligations,[149] it then discusses how those Items can be applied to climate change-related issues.[150] The applications are

interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." *Perez*, 575 U.S. at 101. It should be noted, however, that the Exchange Act and the Securities Act do not mandate that rule challenges be filed in the D.C. Circuit, and the Supreme Court has infamously never addressed the issue of whether a legislative rule can be disguised as an interpretive rule. Therefore, the *Paralyzed Veterans* analysis is not nationally binding on challenges to SEC rules.

147 *Paralyzed Veterans*, 117 F.3d at 588.

148 17 C.F.R. §§ 230.408(a), 240.12b-20 (2020).

149 2010 CLIMATE GUIDANCE, *supra* note 13, at 12–20.

150 *Id.* at 22–27.

"tightly drawn linguistically" because the Guidance is applying the climate change-related issues to the specific language and purpose of the Items. For example, Item 503(c) requires an issuer to disclose non-generic risk factors which the Guidance then states could include pending litigation or legislation pertaining to climate change.[151] Lastly, the Guidance is not distinct or additive to Regulation S-K; rather, it finds that climate risks "could" or "may" trigger disclosure obligations, and that companies "should consider" disclosing material risks.[152] Because the 2010 Climate Guidance cannot be seen as a legislative rule, it therefore provides no binding effect on the SEC nor the regulated entities; it is simply the SEC's interpretation of existing disclosure obligations as it relates to material climate-related information.

VI. RECOMMENDATION: IMPROVED LEGISLATION REQUIRING MANDATORY CLIMATE-RELATED FINANCIAL DISCLOSURES ALIGNED WITH THE TCFD RECOMMENDATIONS

This Note suggests that passing an amended version of the CRDA, requiring alignment with the TCFD Recommendations, will hasten the U.S. path to a low-carbon economy. As a world leader, the U.S. must lead by example and work with other G20 countries to adhere to the targets of the Paris Agreement. As seen with the Kyoto Protocol, where other countries like the European Union would only agree to an emissions trading system if the U.S. would agree to join,[153] the U.S. has an opportunity to make mandatory climate risk disclosure mainstream among developed nations. With global support of the Recommendations, the U.S., by creating a mandatory reporting framework aligned with the TCFD Recommendations, will encourage other countries to adopt the same or substantially similar frameworks. With global uniformity in the availability of information pertaining to climate-related risks, investors will have the necessary information to make

[151] *Id.* at 22.

[152] *See* General Electric Co. v. EPA, 290 F.3d 377, 381–85 (D.C. Cir. 2002) (discussing that non-mandatory language can help determine if a rule is interpretive rather than legislative).

[153] *See* MICHAEL BLOWFIELD, BUSINESS AND SUSTAINABILITY 139 (2013).

informed investments, allowing the global economy to transition to a low-carbon economy faster.

A mandatory scheme is needed because voluntary frameworks, like those offered by the Sustainability Accounting Standards Board, the Climate Disclosure Standards Board, the Global Reporting Initiative, and the International Integrated Reporting Council, have not been adopted and implemented fast enough.[154] The window to adopt and implement these frameworks is closing quickly, but the implementation must occur in order to minimize the financial risks from climate change.[155] Many companies already disclose sustainability issues in voluntary reports, but have been hesitant to disclose them in mandatory reports because of their perceived litigation risk.[156] Information in official filings are of more use because the information "gets greater scrutiny, is subject to better internal controls and procedures, in reality poses no legal risk,[157] and is more credible to investors."[158] The litigation risk that companies are concerned about pertains to scenario analysis being interpreted as a financial forecast; however, it is important for companies to understand that the TCFD is asking companies to "explain how their business might be affected under different scenarios" rather than provide a financial forecast.[159] A mandatory framework should ease these concerns by requiring all issuers to use scenario analysis for hypothetical futures.

A. New Legislation is Needed Rather than a New

[154] 2019 STATUS REPORT, *supra* note 11, at i ("[P]rogress must be accelerated. Today's disclosures remain far from the scale markets need to channel investment to sustainable and resilient solutions, opportunities, and business models.").

[155] BANK OF ENGLAND, TRANSITION IN THINKING: THE IMPACT OF CLIMATE CHANGE ON THE UK BANKING SECTOR 9 (2018), https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/report/transition-in-thinking-the-impact-of-climate-change-on-the-uk-banking-sector.pdf [https://perma.cc/C9GA-GWQK].

[156] Robert G. Eccles & Michael P. Krzus, *Why Companies Should Report Financial Risks From Climate Change*, 59 MIT SLOAN MGMT. REV. (2018), http://ilp.mit.edu/media/news_articles/smr/2018/59312.pdf [https://perma.cc/98AH-NQN9].

[157] It is logical that companies would be subject to litigation risk by *not including* this relevant information in official reports rather than in voluntary reports because they would be subject to the litigation risk of failing to disclose material issues and misleading investors.

[158] Eccles & Krzus, *supra* note 156.

[159] *Id.*

Regulation

Climate change is an extraordinary issue that requires bold solutions. The solutions used to combat it must be used long enough to promote meaningful change. A law requiring mandatory climate-related financial disclosures is one such solution. Although both congressional legislation and agency regulation carry the force of law,[160] congressional legislation is preferred. A regulation for an issue of this importance is not as beneficial because of potential presidential influence cast upon the promulgation process. Because the question of whether the SEC is truly an independent agency has not been answered,[161] it is a safer option to avoid the uncertainty of presidential influence by enacting legislation rather than a regulation.

Since the issuance of Executive Order 12,291,[162] regulations have been plagued with questionable presidential influence.[163] This Executive Order required agencies to follow a set of policy goals and mandates when proposing new regulations, which are then reviewed by the Office of Information and Regulatory Affairs ("OIRA") prior to publication.[164] Although it was later revoked by Executive Order 12,866,[165] its basic principles are still reflected in the executive review process today.[166] OIRA is tasked with ensuring that agency actions are consistent presidential policies and priorities.[167] The intent of the review program was to restore integrity, legitimacy, and transparency to the regulatory decision-making process.[168] Despite these efforts, the program has yet to achieve these goals and is plagued by delays of agency actions,

[160] *See* "force of law discussion" *supra* Part V.

[161] *See supra* note 12 for a discussion on the issue of SEC independence.

[162] Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 472–76 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2018).

[163] Peter Ketcham-Colwill, *Presidential Influence Over Agency Rulemaking Through Regulatory Review*, 82 GEO. WASH. L. REV. 1622, 1624 (2014).

[164] *Id.* at 1623–24.

[165] Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 822–27 (2018).

[166] Ketcham-Colwill, *supra* note 163, at 1624.

[167] *Id.*

[168] Exec. Order No. 12,866, pmbl., 3 C.F.R. at 638.

circumvention of disclosure and transparency requirements, and, because of this circumvention, a lack of accountability.[169]

This influence has already been seen by the lack of SEC enforcement and the halted review of the Concept Release on Business and Financial Disclosures Required by Regulation S-K.[170] To limit presidential influence and to avoid many of these executive hurdles, legislation should be the vehicle used to introduce a law requiring climate-related financial disclosures. Congressional legislation can require the SEC to promulgate more stringent regulations, therefore limiting the amount of presidential influence on the regulatory review process.

B. Required Changes to the Climate Risk Disclosure Act of 2019

As with most congressional legislation, the CRDA is vague, providing the SEC with too much discretion when promulgating regulations under the specified criteria and also leaving the SEC vulnerable to influence by whomever is the head of the executive branch. The CRDA is a step in the right direction, but it does not require enough disclosure and does not set forth a uniform framework that provides investors with a full spectrum of quality information that will allow investors to make the profitable and necessary investments required for a swift transition to a low-carbon economy. Without uniform standards, enforcement becomes more difficult, causing companies to incur greater indirect costs like maintaining separate record-keeping requirements for each jurisdiction they operate in.[171] The new bill should require alignment with the TCFD Recommendations to promote global uniformity in disclosure requirements.

Appendix B of this Note lists where the CRDA is aligned with the Recommendations (Appendix A provides a table that lists the parts of the TCFD's four core recommendation categories). Risk Management is the only core recommendation category that the CRDA aligns with; the CRDA fails to fully align with the other three core recommendation categories. To start, the subsection of

[169] *See* Ketcham-Colwill, *supra* note 163, at 1626–33.

[170] Nowiski, *supra* note 52, at 7–8; *see also* Gelles, *supra* note 6.

[171] *See, e.g.*, Jason J. Czarnezki & Katherine Fielder, *The Neoliberal Turn in Environmental Regulation*, 2016 UTAH L. REV. 1, 40 (2016) (discussing the costs associated with non-uniform eco-labels).

the CRDA that discusses corporate governance only requires disclosure of the company's practices surrounding climate-related risks.[172] To fully align with the Governance category of the Recommendations, the phrase "and opportunities" should be added to the end of the sentence. The CRDA should also include language that explicitly requires a discussion of the board's oversight and management's role in the corporate governance process pertaining to climate-related risks and opportunities.

Next, the CRDA is not fully aligned with parts A and B of the Recommendation's Strategy category. Part A is not satisfied because the Act fails to require companies to "[d]escribe the climate-related risks and opportunities the organization has identified over the short, medium, and long term."[173] A similar requirement should be added. Part B is only partially satisfied because the Act only requires companies to identify and evaluate the financial impact of climate-related risks.[174] In order to fully align with the Strategy category, the Act must also include the identification and evaluation of the financial impact of climate-related opportunities.

Lastly, the CRDA is only partially aligned with the Metrics and Targets category of the Recommendations. Part B is only partially satisfied because, although the Act requires the disclosure of direct and indirect GHG emissions, it does not specifically require the use of the GHG Protocol.[175] Use of the GHG Protocol should be used to fully align with the Recommendations and also further promote the use of a standard framework. Part C is not satisfied because language must be added to require the issuer to discuss its metrics and targets for factors like GHG emissions, water use, and energy use.

The most important piece missing from the CRDA is the identification of opportunities a company has during the transition to a low-carbon economy. The current text of the CRDA only

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[172] Climate Risk Disclosure Act of 2019, S. 2075, 116th Cong. § 5(a) (2019) (adding Section (s)(2)(B) as a proposed amendment to the Securities Exchange Act of 1934, 15 U.S.C. § 78m (2018)).

[173] TCFD RECOMMENDATIONS, *supra* note 9, at 14.

[174] S. 2075 § 5(a) (Section (s)(2)(a) of the proposed amendment to § 78m).

[175] The GHG Protocol is a standardized corporate GHG accounting and reporting framework that termed Scope 1, 2, and 3 GHG emissions. *See generally* A CORPORATE AND REPORTING STANDARD, THE GREENHOUSE GAS PROTOCOL (2004), https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf [https://perma.cc/MW72-NR94].

mentions the word "opportunity" three times: once in the "Sense of Congress" section, and twice in the "Findings" section, where the language is qualified by the non-mandatory language "should."[176] No mention of opportunity is made in the two subsequent sections: "Disclosures Relating to Climate Change" and "Rulemaking."[177]

Opportunities are needed for full disclosure. The purpose of climate risk disclosure is to assist in the swift transition to a low-carbon economy and to provide investors with accurate information about the assets they are investing in. When making an investment decision in the future low-carbon economy, knowing what opportunities exist for a company is essential information for an investor.[178] Mercer indicates in its 2019 report that its clients want to know how the market prices climate opportunities.[179]

The sole disclosure of risks solves only the first half of the transition to a low-carbon economy: divestment from fossil fuels. The second half requires investment in renewables so that the technology and infrastructure needed for the low-carbon economy is perfected and in place. Thus, it is necessary for opportunities to be disclosed by companies as well. Because the transition to a low-carbon economy is inevitable,[180] disclosure of climate-related opportunities will shift green investments away from stereotypical activist investors, sustainable investors, socially responsible investors, etc., and towards mainstream investment. Mercer identifies investment in to the 2 degrees Celsius Scenario as both an economic imperative and an opportunity.[181] Investors who become opportunistic "can target investment in the many mitigation and adaptation solutions required for a transformative transition."[182] Therefore, the disclosure of these opportunities is necessary to capture investors who have not traditionally made green investments.

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176 S. 2075 §§ 3(7), 4(1)–(2)(C).

177 *Id.* §§ 5, 6.

178 *See* MERCER, INVESTING IN A TIME OF CLIMATE CHANGE 11 (2019), https://www.mercer.com/content/dam/mercer/attachments/private/nurture-cycle/gl-2019-wealth-climate-change-the-sequel-summary.pdf [https://perma.cc/6NLM-RHPU].

179 *Id.* at 9.

180 Helen Mountford, *Can Low-Carbon Investments Help Economies Recover from Coronavirus?*, WORLD ECONOMIC F. (Mar. 17, 2020), https://www.weforum.org/agenda/2020/03/coronavirus-low-carbon-investments-economies-recovery-climate-change [https://perma.cc/UFP9-U8JC].

181 MERCER, *supra* note 178, at 11.

182 *Id.* at 12.

VII. ALTERNATIVES IN ADMINISTRATIVE LAW

Although this Note recommends that new legislation be passed, it is not necessarily the most feasible option because of the difficulty in passing legislation, especially in today's increasingly polarized political climate. Alternatives within administrative law exist that are more feasible in the short term. However, these options may not be feasible during the current Trump Administration because of its pro-industry approach to environmental regulation.[183]

A. Use a More Forceful Interpretation of the Current Law to Create a New Interpretive Rule

Although the 2010 Climate Guidance stated that disclosure of material climate-related information is already required under current securities law, the Guidance was not as forceful as it could have been. Because the Guidance consistently uses the terms "could," "may," and "should consider," a significant amount of discretion is left to management in determining what climate-related issues must be disclosed. In order to "remind parties of their existing duties," the SEC can provide substantially more clarification on what climate-related information is material and how it should be disclosed.

A more forceful interpretation of Regulation S-K is required. The 2010 Guidance only addresses four areas of Regulation S-K where climate risk disclosure could be triggered: Item 101, "Description of Business"; Item 103, "Legal Proceedings"; Item 303, "Management's Discussion and Analysis"; and Item 503(c), "Risk Factors."[184] Other Items of Regulation S-K trigger disclosure requirements if a more forceful interpretation is used. For example, Item 102, "Description of Property," requires a registrant to "[s]tate briefly the location and general character of the principal plants and other materially important physical properties of the

[183] *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 03, 2017) ("[I]t is important that for every one new regulation issued, at least two prior regulations be identified for elimination."); *see also* Eric Lipton et al., *The Real-Life Effects of Trump's Environmental Rollbacks: 5 Takeaways from Our Investigation,* N.Y. TIMES (Dec. 26, 2018), https://www.nytimes.com/2018/12/26/us/trump-environment-regulation-rollbacks.html [https://perma.cc/8CMB-ESEB].

[184] 2010 CLIMATE GUIDANCE, *supra* note 13, at 12–20.

registrant and its subsidiaries."[185] Climate related disclosures under this Item include the vulnerability of a company's property to sea level rise or water scarcity, and also include the opportunity for investments in adaptation and mitigation infrastructure. Item 304, "Changes in and Disagreements with Accountants on Accounting and Financial Disclosures," requires the disclosure of, *inter alia*, disagreements between the registrant and the former accountant over the scope of financial statement disclosure.[186] Climate-related disclosures are triggered if the former accountant believed that the scope or fairness of the financial statement provided by management did not, based on the information available to the accountant, account for all of the financial risks the company is exposed to due to climate change.[187] Item 305, "Quantitative and Qualitative Disclosure of Market Risk,"[188] triggers disclosure if the market for oil and gas is disrupted. This Item also requires disclosure of how the company manages that market risk exposure (i.e., what are its objectives and general strategies).[189] Item 308, "Internal Controls Over Financial Reporting," requires management to disclose the framework used for evaluating the effectiveness of its internal controls over financial reporting, and the registrant cannot conclude that the controls are effective if "there are one or more material weaknesses in the registrant's internal control over financial reporting."[190] Almost all companies cannot conclude that their internal controls over financial reporting are effective if they are not reporting climate-related risks and opportunities or are only providing vague or overly broad statements because these issues are material.

A more forceful interpretation, then translated into a new interpretive rule, can more clearly and appropriately clarify and remind issuers of their duties under current securities law as it relates to material climate-related information. The SEC providing a new interpretive rule is the quickest administrative action that can be taken because it would not have to go through notice and

185 17 C.F.R. § 229.102 (2020).
186 *Id.* § 229.304(a)(1)(iv).
187 *See id.* § 229.304(a)(1)(v).
188 *Id.* § 229.305.
189 *See id.* § 229.305(b)(ii).
190 *Id.* § 229.308(a)(3).

comment rulemaking.[191] A new interpretation is appropriate for two reasons: (1) global knowledge on climate science has significantly increased since 2010, and (2) management would have less discretion when determining which climate-related impacts on their company are material. New data about climate change is uncovered every day. The National Academy of Sciences, Engineering, and Medicine released a report in 2016 that defines the study of climate change and its effect on an individual weather or climate event as "event attribution." The report states that "more and more event attribution studies are being published every year,"[192] and this in part due to "the potential value of attribution for informing choices about assessing and managing risk in guiding climate adaptation strategies."[193] A new interpretation that reflects the abundance of science discovered since 2010 will provide management with the guidance they need for determining what information is material, and thus disclosed, as to not be misleading to investors. Although an interpretive rule is the weakest solution because it is not binding law, it will still provide management with less discretion in determining what is material.[194] An interpretive rule "reminds affected parties of existing duties,"[195] so management will have less grounds to argue that the information they failed to disclose was not material.

A more forceful interpretation, however, may run in to legal concerns related to administrative law, primarily issues of deference. The *Auer* doctrine,[196] recently upheld but limited in the process by *Kisor v. Wilkie*,[197] instructs a court to defer to an agency's

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[191] Administrative Procedure Act, 5 U.S.C. § 553(b)(A) (2018).

[192] NATIONAL ACADEMY OF SCIENCES, ENGINEERING, AND MEDICINE, COMMITTEE ON EXTREME WEATHER EVENTS AND CLIMATE CHANGE ATTRIBUTION, ATTRIBUTION OF EXTREME WEATHER EVENTS IN THE CONTEXT OF CLIMATE CHANGE 2 (2016).

[193] *Id.* at 1.

[194] An important comparison to note here is that a new interpretive rule would limit *management's* discretion, not the SEC's enforcement discretion, so the interpretive rule would not create a binding effect that would thereby classify the rule as legislative. *Cf.* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 949 (D.C. Cir. 1987) (finding that a rule limiting enforcement discretion is deemed a legislative rule rather than interpretive).

[195] General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (citation omitted).

[196] Prior to its limitation, the *Auer* doctrine afforded deference to an agency's interpretation unless that interpretation was "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997).

[197] 139 S. Ct. 2400 (2019).

interpretation of its own regulation after certain factors have been met. First, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous," determined by exhausting all the traditional tools of construction.[198] Second, "[i]f genuine ambiguity remains . . . the agency's reading must still be 'reasonable.'"[199] Third, the "court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[200] This is satisfied if the interpretation is made as the agency's "authoritative" or "official position" (i.e., made by the head of the agency or the head's chief advisors rather than a mid-level official).[201] Next, "the agency's interpretation must in some way implicate its substantive expertise."[202] Lastly, "an agency's reading of the rule must reflect 'fair and considered judgment' to receive *Auer* deference."[203] This means that it cannot be a "convenient litigating position," be a "*post hoc* rationalization advanced to defend past agency action," or create "unfair surprise" to regulated parties.[204]

On its face, a more forceful interpretation would have difficulty surviving the first factor. Is the term "material" genuinely ambiguous after a court exhausts all traditional tools of construction? It is hard to say; the term "material" is vague, as well as the term "reasonable investor" used in the Supreme Court's and SEC's definitions.[205] "The 'reasonable investor' is at best a shadowy figure, described only generically in judicial opinions and—in doctrine if not in practice—someone for the fact-finder to identify case-by-case."[206] Assuming, *arguendo*, that a court finds that the regulation is genuinely ambiguous, the new interpretation should have no trouble passing the remaining four factors. The new interpretation is "reasonable" because it serves the purpose of protecting

[198] *Id.* at 2415.

[199] *Id.*

[200] *Id.* at 2416.

[201] *Id.*

[202] *Id.* at 2417.

[203] *Id.*

[204] *Id.* at 2417–18 (internal quotations omitted).

[205] *See* TSC Indus. v. Northway, Inc., 426 U.S. 438, 445 (1976).

[206] Amanda Rose, *The "Reasonable Investor" of Federal Securities Law*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 13, 2016), https://corpgov.law.harvard.edu/2016/10/13/the-reasonable-investor-of-federal-securities-law/ [https://perma.cc/9QLH-NHQS].

investors and falls in line with market trends and the approach of other financial regulators around the world. The third factor is satisfied because this alternative will be issued as a new interpretive rule, such that it is "authoritative" and the "official position" of the SEC. A new interpretive rule may encounter some trouble when applied to the "substantive experience" factor. On the one hand, a more forceful interpretation may face challenges that, because the SEC does not have the technical expertise to address issues of climate change, they should not be able to make such determinations. Challengers may argue that the SEC, as an agency that deals with securities and investor protection, is not the appropriate agency to address issues of climate change. On the other hand, the SEC is an agency that analyzes financial risks. Analyzing a climate-related risk is just like analyzing the other risks that fall on the desks of SEC staff, and, as Larry Fink said in his 2020 annual letter to CEOs, "climate risk is investment risk."[207] The latter view lends support that a new interpretive rule with a more forceful interpretation of Regulation S-K would be given *Auer* deference by a reviewing court. Lastly, this is not a "convenient litigating position" or "*post hoc* rationalization advanced to defend past agency action" because it is not in response to litigation or an agency action. It also does not catch regulated parties off guard because the market is clearly trending in the direction of requiring more climate-related disclosures.

B. Amend Regulation S-K

Another solution is to amend Regulation S-K—the regulation that provides instructions for filing forms.[208] The SEC took one step towards this in 2016 when they issued the Concept Release, seeking public comments on whether the SEC should consider line-item disclosure for sustainability issues, as well as materiality standards of sustainability factors.[209] This alternative helps with the confusion around what exactly needs to be disclosed and provides less freedom to management to make those decisions. However, an

[207] *See* Letter from Larry Fink, *supra* note 8.
[208] 17 C.F.R. pt. 229 (2020).
[209] 2016 Concept Release, 81 Fed. Reg. at 23,924.

amendment to the regulation must go through notice and comment rulemaking, which could take some time.[210]

The SEC would also have the opportunity to require alignment with the TCFD Recommendations in the regulation. The different parts of the TCFD Recommendations can be added as instructions for what must be disclosed under certain paragraphs of various Items under Regulation S-K. For example, the SEC includes instructions in Item 302, "Supplementary Financial Information,"[211] providing disclosures recommended by the Financial Accounting Standards Board.[212] Alternatively, the SEC can add an additional discussion section that requires analysis of climate-related issues, similar to the Management Discussion & Analysis (MD&A).[213]

Amending Regulation S-K to include disclosure requirements for climate-related risks and opportunities may cause challenges based on *Chevron* deference.[214] A Chevron analysis involves a three-step test used when an agency rule interprets its substantive statute. Step Zero allows a particular regulation to qualify for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.[215] Step One asks whether Congress has directly spoken to the issue.[216] If Congress spoke directly to the issue, the court, as well as the agency, cannot substitute its own interpretation for that of Congress.[217] For Step Two, if the court determines that Congress did not directly address the precise question at issue, the court must decide whether the agency's interpretation is "based on a permissible construction of

[210] Administrative Procedure Act, 5 U.S.C. § 553 (2018); *see* Am. Mining Cong. v. Mine Safety and Health Admin., 995 F.2d 1106, 1107 (D.C. Cir. 1993).

[211] 17 C.F.R § 229.302.

[212] The FASB is the independent organization, designated by the SEC, that publishes Generally Accepted Accounting Principles (GAAP) for use by public companies. *About the FASB*, FIN. ACCT. STANDARDS BOARD, https://www.fasb.org/facts/index.shtml [https://perma.cc/WN8W-ZH85].

[213] *See* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 956–58 (2019) (proposing a "Sustainability Discussion & Analysis" (SD&A) section of the annual report).

[214] Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842–44 (1984).

[215] *See* United States v. Mead Corp., 533 U.S. 218, 227 (2001).

[216] *Chevron*, 837 U.S. at 842.

[217] *Id.* at 842–43.

the statute."[218] If the agency interpretation is reasonable, the court cannot substitute its own for that of the agency.[219]

Step Zero is satisfied because the Securities Act expressly states that "[t]he Commission shall adopt regulations under this subsection requiring each issuer of an asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security."[220] The amended regulation will also satisfy Step One because Congress, through the Securities Act, did not speak to the issue; rather Congress gave the SEC full authority to determine what information must be disclosed. The amended regulation encounters trouble under Step Two: whether the SEC's interpretation is reasonable and a permissible construction of the Securities Act. Interpreting the Securities Act to allow the SEC to require disclosure of climate-related risks and opportunities is entirely permissible because of the broad discretion Congress gave the SEC in determining what information must be disclosed. Challengers of this construction of the statute can bring weak arguments that the 1933 Congress did not intend, and could not have foreseen, the Securities Act encompassing uncertain risks like climate change. However, the 1933 Congress "recognized that investors must have access to accurate information important to making investment decisions. . . ."[221] Just as the 1933 Congress left broad discretion to the SEC to determine what information must be disclosed, using the phrase "accurate information" similarly supports a broad interpretation of the statute. Disclosure of climate-related risks is necessary to provide investors with accurate information and is permissible under a broad interpretation of the intent of the Securities Act.

C. Promulgate a New Regulation

Another option is for the SEC to promulgate a new regulation pursuant to the Securities Act[222] that deals solely with climate-related risks and opportunities. This solution will also take some time because it must go through notice and comment

[218] *Id.* at 843.
[219] *Id.*
[220] Securities Act of 1933, 15 U.S.C. § 77g(c)(1) (2018).
[221] 2016 Concept Release, 81 Fed. Reg. at 23,921.
[222] 15 U.S.C. § 77s.

rulemaking.[223] This regulation would be an in-depth framework aligned with the TCFD Recommendations. Just as the Concept Release was looking to do, a new regulation should also provide unambiguous materiality standards for climate-related risks and opportunities. The standards would provide management with less discretion and would provide investors with better opportunities to bring derivative lawsuits and the SEC with more power to bring enforcement actions.[224]

Promulgating a regulation that deals solely with climate-related risks and opportunities may also encounter challenges based on *Chevron*.[225] The arguments against this administrative alternative are virtually the same as the arguments against amending Regulation S-K. Steps Zero and One are satisfied because Congress, in the Securities Act, expressly gave the SEC full discretion to determine what information must be disclosed. By giving the SEC full authority, Congress did not speak to the issue and the analysis can proceed to *Chevron* Step Two. Under Step Two, interpreting the delegation provision of the Securities Act to allow the SEC to require climate-related disclosures is entirely permissible under a broad interpretation of the intent of the Securities Act because it will provide investors with accurate information.

VIII. CONCLUSION

The era of relying on voluntary disclosure programs with limited government oversight must come to an end. Full disclosure—of both climate-related risks *and* opportunities—is essential to providing investors with the necessary information required to finance our future's health, and to ensure a swift transition to a low-carbon economy. Regulations that require the disclosure of a more complete set of information help cure the market inefficiencies caused by distorted and imperfect information.[226] The current lack of information surrounding climate-related risks and opportunities

[223] Administrative Procedure Act, 5 U.S.C. § 553 (2018).

[224] "A suit brought by shareholders on behalf of a corporation to enforce corporate rights against directors or other insiders, or to assert rights of the corporation in the absence of corporate action to protect such rights." *Derivative Suit*, BARRON'S DICTIONARY OF FIN. & INV. TERMS (10th ed. 2018).

[225] Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984).

[226] Czarnezki & Fiedler, *supra* note 171, at 36–37.

is one such inefficiency; however, a mandatory reporting framework will help correct this inefficiency.

Passing legislation that aligns mandatory reporting with the TCFD Recommendations will have the most beneficial national and global impacts by promoting uniformity. It will cure the market inefficiencies caused by the lack of or incomplete information and will allow investors to properly allocate capital in order to mitigate climate change's physical and financial effects on the U.S. Creating a mandatory disclosure framework will also allow U.S. regulators to take control of climate-related disclosures for the U.S. capital markets before other jurisdictions can impose disclosure regimes on U.S. issuers and investors. Regardless of what type of law is chosen or what disclosure framework is used, a mandatory reporting scheme for climate-related risks and opportunities is needed to prevent the most severe consequences of climate change, and it is needed fast.

IX. APPENDIX A: TCFD RECOMMENDED DISCLOSURES[227]

Governance	Strategy	Risk Management	Metrics and Targets
(a) Describe the board's oversight of climate-related risks and opportunities (b) Describe management's role in assessing and managing climate-related risks and opportunities	(a) Describe the climate-related risks and opportunities the organization has identified over the short, medium, and long term (b) Describe the impact of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning	(a) Describe the organization's processes for identifying and assessing climate-related risks (b) Describe the organization's processes for managing climate-related risks (c) Describe how processes for identifying, assessing, and managing climate-related risks are integrated into the organization's overall risk management	(a) Disclose the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process (b) Disclose Scope 1, Scope 2, and, if appropriate, Scope 3 greenhouse gas (GHG) emissions, and the related risks

[227] TCFD RECOMMENDATIONS, *supra* note 9, at 14.

	(c) Describe the resilience of the organization’s strategy, taking into consideration different climate-related scenarios, including a 2 degrees Celsius or lower scenario		(c) Describe the targets used by the organization to manage climate-related risks and opportunities and performance against targets

X. APPENDIX B: LANGUAGE IN THE CRDA OF 2019 THAT ALIGNS WITH THE TCFD RECOMMENDATIONS

Governance	Strategy	Risk Management	Metrics and Targets
There is one subsection that comes close: "a description of any established corporate governance processes and structures to identify, assess, and manage climate-related risks."[228]	Part b) is partly satisfied by: "the identification of, the evaluation of potential financial impacts of, and any risk management strategies relating to–(i) physical risks posed to the covered issuer by climate change; and (ii) transition risks posed to the covered issuer by climate change."[229]	Part a) is satisfied by: "the identification of, the evaluation of potential financial impacts of, and any risk management strategies relating to–(i) physical risks posed to the covered issuer by climate change; and (ii) transition risks posed to the covered issuer by climate change,"[232] and "a description of any established corporate governance processes and structures to identify, assess, and manage climate-related risks."[233]	Part a) is satisfied by: "require that a covered issuer . . . incorporate into the disclosure . . . a discussion of the short-, medium, and long-term resilience of any risk management strategy, and the evolution of applicable risk metrics, of the covered issuer under each scenario..."[236]

[228] Climate Risk Disclosure Act of 2019, S.2075, 116th Cong. § 5(a) (2019) (Section (s)(2)(B) of the proposed amendment to the Securities Exchange Act of 1934. 15 U.S.C. § 78m (2018)). Section 5(a) of the CRDA proposes to add a Subsection (s) to Section 78m of the Exchange Act. The following citations to subsection (s) are in reference to this proposed amendment.

[229] *Id.* (to be incorporated as Section (s)(2)(A)).

[232] *Id.* § 5(a) (to be incorporated as Section (s)(2)(A)).

[233] *Id.* (to be incorporated as Section (s)(2)(B)).

[236] *Id.* § 6(a)(2)(A)(v).

	Part c) is satisfied by: "a description of the resilience of the strategy of the covered issuer for addressing climate risks, taking into account different climate scenarios,"[230] and "consider, when preparing any qualitative or quantitative risk analysis statement contained in the disclosure– (i) a baseline scenario that includes physical impacts of climate change; (ii) a well below 1.5 degrees scenario; and (iii) any additional climate analysis scenario considered appropriate by the Commission, in consultation with the appropriate climate principals."[231]	Part b) is also satisfied by "the identification of, the evaluation of potential financial impacts of, and any risk management strategies relating to–(i) physical risks posed to the covered issuer by climate change; and (ii) transition risks posed to the covered issuer by climate change."[234] Part c) is satisfied by: "a description of how climate risk is incorporated into the overall risk management strategy of the covered issuer."[235]	Parts b) and c) are partly satisfied with requirements that an issuer disclose direct and indirect GHG emissions,[237] as well as water withdrawal and regional scarcity.[238]

[230] *Id.* (to be incorporated as Section (s)(2)(D)).
[231] *Id.* § 6(a)(2)(B).
[234] *Id.* (to be incorporated as Section (s)(2)(A)).
[235] *Id.* (to be incorporated as Section (s)(2)(E)).
[237] *Id.* § 6(a)(1)(B).
[238] *Id.* § 6(a)(2)(C)(ii)(V)–(VI).