# Investor Driven Climate Accountability

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*As the world confronts an urgent climate crisis, corporations are under increasing pressure to take action to reduce greenhouse gas emissions. In place of genuine effort, many public companies have made climate pledges that they are not on track to fulfill. Further, despite the very real financial risks corporations face as temperatures rise, climate-related risks are often under-disclosed. While the SEC has proposed rules that could begin to address corporate accountability, formidable legal challenges are expected. Recognizing that top-down responses may not be effective, shareholders could opt to take matters into their own hands through direct action. This Article explores how investors may take the reins to hold corporations accountable for misstating their climate efforts and failing to disclose their climate risks. After describing top-down measures and their inherent weaknesses, we investigate the viability of private Rule 10b-5 claims, shareholder derivative suits, and shareholder proposals. Because some companies are focused on preparing for or lobbying against potential regulation, they may not be attuned to the risk of*

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*such investor-driven actions. After analyzing these bottom-up approaches to climate accountability, we provide a series of recommendations as to how corporations can respond to these efforts.*

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## INTRODUCTION

As the world confronts an urgent climate crisis, corporations are under increasing pressure to take action to reduce greenhouse gas ("GHG") emissions.[1] Although U.S. companies have had an outsized impact on the environment,[2] the United States lags behind many other countries in terms of regulatory action.[3] Not only are companies in the United States failing to address their contribution to global warming, many are also making misleading claims regarding their environmental performance in order to improve the company's goodwill or to attract environmentally conscious investors.[4] Given the size of the green investing movement, companies stand to profit handsomely from such "greenwashing" campaigns.[5] Concerned about their investments and

[1] *See* David Gelles & Somini Sengupta, *Big Business Says It Will Tackle Climate Change, but Not How or When*, N.Y. TIMES (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/business/corporate-climate-davos.html [https://perma.cc/M3AV-BT4T].

[2] The United States is responsible for emitting more $CO_2$ than any other country (25% of historical emissions to date). Hannah Ritchie, *Who Has Contributed Most to Global CO2 Emissions?*, OUR WORLD IN DATA (Oct. 1, 2019), https://ourworldindata.org/contributed-most-global-co2 [https://perma.cc/V8BD-RYKQ].

[3] Rachel Hellman, *U.S. Lags in Latest Climate Protection Rankings*, U.S. NEWS (Feb. 28, 2022, 7:30 AM), https://www.usnews.com/news/best-countries/articles/2022-02-28/denmark-shines-u-s-lags-in-latest-climate-protection-rankings [https://perma.cc/J436-9R8K].

[4] Magali A. Delmas & Vanessa Cuerel Burbano, *The Drivers of Greenwashing*, 54 CAL. MGMT. REV. 64, 64 (2011).

[5] *See* Chris Stokel-Walker, *How Sustainable Investing Will Become the Norm*, WORLD ECON. F. (Feb. 2, 2022), https://www.weforum.org/agenda/2022/02/sustainable-investing-esg-finance-future-norm/ [https://perma.cc/J4G8-N7RT] (reporting $35.3 trillion of sustainable assets under management).

the environment, investors are beginning to take notice when corporations fail to live up to these promises.[6]

A separate but related grievance arises when corporations fail to disclose the risks that they bear due to climate change. Many companies face the physical risks of global warming, such as the damage caused by extreme weather events.[7] Other companies will bear the transition risks associated with new regulatory requirements, changes in policy, or modifying their operations to reduce their reliance on carbon-based energy sources.[8] Additional financial risks stem from the potential costs to compensate those who have suffered losses due to failure to address these physical or transition risks.[9] Despite these foreseeable threats, climate-related risks are under-disclosed and may be reported in ways that prevent comparison to other firms or are otherwise unclear to investors.[10]

The Securities and Exchange Commission ("SEC") is the main federal agency responsible for protecting investors by enforcing securities laws.[11] The SEC's Office of Investor Education and Advocacy explains that the primary purpose of these laws is to ensure that "[c]ompanies offering securities for sale to the public . . . tell the truth about their business, the securities they are selling, and the risks involved in investing in those securities."[12] In March 2022, the SEC proposed a series of rules that would standardize reporting of climate-related

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[6] *See* Lauren Foster, *How "Greenwashing" Cost a CEO His Job*, BARRON'S (June 2, 2022, 8:53 AM EDT), https://www.barrons.com/articles/greenwashing-dws-group-ceo-51654130739?noredirect=y [https://perma.cc/43K6-8Y5C].

[7] *See* FIN. STABILITY OVERSIGHT COUNCIL, FSOC REPORT ON CLIMATE-RELATED FINANCIAL RISK 12 (2021), https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf [https://perma.cc/9ZQR-74CP].

[8] *Id.* at 13.

[9] *Id.* at 60-61.

[10] *See* SUSTAINABILITY ACCT. STANDARDS BD., THE STATE OF DISCLOSURE 2017: AN ANALYSIS OF THE EFFECTIVENESS OF SUSTAINABILITY DISCLOSURE IN SEC FILINGS 2 (2017), [https://perma.cc/USC8-2HN2].

[11] U.S. SEC. & EXCH. COMM'N, *The Role of the SEC*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/role-sec (last visited Dec. 11, 2022) [https://perma.cc/V76R-8UU5]. The two major federal statutes concerning investments are the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) which created the SEC. *Id.*

[12] *Id.*

information and require reporting corporations to make certain climate-related disclosures in registration statements and periodic reports.[13]

A few months later, the SEC also proposed rules to combat greenwashing by investment firms that market themselves as having an ESG focus. Funds that label themselves as "ESG Funds" or "Socially Responsible Funds" would be required to make certain to allow investors to determine whether a fund is in compliance with its stated purpose.[14] Although the proposed rules, taken together, could begin to address the rising concerns regarding climate accountability, they are expected to face legal challenges in light of the Supreme Court's decision in *West Virginia vs. Environmental Protection Agency* ("*EPA*"), which called into question federal agencies' authority to tackle climate change.[15]

Although Congress could act to provide the "clear statement" of authority for regulators to address climate change or to promote accountability with respect to climate claims as required by the *West Virginia* decision,[16] such language is notably absent from the newly passed Inflation Reduction Act, touted as the most significant climate legislation in history.[17] While some view the Act as affirming the EPA's

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[13] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

[14] Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environment, Social, and Governance Investment Practices, 87 Fed. Reg. 36654-36761, 36594-36651(June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279). In this Article, "ESG" refers to environmental, social, and governance standards.

[15] *See* 142 S. Ct. 2587, 2592, 2643 (2022) (applying the "major questions doctrine" to determine that the EPA's use of the "best system of emission reduction" to set emissions limits *was not within the authority granted to the EPA* because the agency lacked "clear congressional authorization").

[16] *See id.* at 2594 (requiring a "clear statement" of congressional authority for an agency's actions).

[17] *See generally* Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (codified as amended in scattered sections of 7, 23, 26, 42, 43 & 49 U.S.C.) (The act is primarily tax and spending legislation.).

authority to regulate GHGs,[18] the Act did not provide the SEC with express authority to address climate change or to promote climate accountability, cloaking their efforts to do so in uncertainty.[19] Recognizing that they cannot rely on a top-down approach from regulators or Congress to address climate change in a meaningful way, shareholders may opt to take matters into their own hands through direct action.

This Article explores the emergence of bottom-up measures taken by shareholders to hold corporations accountable for their failure to disclose and address climate-related risks and for their misstatements regarding climate change measures. The first avenue involves shareholders bringing suit under Section 10b of the Securities Exchange Act, which prohibits "manipulative or deceptive device[s]" in securities transactions.[20] Although the Act does not expressly provide a civil remedy for violations, courts have noted an implied private right of action.[21] Liability under these claims has also been extended to

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[18] *See* Lisa Friedman, *Democrats Designed the Climate Law to Be a Game Changer. Here's How.*, N.Y. TIMES (Aug. 22, 2022), https://www.nytimes.com/2022/08/22/climate/epa-supreme-court-pollution.html [https://perma.cc/MSU2-RLTW]; Jennifer Hijazi, *Climate Law Gives Clean Air Act a Legal Boost After Court Rebuke*, BLOOMBERG L. (Aug. 22, 2022, 2:35 PM PDT), https://news.bloomberglaw.com/environment-and-energy/climate-law-gives-clean-air-act-a-legal-boost-after-court-rebuke [https://perma.cc/9MN4-XRN4] (quoting Dan Farber).

[19] The extent to which the SEC can require climate-related disclosures is hotly debated. *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1303 (1999) (contending that in addition to disclosures for investor protection, the SEC has public interest disclosure power). For an argument that the rules were within the SEC's rulemaking authority, see Letter from Jill E. Fisch, Saul A. Fox Distinguished Professor of Bus. L., Univ. of Pa. Carey L. Sch. & George S. Georgiev, Assoc. Professor of L., Emory Univ. Sch. of L., to Vanessa A. Countryman, Sec'y, Sec. & Exch. Comm'n (June 6, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf [https://perma.cc/58QF-YG4F].

[20] 15 U.S.C. § 78j(b).

[21] *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) (observing that "[t]he existence of this implied remedy is simply beyond peradventure"). Similarly, private actions could be brought under Section 11 and 12(a) of the Securities Act of 1933 in connection with registration statements. 15 U.S.C. §§ 77k, 77l (permitting private actions regarding an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not

statements made outside of SEC filings, giving shareholders the ability to bring an action against a corporation that misrepresents its business practices as environmentally friendly on websites, sustainability reports, ESG reports, or other marketing materials.[22] While others have dismissed the risks of ESG-related shareholder litigation,[23] this Article reexamines the merits of such claims in light of recent legal and social developments.

In addition to — or in conjunction with — private actions under Section 10b-5, shareholders may seize the opportunity to engage the revived *Caremark* standard against corporate boards directly.[24] A

misleading.) However, this paper will focus on Rule 10b-5 claims because of their broader coverage.

[22] *See, e.g.*, *In re* Vale SA Sec. Litig., No. 1:15-cv-9539, 2017 WL 1102666, at *10 (S.D.N.Y. Mar. 23, 2017) (finding certain statements concerning the companies "commitment to environmental and social issues" and claims that the company had "health, safety and environmental standards and risk management systems and processes in place" made in *sustainability reports* to be actionable because the company's disclaimers were found in other documents); *In re* BP P.L.C. Sec. Litig., 922 F. Supp. 2d 600 (S.D. Tex. 2013) (finding that statements regarding its key safety measures in corporate *sustainability reports* was material misstatements under federal securities law).

[23] *See, e.g.*, Cadesby B. Cooper, *Rule 10b-5 at the Intersection of Greenwash and Green Investment: The Problem of Economic Loss*, 42 BOS. COLL. ENV'T AFFS. L. REV. 405, 432 (2015) (concluding that Section 10b-5 claims will likely be unsuccessful due to the economic loss requirement).

[24] *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968 (Del. Ch. 1996) (recognizing that a board's fiduciary duties require corporate directors to make a "good faith effort" to oversee the company's operation). Although *Caremark* claims are difficult to win, the doctrine has been somewhat revived as some recent *Caremark* claims have survived motions to dismiss. *See, e.g.*, Marchand v. Barnhill, 212 A.3d 805, 807-09 (Del. 2019) (reversing the denial of a motion to dismiss in the food safety context); *see also In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188, at *10 (Del. Ch. Oct. 1, 2019) (denying motion to dismiss in the pharmaceutical regulatory approval context). For more on this topic, see generally Robert C. Bird, Caremark *Compliance for the Next Twenty-Five Years*, 58 AM. BUS. L.J. 63, 86-102 (2021) (analyzing twenty-four law firm client memos on the Delaware Supreme Court's decision in *Marchand v. Barnhill*); H. Justin Pace & Lawrence J. Trautman, *Climate Change and* Caremark *Doctrine, Imperfect Together*, 25 U. PA. J. BUS. L. 777 (forthcoming 2023) (explaining the emerging risk of liability under *Caremark* if directors ignore "mission critical" risks); Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885 (2021) (describing how a board's oversight duty under *Caremark* extends to ESG).

"*Caremark* claim" is a claim that the board of directors breached their fiduciary duty of loyalty to the corporation by not making "a good faith effort to oversee the company's operations."[25] In such a shareholder derivative suit, board members could be found personally liable for breaching their fiduciary duties to the corporation.[26] While *Caremark* claims are notoriously difficult to bring, recent cases have revived this option.[27]

A final route to hold corporations accountable stems from the willingness of institutional shareholders and shareholder activists to put forth proposals asking for GHG reports, net zero commitments, or more robust disclosure of the financial risks of climate change.[28] The largest fund managers, BlackRock, State Street, and Vanguard, have all expressed concern over the long-term financial viability of companies that ignore the climate crisis.[29] Although small in number, there have been some notable successes in requiring companies to be more forthcoming in how they are addressing the climate crisis.[30]

An uptick in these bottom-up approaches is likely, given the increasing prevalence and interest in climate-risk disclosures, and the likelihood that federal efforts to slow global warming and promote

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[25] Gail Weinstein, Warren S. de Wied & Philip Richter, Caremark *Liability for Regulatory Compliance Oversight*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jul. 8, 2019), https://corpgov.law.harvard.edu/2019/07/08/caremark-liability-for-regulatory-compliance-oversight/ [https://perma.cc/M5BY-GMK2].

[26] The general rule is that directors are shielded from personal liability for decisions made in the course of their role as members of a corporate board. However, in shareholder derivative suits, directors may be held personally liable to the corporation itself. *In re* Caremark Int'l, 698 A.2d 959, 971 (Del. Ch. 1996). Although DEL. CODE ANN. tit. 8, § 102(b)(7) (2022) permits corporations to include provisions waiving a director's personal liability, a breach of the duty of loyalty and bad faith decisions cannot be waived. Stone v. Ritter, 911 A.2d 362, 372 (Del. 2006) (explaining how a decision made in bad faith is a breach of the duty of loyalty).

[27] *See infra* Part II.B.1.

[28] Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005) (making the case for the importance of shareholder action especially in connection with corporate governance).

[29] *BlackRock's 2030 Net Zero Statement*, BLACKROCK (2021), https://www.blackrock.com/corporate/about-us/our-2021-sustainability-update/2030-net-zero-statement [https://perma.cc/8J4P-JVQY].

[30] *See infra* Part II.C.

accountability will be blocked by legal challenges. Because avenues for shareholders to hold companies accountable for failing to identify and live up to climate risks have been expanded, corporations and boards who fail to properly disclose their risks leave themselves vulnerable to legal challenges. In addition, they forego the rewards of genuine efforts to effect change. Proper disclosures would make them more attractive to investors and help their bottom line.[31]

To understand why bottom-up approaches to climate accountability might be the most viable option, we first assess the potential success of top-down efforts to promote accountability with respect to climate change in Part I. In Part II, we analyze how shareholder-driven action could provide greater transparency regarding a company's climate-related risks, their contributions to global warming, and the remedial actions they are taking. Lastly, in Part III, we offer a series of recommendations to manage the risks presented by both top-down and bottom-up initiatives, focusing on the merits of identifying climate risks, overseeing and monitoring climate change impacts, making appropriate disclosures, and living up to corporate pledges.

In this Article, we contend that actively addressing climate change in their corporate disclosures is worthwhile so long as corporations follow through on their promises and verify the information provided. Accurate and timely disclosures not only decrease reputational risks, but they also proactively leverage legal strategies to reduce legal risk in the future. Corporations that ignore the physical and transitional risks of climate change are more likely to suffer sudden and extreme losses causing harm to both investors and the economy.

## I. TOP-DOWN APPROACHES TO CLIMATE ACCOUNTABILITY

In response to growing pressure from a range of stakeholders to take action on climate change, large companies have increasingly identified targets to reduce or eliminate their contributions to global warming.[32]

[31] *See infra* Part II.C.2.

[32] THOMAS DAY, SILKE MOOLDIJK, SYBRIG SMIT, EDUARDO POSADA, FREDERIC HANS, HARRY FEARNEHOUGH, AKI KACHI, CARSTEN WARNECKE, TAKESHI KURAMOCHI & NIKLAS HOHNE, CORPORATE CLIMATE RESPONSIBILITY MONITOR 2022, at 4 (Feb. 07, 2022), https://newclimate.org/sites/default/files/2022/02/CorporateClimateResponsibilityMonitor2022.pdf?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter

For example, many large companies have pledged to be "net-zero" or "carbon-neutral" by certain dates.[33] The problem is that there is a mismatch between the public appearance of the pledges and the actual commitment of the companies to reduce emissions.[34] A recent study identified "significant credibility problems" with such pledges due to limited emissions coverage, inconsistent messaging, and the procurement of low-quality carbon credits with all of the companies assessed, which included Amazon, Apple, Google, Wal-Mart, Unilever, and Sony.[35]

A separate but related problem arises when companies fail to disclose their own risks related to climate change. When PG&E Corp. filed for bankruptcy in 2019, it was called the first climate change bankruptcy.[36] In the wake of a series of wildfires after a prolonged drought in California, the publicly traded utility company was overwhelmed by lawsuits and other liabilities.[37] While PG&E had discussed *regulatory* risks related to climate change in its investor reporting, it had not disclosed its *physical* exposure to environmental risks from climate change.[38] This is not uncommon, as most climate related disclosures have focused on the related regulatory and competitive risks.[39]

Both federal regulators and state officials have taken notice of these issues. The past few years have witnessed top-down efforts to promote accountability with respect to ESG matters in the form of proposed

_axiosam&stream=top [https://perma.cc/2EY5-SM32] (analyzing pledges by Apple, Amazon, Ikea, Wal-Mart, Google, and others). The study assessed 25 of the largest companies in the world, which account for five percent of GHG emissions. *Id.* at 5.

[33] *Id.* at 9.

[34] *See id.* at 5.

[35] *Id.* at 7.

[36] Russell Gold, *PG&E: The First Climate-Change Bankruptcy, Probably Not the Last*, WALL ST. J. (Jan. 18, 2019, 9:00 AM EST), https://www.wsj.com/articles/pg-e-wildfires-and-the-first-climate-change-bankruptcy-11547820006 [https://perma.cc/23XT-WH4J].

[37] *Id.*

[38] Ian Gray & Gretchen Bakke, *Pacific Gas and Electric Is a Company that Was Just Bankrupted by Climate Change. It Won't Be the Last*, WASH. POST (Jan. 30, 2019, 8:48 AM EST), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/30/pacific-gas-and-electric-is-a-company-that-was-just-bankrupted-by-climate-change-it-wont-be-the-last/ [ https://perma.cc/JZL8-8EGX].

[39] *Id.*

rules and legislation as well as enforcement actions.[40] In this Part, we examine these efforts and then assess the forces that may thwart meaningful top-down progress toward climate accountability.

### *A. Federal Efforts*

Shortly after taking office, President Biden issued an executive order that called for "a whole-of-government approach to put climate change at the center of our domestic, national security, and foreign policy."[41] In the words of presidential-advisor Sam Ricketts, "every agency is a climate agency now."[42] Across the board, the Biden Administration's policies have called for agencies to "prioritize action on climate change."[43] In executing his approach, President Biden established a National Climate Task Force, comprised of leaders from twenty-one federal agencies and departments.[44] As it is particularly relevant to our focus on corporate accountability, this Section describes the SEC's approach to prioritizing climate action as well as the potential for the Federal Trade Commission ("FTC") to do the same.

#### 1. The SEC's Climate Disclosure Rules

To restore the public's confidence in the markets after the stock market crash of 1929, Congress passed the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act").[45] The Exchange Act created the SEC and authorized the

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[40] We use the term ESG to refer to environmental, social, and governance matters.

[41] Press Release, White House, Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity (Jan. 27, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/27/remarks-by-president-biden-before-signing-executive-actions-on-tackling-climate-change-creating-jobs-and-restoring-scientific-integrity/?utm_source=link) [https://perma.cc/8MQV-6TU2].

[42] *See* Valerie Volcovici, ***Explainer: How Biden Could Use His Whole Government to Take on Climate Change***, REUTERS (Jan. 19, 2021, 9:47 AM PST), https://reut.rs/3bU6ugv [https://perma.cc/52Q4-YX6H] (quoting Sam Ricketts).

[43] Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7623 (Jan. 27, 2021), https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf [https://perma.cc/5MV8-T8MH].

[44] *Id.*

[45] U.S. SEC. & EXCH. COMM'N, *supra* note 11.

commission to promulgate regulations to combat securities fraud and to require publicly traded companies to disclose information to enable investors to make informed investment decisions.[46] Securities law is designed to protect investors by providing them with the information needed to make investment decisions and prevent market manipulation.[47] The primary means of providing information to investors is through mandated disclosures.[48] These disclosure requirements are outlined in Regulation S-K.[49]

In 2010, the SEC issued an interpretive release on climate-related disclosures, which first expressly linked these S-K disclosure requirements to climate change risk, but did not provide explicit metrics or reporting requirements.[50] Per the guidance, public companies were to disclose, when *material*, the impacts of climate legislation and regulation, international accords relating to climate change, indirect consequences of regulation or business trends, as well as the physical impacts of climate change.[51] As explained by Wharton scholar Sarah E. Light, Regulation S-K requires:

> [P]ublicly traded firms to disclose the costs of complying with environmental laws, including *material* capital expenditures; *material* pending legal proceedings, including environmental legal proceedings; *material* impacts of risk events, including

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46 *Mission*, U.S. SEC. & EXCH. COMM'N (Nov. 22, 2021), https://www.sec.gov/about/mission#section1 [https://perma.cc/L699-XMRE] ("Companies offering securities for sale to the public must tell them the truth about their business, the securities they are selling, and the investment risks."). *See generally* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 39-40 (3d ed. 2003) (explaining how these disclosures take the form of registration statements under the Securities Act of 1933 and ongoing reporting (*e.g.*, Form 10-K) required by the Securities Exchange Act of 1934).

47 Robert C. Bird & Stephen Kim Park, *Organic Corporate Governance*, 59 B.C. L. REV. 21, 35 (2018) ("The SEC seeks to protect investors (both current shareholders and other capital market participants), and 'its main tool is mandatory disclosure.'" (citations omitted)).

48 Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 165 (2019)*; see also* 15 U.S.C. §§ 78a-qq.

49 17 C.F.R. § 229 (2022).

50 *See* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6295-97 (Feb. 8, 2010) [hereinafter SEC 2010 Climate Guidance].

51 *Id.* at 6296-97 (emphasis added).

> *material* "risk factors;" and a general management discussion and analysis of financial condition, including known future trends as well as "uncertainties that are reasonably likely to have a *material* effect on financial condition or operating performance."[52]

Thus, under the 2010 guidance, climate-related disclosures are only required when material.

On March 21, 2022 though, the SEC published a regulatory proposal that would expand climate-related disclosures beyond the materiality standard. If adopted, the new rules would mandate publicly traded companies to disclose certain climate-related financial statement metrics, GHG emissions, and governance practices on climate-related risks.[53] According to SEC Chair Gary Gensler, the proposed rule would provide consistent and comparable information for investors and clear reporting standards for issuers.[54]

If the proposed rules are adopted, key SEC filings — namely registration statements and Form 10-Ks — would include disclosures related to GHG emissions. More specifically, the rules would require public companies that identify climate-related risks totaling one percent or higher of a total line item in financial statements to disclose data about their direct GHG emissions from operations that are owned or controlled by the registrant (Scope 1).[55] Secondly, registrants would also

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[52] Light, *supra* note 48, at 166 (citing SEC 2010 Climate Guidance, *supra* note 50) (emphasis added).

[53] Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 [https://perma.cc/NZ5Y-8KUL] [hereinafter March 21 SEC Press Release]. The SEC used the guidelines issued by the Task Force on Climate-Related Financial Disclosures ("TCFD") as the basis for the proposed regulations. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21343, 21346 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

[54] March 21 SEC Press Release, *supra* note 53; *see also* George S. Georgiev, *The Market-Essential Role of Corporate Climate Disclosure*, 56 UC DAVIS L. REV. 2105, 2105 (2023) (arguing that mandatory climate disclosures ensure that share prices accurately reflect relevant information).

[55] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21346, 21374. The definitions are based on GHG Protocol. *See*

be required to disclose their indirect emissions from the use of electricity, steam, heat or cooling that is consumed by operations they own or control (Scope 2).[56]

Then if GHG emissions from both upstream and downstream activities in its value chain (Scope 3) are material or if the company has set relevant emissions targets that include Scope 3 emissions, the company would be required to disclose Scope 3 emissions.[57] The impact of requiring Scope 3 reporting extends well beyond publicly traded registrants themselves. If Scope 3 reporting is required, for example, private companies that are part of a registrant's value chain may be required to report their own emissions by their customers or suppliers.[58] To adapt, these companies would need to develop the technology and governance mechanisms required to track and report their own emissions.[59]

The proposed rules would also affect financial statements by adding new footnote requirements. Under the proposed rules, publicly traded companies would be required to footnote the impact of severe weather and other natural conditions if such impact exceeds one percent of the related line item.[60] Relatedly, if the impact exceeds one percent of the related line item, registrants would need to footnote the costs of mitigating exposure to transition risks.[61] In addition, disclosures of

*About Us*, GREENHOUSE GAS PROTOCOL, https://ghgprotocol.org/about-us (last visited Dec. 16, 2023) [https://perma.cc/N92N-Z7ZE] ("GHG Protocol establishes comprehensive global standardized frameworks to measure and manage greenhouse gas (GHG) emissions from private and public sector operations, value chains and mitigation actions.").

[56] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21346, 21374.

[57] *Id.* at 21374. A registrant would have to disclose Scope 3 GHG emissions and intensity "if material, or if the registrant has set a GHG emissions reduction target or goal that includes its Scope 3 emissions." *Id.* at 21345.

[58] KPMG, DIGESTING THE SEC'S CLIMATE PROPOSAL 3 (2022), https://frv.kpmg.us/reference-library/2022/talkbook-sec-climate-disclosures.html [https://perma.cc/P6QE-XKEG].

[59] *Id.*

[60] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21464.

[61] *Id.*

impacts of climate-related risks on estimates and assumptions are required to be footnoted.[62]

Separately, on May 25, 2022, the SEC proposed a rule for investment companies, business development companies, and investment advisers to require funds and advisers engaged in ESG investing to provide more specific disclosures related to their ESG strategies in fund prospectuses, annual reports, and adviser brochures.[63] Another proposed rule would require a fund to invest at least eighty percent of its assets in the ESG factor suggested by its name.[64] Funds that consider non-ESG factors as much as ESG factors would not be able to use ESG terms in their names.[65]

When announcing these proposed rules, Gensler said that the proposal "establish[es] disclosure requirements for funds and advisers who market themselves as having an ESG focus" in order to allow investors to "drill down to see what's under the hood of these strategies."[66] The proposal has been applauded as a means to prevent greenwashing by funds and advisers.[67] If adopted, the rule represents a departure from the current disclosure scheme for funds and advisors in that it focuses on a particular aspect of the investment process.[68]

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62 *Id.* at 21345.

63 Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654, 36654-761 (June 17, 2022).

64 Investment Company Names, 87 Fed. Reg. 36594, 36594-651 (June 17, 2022).

65 *Id.* at 36598.

66 Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices (May 25, 2022), https://www.sec.gov/news/press-release/2022-92 [https://perma.cc/R2MB-Z3RK].

67 *See, e.g.*, Letter from Mindy S. Lubber, CEO, Ceres, to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (Aug. 16, 2022), https://www.ceres.org/sites/default/files/FINAL_Ceres%20SEC%20ESG%20Comment%20Letter.pdf [https://perma.cc/SV3V-ZLUR] (supporting the creation of a standardized framework for ESG disclosures).

68 Norm Champ, Scott A. Moehrke, Diane Blizzard, Michael Chu, Michael Cohen, Melissa S. Gainor, Phil Vincent Giglio, Nicholas A. Hemmingsen, Daniel Kahl, Alpa Patel, Eric L. Perelman, Noah Qiao, Jaime Doninger, Reed T. Schuster, Josh Westerholm, Alexandra N. Farmer, Mary Beth Houlihan, Jennie Morawetz, & Mackenzie Drutowski, *SEC Proposes Enhanced Disclosure by Certain Advisers on ESG Investment Practices*, KIRKLAND & ELLIS (June 3, 2022), https://www.kirkland.com/publications/kirkland-

### 2. SEC's Enforcement Authority

In addition to its authority to promulgate regulations, the SEC enforces securities regulations through civil enforcement actions.[69] Starting with the creation of the Climate and ESG Task Force in the Division of Enforcement in March of 2021, the SEC began taking ESG-related enforcement actions.[70] In April of 2022, the agency filed a complaint against Vale, a Brazilian mining company, for alleged misrepresentations the company made about the safety of its dams.[71] The next month, the SEC charged a BNY Mellon Investment Advisor, a registered investment advisor, for misrepresenting that its funds had undergone an ESG-quality review.[72] BNY Mellon agreed to pay a $1.5 million penalty.[73] Although these actions do not directly deal with statements regarding emissions or climate change efforts, they do indicate the agency's willingness to hold companies accountable for statements that effect more than just their bottom line.

### 3. Federal Trade Commission ("FTC")'s Unfair or Deceptive Acts or Practices ("UDAP") Authority

Similarly, the FTC, the agency charged with protecting *consumers* by preventing unfair and deceptive business practices,[74] has taken

aim/2022/06/enhanced-disclosure-on-esg-investment-practices [https://perma.cc/6J9X-BX4P].

[69] *How Investigations Work*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/enforce/how-investigations-work.html (last updated Jan. 27, 2017) [https://perma.cc/Z7V9-WWEL].

[70] Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 [https://perma.cc/DB3G-DW53].

[71] Complaint & Demand for Jury Trial at 1, SEC v. Vale, No. 1:22-cv-02405 (E.D.N.Y. Apr. 28, 2022), https://www.sec.gov/litigation/complaints/2022/comp-pr2022-72.pdf [https://perma.cc/AJ85-KQEZ].

[72] Order Instituting Administrative And Cease-And-Desist Proceedings Against BNY Mellon Inv. Adviser, Inc., File No. 3-20867, at 2 (May 23, 2022), https://www.sec.gov/files/litigation/admin/2022/ia-6032.pdf [https://perma.cc/7ZLS-47MT].

[73] *Id.* at 7.

[74] 15 U.S.C. § 45(b). "Under Section 5(b) of the FTC Act, the Commission may challenge 'unfair or deceptive act[s] or practice[s],' 'unfair methods of competition,' or violations of other laws enforced through the FTC Act, by instituting an administrative

enforcement actions when companies have misled consumers about the greenness of their products. For example, the FTC filed complaints against both Kohl's and Wal-Mart for deceptively claiming certain products were eco-friendly.[75] The FTC also produced guidelines for the use of environmental marketing claims.[76] In implementing the Administration's focus on climate, we may see some FTC enforcement actions related to climate/emissions efforts.

As an example, the FTC could find Chevron's marketing misleading. Even after recent attention on greenwashing, Chevron's homepage does not mention the word "oil" or "gas," but rather states "with REG acquisition, Chevron becomes a leading U.S. renewable fuel company," provides the corporate sustainability report, and states "the future of energy is lower carbon."[77] Viewing these statements as greenwashing, the FTC could take an enforcement action against Chevron and other similarly situated companies, as Chevron has dedicated just 0.2% of its long-term investments to low-carbon energy sources while continuing to be a leading emitter of GHGs globally.[78]

adjudication." *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED TRADE COMM'N, https://www.ftc.gov/about-ftc/mission/enforcement-authority (last updated May 2021) [https://perma.cc/Q5EF-BRJP].

75 Lesley Fair, *$5.5 Million Total FTC Settlements with Kohl's and Walmart Challenge "Bamboo" And Eco Claims, Shed Light on Penalty Offense Enforcement*, FED. TRADE COMM'N (Apr. 8, 2022), https://www.ftc.gov/business-guidance/blog/2022/04/55-million-total-ftc-settlements-kohls-and-walmart-challenge-bamboo-and-eco-claims-shed-light [https://perma.cc/NC8N-KXJW].

76 *Green Guides*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/topics/truth-advertising/green-guides (last visited Dec. 16, 2023) [https://perma.cc/NQC2-86JJ].

77 CHEVRON, https://www.chevron.com/ (last visited Sept. 14, 2022) [https://perma.cc/3SRQ-U9GF].

78 *See* Mei Li, Gregory Trencher & Jusen Asuka, *The Clean Energy Claims of BP, Chevron, Exxonmobil and Shell: A Mismatch Between Discourse, Actions and Investments*, 17 PLOS ONE 2, 18 (Feb. 16, 2022) (comparing performance to claims of Chevron and other fossil fuel companies). The study found that BP, Chevron, ExxonMobil, and Shell obstruct progress toward decarbonization by redirecting the responsibility to consumers, mislead with advertisements that fossil fuels are green, and exaggerate the scale of clean energy investments. *Id.* at 19.

### *B. State Efforts*

In addition to the recent concern displayed at the federal level, some states have led the charge for climate-risk accountability. California, for example, has attempted to implement rules that would require reporting on emissions. Other states' attorneys general have sued oil and gas companies under various state-law theories, including fraud, for misleading claims regarding environmental efforts. This Section highlights some of these efforts.

#### 1. California's Law

On October 7, 2023, Governor Gavin Newsom signed the Climate Corporate Accountability Act into law.[79] Going farther than the SEC's proposed rules, the law will require any company with more than $1 billion in gross annual revenue "that does business in California" to disclose the scope of their Scope 1, Scope 2, and Scope 3 emissions.[80] The disclosures apply to both public and private companies.[81] Under the law, the California Resources Board ("CARB") can levy fines of up to $500,000 per year for violations.[82] CARB is also tasked with developing and adopting regulations to implement the law by January 1, 2025.[83] The law is expected to face challenges from companies and industry trade groups and could possibly be preempted by the SEC's disclosure requirements.[84]

[79] Kevin R. Feldis, Margaret C. Hupp & Nancy Cruz, *California Enacts Broad Climate Disclosure Laws*, PERKINS COIE (Oct. 19, 2023), https://www.perkinscoie.com/en/news-insights/california-enacts-broad-climate-disclosure-laws.html [https://perma.cc/25BR-DD7H].

[80] *Id.*

[81] Sarah Jarvis, *5 Things To Know About Calif.'s New Climate Disclosure Law*, LAW360 (Oct. 13, 2023, 8:48 PM), https://www.morganlewis.com/-/media/files/news/2023/law360-5-things-to-know-about-californias-new-climate-disclosure-law.pdf [https://perma.cc/DPM7-5GSS].

[82] *Id.*

[83] *Id.*

[84] *Id.*

2. State and City Litigation

At least twenty lawsuits against fossil fuel companies filed by cities and states across the United States are pending.[85] The claims vary from state to state, but most allege that the named oil and gas companies failed to disclose their impacts on the environment in violation of state laws.[86] The legal theories asserted by state and local governments include public nuisance, physical harm, fraudulent disclosures, and violation of consumer protection laws.[87] Rhode Island's Attorney General was the first to file a lawsuit, with attorneys general in several states following suit thereafter.[88] Only one case has gone to trial thus far, resulting in the New York Supreme Court finding that the state provided insufficient evidence to prove that Exxon intentionally misled investors about known climate change risks.[89] This Subsection describes the litigation in Delaware and Massachusetts as examples of these claims. Delaware case law is especially important as more than two-thirds of Fortune 500 companies are incorporated there.[90]

*a. Delaware*

In September of 2020, Delaware sued thirty fossil fuel companies and the American Petroleum Institute ("API") for negligent failure to warn, trespass, public nuisance as well as violations of the state's Consumer

[85] Bruce Gil, *U.S. Cities and States Are Suing Big Oil Over Climate Change. Here's What the Claims Say and Where They Stand.*, FRONTLINE (Aug. 1, 2022), https://www.pbs.org/wgbh/frontline/article/us-cities-states-sue-big-oil-climate-change-lawsuits/ [https://perma.cc/3CWP-HJ8F].

[86] *Id.*

[87] *See* Chris McGreal, *Big Oil and Gas Kept a Dirty Secret For Decades. Now They May Pay the Price*, GUARDIAN (June 30, 2021, 3:00 EDT), https://www.theguardian.com/environment/2021/jun/30/climate-crimes-oil-and-gas-environment [https://perma.cc/9Y93-HRVZ].

[88] Gil, *supra* note 85.

[89] *Id.*

[90] DEL. DIV. OF CORPS., 2022 ANNUAL REPORT 1 (2022), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report.pdf [https://perma.cc/B4YR-BVSB] (approximately 79% of all U.S. public offerings in 2022 were registered in Delaware).

Fraud Act.[91] In the complaint, Delaware describes damages from sea-level rise, extreme weather events, acidification of the oceans, and air temperature increases, which include costs related to flooding, additional electricity demand, heat-related illnesses, and mitigation.[92] With respect to the fraud claims, Delaware alleged that the defendants marketed fossil fuels through material misstatements and omissions regarding, among other things, the actions they have taken to reduce their carbon footprint, invest in more renewables, and lower their fossil fuel production as well as their "diversified energy portfolio with meaningful renewable and low-carbon fuel components."[93]

Delaware alleged that the defendants knew of or recklessly disregarded the climate effects caused by their products, including global warming, and yet coordinated the dissemination of marketing materials that refuted the scientific consensus.[94] The fraud allegations also include greenwashing campaigns by Exxon, BP, Chevron, Marathon, ConocoPhillips, and API.[95] Taking Exxon as an example, the complaint points to advertisements that deceptively over-emphasized Exxon's investments in "sustainable and environmentally friendly" energy sources, when the company spent just 0.2% of its capital

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[91] Press Release, State of Delaware, Attorney General Jennings Announces Suit to Hold Exxon, American Petroleum Institute, 29 Others Accountable for Climate Change Costs (Sept. 10, 2020), https://news.delaware.gov/2020/09/10/ag-jennings-announces-suit-to-hold-exxon-american-petroleum-institute-29-others-accountable-for-climate-change-costs/ [https://perma.cc/N4WT-42AN]. In its 222-page complaint, Delaware alleged that the country's leading oil and gas companies have long understood the science of climate change and the dangers posed by fossil fuels, yet they intentionally undermined the growing scientific consensus around climate science. *See* Complaint & Demand for Jury Trial at 4-5, Delaware v. BP America Inc., No. N20C-09-097 (Del. Super. Ct. 2020), https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2020/09/2020-09-09-Final-Complaint.pdf [https://perma.cc/N9HZ-LT2R]. For example, Delaware referenced a 1979 Exxon study warned that burning fossil fuels "will cause dramatic environmental effects" in the coming decades. *Id.* at 79. "The potential problem is great and urgent." *Id.* The internal documents referenced show that Exxon coordinated "a very aggressive defensive program in . . . atmospheric science and climate." *Id.* at 80.

[92] Complaint & Demand for Jury Trial, *BP America Inc.*, at 184-98 (No. N20C-09-097).

[93] *Id.* at 209-10.

[94] *Id.* at 211.

[95] *Id.* at 149-72, 212.

expenditures on low-carbon energy systems, with the remaining 99.8% focused on maintaining and expanding fossil fuel production.[96] It remains to be seen how these claims will play out in state court.[97]

### b. *Massachusetts*

Massachusetts has taken a similar approach to that of Delaware. In a lawsuit filed by the State's Attorney General, the State claims that Exxon violated its consumer protection laws.[98] According to the complaint, Exxon has been misleading Massachusetts consumers through greenwashing campaigns that wrongly imply that Exxon Mobil is taking steps to solve climate change and reduce carbon.[99] The lawsuit has survived motions to dismiss and motions to remove the case to federal court and it appears that Exxon will have to go to trial to answer the allegations.[100] In the complaint, Massachusetts cited harms related

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[96] *Id.* at 157.

[97] The defendants attempted to have the case moved to federal court at the outset. Notice of Removal at ii, Delaware v. BP America Inc., No. 1:20-cv-01429 (D. Del. Oct. 23, 2020), https://climatecasechart.com/wp-content/uploads/case-documents/2020/20201023_docket-120-cv-01429_notice-of-removal.pdf [https://perma.cc/5WYS-WXZ3]. Recently though, the Third Circuit affirmed the district court's decision to have the case remanded back to state court. Precedential Filing at 20, Delaware v. BP America Inc., No. 21-2728 (3d Cir. Aug. 17, 2022), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230817_docket-N20C-09-097_reply-12.pdf [https://perma.cc/T4SL-U66W]. On September 15, 2023, California filed a similar suit against Exxon Mobil, Shell, BP, ConocoPhillips, Chevron, and API seeking the "creation of an abatement fund to pay for the future damages caused by climate related disasters in the state." David Gelles, *California Sues Giant Oil Companies, Citing Decades of Deception*, N.Y. TIMES (Sept. 15, 2023), https://www.nytimes.com/2023/09/15/business/california-oil-lawsuit-newsom.html [https://perma.cc/F5DR-CR3S]. Complaint & Demand for Jury Trial at 132, People v. Exxon Mobil, No. T-23-1342 (Cal. Super. Ct. Sept. 15, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230915_docket-T-23-1342_complaint.pdf [https://perma.cc/Z6NR-CTH7].

[98] Complaint at 1, Massachusetts v. Exxon Mobile Corp., No. 1984CV03333 (Mass. Super. Ct. Oct. 24, 2019), https://climatecasechart.com/wp-content/uploads/case-documents/2019/20191024_docket-1984CV03333_complaint.pdf [https://perma.cc/3AH5-LYH7].

[99] *Id.* at 153-55.

[100] Aaron Katersky, *Exxon Mobil Must Face Environmental Allegations, Court Rules*, ABC NEWS (May 24, 2022, 2:16 PM), https://abcnews.go.com/US/exxon-mobil-face-

to climate change including flooding, increased storm severity, property damage, threats to ecosystems, erosion, public health, and mitigation.[101]

### C. *Obstacles to Top-Down Approaches*

Any effort to change the status quo is met with considerable resistance.[102] Reversing climate change is no different.[103] Greenhouse gas emissions from human activities are now higher than at any point in history.[104] Reversing this trend would take an enormous worldwide, coordinated effort.[105] While the "whole-of-government" approach taken by the Biden Administration represents a start toward such effort, all levels of government are under pressure to preserve the status quo by those who stand to lose in a transition away from a carbon-based economy. In this Section, we review the obstacles that may stymie the top-down efforts described above.

#### 1. *West Virginia vs. EPA* and the Major Questions Doctrine

As part of its Clean Power Plan in 2015, the EPA issued a new rule for existing coal-fired power plants that would have required the facilities to reduce their own production of electricity or subsidize increased generation via alternatives such as wind, solar, or natural gas.[106] The EPA

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environmental-allegations-court-rules/story?id=84946565#:~:text=Massachusetts [https://perma.cc/Y53J-S3W8].

[101] Complaint, *supra* note 98, at 54-61.

[102] *See* Raquel Fernandez & Dani Rodrik, *Resistance to Reform: Status Quo Bias in the Presence of Individual-Specific Uncertainty*, 81 AM. ECON. REV. 1146, 1146 (1991) (finding a bias in favor of the status quo).

[103] Nikolas K. Gvosdev, *What is the Status Quo for the Climate?*, ETHICS & INT'L AFFS. BLOG (Sept. 3, 2019), https://www.ethicsandinternationalaffairs.org/2019/what-is-the-status-quo-for-the-climate/ [https://perma.cc/5672-TKZG].

[104] Johannes Friedrich & Thomas Damassa, *The History of Carbon Dioxide Emissions*, WORLD RES. INST. (May 21, 2014), https://www.wri.org/insights/history-carbon-dioxide-emissions [https://perma.cc/8JFJ-547B].

[105] *See* David Herring & Rebecca Lindsey, *Can We Slow or Even Reverse Global Warming?*, CLIMATE (Oct. 12, 2022), https://www.climate.gov/news-features/climate-qa/can-we-slow-or-even-reverse-global-warming [https://perma.cc/PDQ3-2JJF].

[106] West Virginia v. EPA, 142 S. Ct. 2587, 2603 (2022). The plan proposed a restructuring of the country's mix of electricity generation, requiring a reduction from 38% coal to 27% coal by 2030. *See id.* at 2603-04.

viewed this rule as within its authority to identify the "best system of emission reduction" for existing facilities under Section 7411(d) of the Clean Air Act.[107] In a 6–3 ruling, the Supreme Court held that Section 7411(d) did not grant the EPA the authority to limit the emissions of existing power plants by requiring them to shift to cleaner sources.[108]

Ordinarily, when reviewing an agency's action, courts apply the *Chevron* standard to grant agencies deference when an agency interprets statutes that it has the authority and obligation to administer.[109] In line with two pandemic-era Supreme Court decisions though,[110] the majority's opinion in *West Virginia v. EPA* fails to mention *Chevron* and instead applied the "major questions doctrine" to review the challenged rule.[111] The Court held that the doctrine applies to "extraordinary cases" in which the "the history and the breadth of the authority . . . asserted and the economic and political significance of that assertion" provide a "reason to hesitate before concluding that Congress meant to confer such authority."[112] Beyond the impact to the EPA's efforts to regulate climate change, the case raises the question of how broadly the courts will apply the major questions doctrine going forward in an effort to strike down climate change regulations.[113]

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[107] *Id.* at 2602-03.

[108] *Id.* at 2616.

[109] David Freeman Engstrom & John E. Priddy, West Virginia v. EPA *and the Future of the Administrative State*, STAN. L. SCH. BLOG (July 6, 2022), https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/ [https://perma.cc/2BAJ-KFVS]. In *Chevron U.S.A. v. Natural Resources Defense Council, Inc*, the Court created its famous two-step inquiry. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190 (2006). In step one, a court determines whether Congress clearly expressed its intent in the statute. *Id.* at 190-91. If the intent of Congress is unclear, then the second step asks whether the agency's interpretation is reasonable. *Id.* at 191.

[110] *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117-120 (2021) (per curiam) (applying the major questions doctrine to OSHA's vaccination and testing requirements that applied to a large portion of the U.S. workforce); Ala. Ass'n of Realtors v. Dept. of Health & Hum. Servs., 141 S. Ct. 2485, 2488-2490 (2021) (applying the major questions doctrine to block enforcement of the CDC's nationwide eviction moratorium).

[111] Engstrom & Priddy, *supra* note 109.

[112] *West Virginia*, 142 S. Ct. at 2608 (internal quotations and citations omitted).

[113] Engstrom & Priddy, *supra* note 109; *see also*, KATE R. BOWERS & DANIEL J. SHEFFNER, CONG. RSCH. SERV., LSB10745, THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE: BACKGROUND AND RECENT DEVELOPMENTS 5 (2022), https://crsreports.congress.gov/

Even before *West Virginia v. EPA*, challenges to the SEC's Climate Risk Disclosure proposal were expected.[114] Now though, among the bases for legal challenges to this rule is the argument that the new rules would also invoke the major questions doctrine as the policy has such "economic and political significance" that authorization from Congress should not be assumed.[115] Given the composition of the Court, a distinct possibility exists that the Court would see the SEC efforts to require climate-related disclosures as presenting such an "extraordinary case" and would thus require a clear congressional authorization.

Congress could have responded to the Court's ruling when it passed the Inflation Reduction Act in August of 2022 by expressly granting the EPA new authority to require power plants to shift electricity production from fossil fuels to cleaner alternatives. Instead, the act, which is largely characterized as a spending bill, increased the EPA's budget across a range of air pollution programs and amended the Clean Air Act to include new sections on GHG emissions.[116] While some view the amendments as affirming the EPA's authority to regulate greenhouse gases generally,[117] the Act fell short of granting the EPA the express authority to revive the generation shifting approach required by the Clean Power Plan.[118] Further, it did nothing to provide other agencies like the SEC or FTC with express authority to address climate

product/pdf/LSB/LSB10745 [https://perma.cc/39U7-Z7AH] ("[L]itigants and judges have invoked the major questions doctrine in other environmental lawsuits, including challenges to vehicle greenhouse gas emission standards, the scope of federal jurisdiction under the Clean Water Act, and federal agencies' use of estimates of the 'social cost of greenhouse gas' emissions in their regulatory processes.").

[114] Jacqueline M. Vallette & Kathryne M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 10, 2022), https://corpgov.law.harvard.edu/2022/05/10/secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges/ [https://perma.cc/3PJQ-R6FJ].

[115] *Id.*

[116] Hijazi, *supra* note 18.

[117] *See id.* (quoting Dan Farber); Friedman, *supra* note 18.

[118] Patrick Parenteau, *The Inflation Reduction Act Doesn't Get Around the Supreme Court's Climate Ruling in* West Virginia v. EPA, *but It Does Strengthen EPA's Future Abilities*, CONVERSATION (Aug. 24, 2022, 1:43 AM EDT), https://theconversation.com/the-inflation-reduction-act-doesnt-get-around-the-supreme-courts-climate-ruling-in-west-virginia-v-epa-but-it-does-strengthen-epas-future-abilities-189279 [https://perma.cc/CRE7-5BWB].

change or to promote climate accountability, cloaking their efforts to do so in uncertainty.

2. Other Litigation Challenges

Even if the major questions doctrine is not applied, the Court could rule that the disclosure rules exceed the SEC's authority under its enabling statutes.[119] In 2021, several states attorneys general responded to the proposed rules with a letter that urges the SEC to "act mindful of the statutory and constitutional guideposts that define its authority."[120] According to the letter, the SEC should limit itself to requiring disclosures that protect investors from inflated prices or fraud rather than those that are "helpful for investors interested in companies with corporate practices consistent with federally encouraged social views."[121] If the proposed rules are adopted, it is very likely that those who joined the letter as well as affected companies and trade

[119] The Securities Act of 1933 and the Securities Exchange Act of 1934 enable the SEC to promulgate rules to protect investors in securities transactions. *Investor Bulletin: An Introduction to The U.S. Securities and Exchange Commission — Rulemaking and Laws*, U.S. SEC. & EXCH. COMM'N (Aug. 20, 2015), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_rulemaking [https://perma.cc/73P5-WDZT].

[120] Letter from Patrick Morrisey, Att'y Gen., State of W. Va., to Gary Gensler, Chair, Sec. and Exch. Comm'n (June 14, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8915606-244835.pdf [https://perma.cc/EC2F-6JTF]. The Securities and Exchange Act authorizes the SEC to require reporting that is "necessary or appropriate" for the "proper protection of investors and to ensure fair dealing in the security." Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78qq, 78(m)(a).

[121] *See* Letter from Patrick Morrissey, *supra* note 120, at 2. SEC commissioners have made statements regarding the proposed rules. For example, Commissioner Hester Peirce, has publicly stated that she does not support the proposal. Statement, Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, We Are Not the Securities and Environment Commission — At Least Not Yet (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 [https://perma.cc/E3YZ-2MRH]. Peirce contends that the rules will "undermine the existing regulatory framework" in that it mandates some disclosures "without regard for materiality" and distorts materiality in others. *Id.* Chair Gary Gensler, on the other hand, has publicly supported the rule stating that the rule would provide investors with "consistent, comparable, and decision-useful information" for making investment decisions. Statement, Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, Statement on Proposed Mandatory Climate Risk Disclosures (Mar. 21, 2022), https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321 [https://perma.cc/6XBN-JC9V].

associations will officially challenge the rules as beyond the SEC's authority.[122]

Separately, the attorneys general argued that the SEC's climate disclosure rules "compel speech" in violation of the First Amendment.[123] If the courts considered the SEC's disclosure requirements to be content-based, then they would review the rules to determine whether the regulations advance a sufficiently compelling government interest.[124] According to the attorneys general, public demand for increased information about climate efforts is not a sufficient government interest.[125] Again, a lawsuit challenging the rules would be expected to include a very similar First Amendment challenge.[126]

Regardless of the exact legal bases for them, formidable challenges to the SEC rules by those opposed thereto are expected.[127] The same arguments could form the basis for challenges to other agencies' efforts to implement Biden's "whole-of-government" approach to slowing climate change. Generally, agencies stand on less sure footing when they

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[122] Vallette & Gray, *supra* note 114. For an argument that the SEC's proposed rules are within its authority, see Letter from Jill E. Fisch et al., Saul A. Fox Distinguished Professor of Bus. L., Univ. of Pa. Carey L. Sch., to Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n 14 (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8911728-244385.pdf [https://perma.cc/YAQ7-S63C]; John C. Coates, *Proposal on Climate-Related Disclosures Falls Within the SEC's Authority*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 22, 2022), https://corpgov.law.harvard.edu/2022/06/22/proposal-on-climate-related-disclosures-falls-within-the-secs-authority/ [https://perma.cc/86BL-K82Q]. Over 10,500 letters have been received in response to the proposed rules, with about 10% of those characterized as negative or not in favor of the rules. Pace & Trautman, *supra* note 24, at 812.

[123] Letter from Patrick Morrissey, *supra* note 120, at 3-4.

[124] *See, e.g.*, Nat'l Inst. of Fam. and Life Advocs. v. Becerra, 138 S.Ct. 2361, 2371 (2018) ("As a general matter, such laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." (internal quotation and citations omitted)). Litigants could argue that requiring disclosures on information that is not material is compelling speech, increased information is about climate measures is not a sufficient government interest, and that requiring only material disclosures would be less restrictive. Vallette & Gray, *supra* note 114.

[125] *See* Letter from Patrick Morrissey, *supra* note 120, at 4.

[126] Vallette & Gray, *supra* note 114.

[127] *Id.*

are departing from long-standing policies or norms.[128] Given that even the EPA's efforts to address climate change have been stymied, the other federal agencies will likely find themselves restricted in these efforts without legislation to back them up.

3. State Laws

A number of states with significant ties to the fossil fuel industry have begun implementing policies and voting on bills that would penalize companies for "pull[ing] away from the fossil fuel industry."[129] Most of these proposed laws focus on preventing state entities (*e.g.*, pension funds) from contracting with companies that take climate change into account when evaluating investments.[130] As an example, Texas Governor Greg Abbott signed a law requiring pension funds and other entities to divest from companies that pull away from the fossil fuel industry.[131] In fact, Texas has prohibited its pension funds from working with BlackRock, UBS Group AG, and Credit Suisse Group AG due to their ESG investing requirements.[132]

These state laws also serve to demonstrate the political force behind maintaining the status quo. The fossil fuel industry is a multi-billion-dollar machine with a powerful lobby that will not easily accept

[128] Motor Vehicle Mfrs. Ass'n v. State Farm Auto Mutual Ins. Co., 463 U.S. 29, 42-44 (1983) (determining that the National Highway Traffic Safety Administration decision to rescind its passive restraint requirement was arbitrary and capricious).

[129] Jacob Hupart, *Red States Move to Penalize Companies that Consider Climate Change when Making Investments*, JD SUPRA (Feb. 18, 2022), https://www.jdsupra.com/legalnews/red-states-move-to-penalize-companies-5424090/l [https://perma.cc/4MZ2-KBDB]*; see also* Zack Colman & Jordan Wolman, *Climate Investing "Boycott Bills" Flood State Capitals*, POLITICO (Feb. 15, 2022, 10:55 AM EST), https://www.politico.com/news/2022/02/15/climate-investing-boycott-bills-flood-state-capitals-00008641 [https://perma.cc/P2GP-MM93].

[130] Hupart, *supra* note 129.

[131] Mario Alejandro Ariza & Mose Buchele, *Texas Stumbles in Its Efforts to Punish Green Financial Firms*, NPR (Apr. 29, 2022, 5:01 AM EDT), https://www.npr.org/2022/04/29/1095137650/texas-stumbles-in-its-effort-to-punish-green-financial-firms [https://perma.cc/U627-7863].

[132] Casey Quinlan, *GOP Leaders Target "Woke" Investments Through State Pension Funds*, N.J. MONITOR (Sept. 20, 2022, 4:01 PM), https://newjerseymonitor.com/2022/09/20/gop-leaders-target-woke-investments-through-state-pension-funds/ [https://perma.cc/8QHB-SGT9].

limitations on or even disclosures of carbon emissions. Even in California, one of the most environmentally progressive states, the opposition to proposed climate disclosure rules was strong enough to slow the passage of a bill that was expected to pass. Thus, the future of climate change accountability resulting from top-down governmental action is uncertain at best.

## II. BOTTOM-UP APPROACHES TO CLIMATE ACCOUNTABILITY

The polarization of Congress,[133] recent Supreme Court decisions,[134] and a strong corporate lobby,[135] have created a void in top-down corporate climate accountability. Investors are increasingly filling this vacuum by directly engaging with corporations due to a confluence of factors. First is the domination of a few institutional investors with enormous leverage willing to confront corporations about the significant risk to their investments due to the potential economic

[133] *See, e.g.*, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 2 (2014) (noting that "Congress is more ideologically polarized now than at any time in the modern regulatory era, which makes legislation ever harder to pass"), *cited in* Adam B. Thimmesch, *Tax, Incorporated: Dynamic Incorporation and the Modern Fiscal State*, 54 ARIZ. ST. L. J. 179, 203 n.128 (2022); Paul Frymer, *Debating the Causes of Party Polarization in America*, 99 CALIF. L. REV. 335, 335-36 (2011) (noting that "[i]n the last few decades, the number of moderates in Congress has declined and both Democrats and Republicans have become more internally unified and more externally opposed in legislative voting"); Samuel A. Marcosson, *Fixing Congress*, 33 BYU J. PUB. L. 227, 227, 233-39 (2019) (noting that "[t]he United States Congress is a broken, dysfunctional mess" and discussing the causes and extent of polarization in Congress); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1741 n.4 (2015) (referencing a wide literature on the polarized federal political process); *see also* Cassandra Handan-Nader, Andrew C. W. Myers & Andrew B. Hall, *Polarization and State Legislative Elections* 1-4 (Stan. Inst. for Econ. Pol'y Rsch., Working Paper No. 22-05, 2022), https://siepr.stanford.edu/publications/politics-and-media/polarization-and-state-legislative-elections [https://perma.cc/WW7Q-KDFK] (describing polarization in state legislatures).

[134] *See supra* Part I.C.1.

[135] *See* Jeffrey Pierre & Scott Neuman, *How Decades of Disinformation About Fossil Fuels Halted U.S. Climate Policy*, NPR (Oct. 27, 2021, 10:35 AM EDT), https://www.npr.org/2021/10/27/1047583610/once-again-the-u-s-has-failed-to-take-sweeping-climate-action-heres-why [https://perma.cc/3GJW-986S] (explaining how lobbyists have torpedoed GHG regulations with disinformation).

harms of climate change.[136] Second is the public's rising awareness of extreme weather events, rising global temperatures, and the physical risks relating to climate change.[137] Third is the ability of shareholders to have more of their proposals heard at annual meetings.[138]

The following sections will discuss these investor-driven approaches. This Article builds on the legal scholarship regarding climate change accountability by reevaluating the potential for bottom-up action to have a greater impact on corporate policy and disclosures and aims to refocus corporations on mitigating the impact of shareholder action. In Section A, we explain how shareholders may bring a private cause of action under Section 10b-5 of the Exchange Act for material misrepresentations or omissions regarding climate change issues.[139] In

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[136] *See* John C. Coffee Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 610 (noting the influence of institutional investors on corporate disclosures); Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 10-11, 24 n.116 (2020) (arguing for the superiority of the portfolio-perspective of institutional investors on climate change activism); Alexander I. Platt, *Index Fund Enforcement*, 53 UC DAVIS L. REV. 1453, 1458-59 (2020) (promoting the ability of institutional investors to influence portfolio companies).

[137] *See* Michela Coppola & Julian Blohmke, *Feeling the Heat? Companies Are Under Pressure On Climate Change and Need to Do More*, DELOITTE INSIGHTS (Dec. 12, 2019), https://www2.deloitte.com/us/en/insights/topics/strategy/impact-and-opportunities-of-climate-change-on-business.html [https://perma.cc/55GM-GS7B] (describing the 2019 climate change protest as the biggest in history); Andrew Revkin, *Most Americans Now Worry About Climate Change — and Want to Fix It*, NAT'L GEOGRAPHIC (Jan. 23, 2019), https://www.nationalgeographic.com/environment/article/climate-change-awareness-polls-show-rising-concern-for-global-warming [https://perma.cc/9L9Y-DWS6] (discussing the increased public attention to global warming).

[138] *See* Marc Treviño, June M. Hu & Joshua L. Levin, *2021 Proxy Season Review: Shareholder Proposals on Environmental Matters*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 11, 2021), https://corpgov.law.harvard.edu/2021/08/11/2021-proxy-season-review-shareholder-proposals-on-environmental-matters/ [https://perma.cc/C5UV-DZH2]. Single-issue shareholder groups rely on the "significant social policy exception" to the Rule 14a-8(i)(7) ordinary business exclusion permitting a corporation to exclude certain shareholder proposals from the proxy statement. *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM'N (Nov. 3, 2021), https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals#_ftnref2 [https://perma.cc/H8K7-R255].

[139] *See* Roshaan Wasim, Note, *Corporate (Non)Disclosure of Climate Change Information*, 119 COLUM. L. REV 1311, 1312-15 (2019) (describing recent litigation regarding

Section B, we describe how shareholders could initiate a derivative suit seeking to hold the board of directors liable by utilizing the expanded *Caremark* standard for harm caused to the corporation.[140] In Section C, we illustrate how institutional investors may seek to promote certain climate-related action in proxy statements or replace directors who do not adequately address the physical and transition risks of climate change.[141]

### *A. 10b-5 Actions*

Rule 10b-5 is the primary antifraud tool used by the SEC to address any number of deceitful practices in connection with the purchase or sale of a security.[142] It was promulgated under Section 10b of the Exchange Act which makes it unlawful for anyone to "use or employ, in connection with the purchase or sale of any security registered on a

securities fraud based upon an inadequate and misleading statement by corporations on climate change risks).

[140] *See* Bird, *supra* note 24, at 118-19 (explaining how *Caremark*'s reach is expanding, potentially making it easier to hold board members personally liable for breaching their duty of care).

[141] *See* John Armour, Luca Enriques & Thom Wetzer, *Mandatory Corporate Climate Disclosures: Now, But How?*, 2021 COLUM. BUS. L. REV. 1085, 1096-1102 (2022) ("'Physical risks' are the risk of damage to assets or operations due to extreme and acute weather events such as droughts, bushfires, floods, and hurricanes, as well as longer-term climatic changes, such as rising sea levels. . . . 'Transition risks' arise from society's response to climate change and encompass several subcategories, including policy risks (e.g., those stemming from the 'potential introduction of stringent carbon-pricing policies that can affect the returns of assets related with carbon-intensive technologies or processes'), technological risks (*e.g.*, those arising from changes in the costs of clean energy technologies), market risks (*e.g.*, related to increasing demand for sustainable products), liability risks (such as the risk of damages awards in connection with climate-related litigation, or of having to change business model in line with a court ruling mandating emission cuts) and reputational risks (*e.g.*, the risk of being perceived by customers as doing less than competitors to tackle climate change).").

[142] *See* SEC v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 180, 195 (1963); *see also* Chiarella v. United States, 445 U.S. 222, 226 (1980) ("Section 10(b) was designed as a catch-all clause to prevent fraudulent practices."); A.T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (2d Cir. 1967) ("[Section] 10(b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities" including fraud through "[n]ovel or atypical methods."). Note that similar cases may be brought under other securities statutes.

national securities exchange or any security not so registered . . . any manipulative or deceptive device."[143] Rule 10b-5 implementing Section 10b provides that:

> [i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.[144]

Although 10b-5 actions are usually initiated by the SEC, harmed shareholders may also bring these types of suits against companies.[145] To understand the application of 10b-5 to statements or omissions regarding climate change, we must first examine the elements of a private 10b-5 claim in this context. The investor has the burden of proving that the defendant made: (1) a material misrepresentation or omission, (2) in connection with the purchase or sale of a security, (3) scienter, (4) reliance, and (5) causation and economic loss.[146]

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[143] 15 U.S.C. § 78j(b).

[144] 17 C.F.R. § 240.10b-5 (2023).

[145] 15 U.S.C. § 78u-4(b)(1); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) ("[I]t is now established that a private right of action is implied under § 10(b)."); *see also* Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983) (describing Section 10(b) as a "catchall" antifraud provision); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731-32 (1975).

[146] Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005).

1. Material Misrepresentation or Omission

Meeting this first requirement with respect to climate-related misstatements or the omission of climate-related risks is more precarious than other more obvious 10b-5 misrepresentations, such as overstating share price after a merger[147] or failing to disclose defective products impacting seventy-two percent of a company's revenue.[148] In general, to meet the materiality requirement though, "there must be a substantial likelihood that the disclosure of the [truth in place of the misstatement or] omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available."[149] The misstatement or omission must be about a matter "to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell" the security.[150] Thus, materiality is determined from the perspective of a reasonable investor.

Some 10b-5 actions have been brought against a company for fraudulent misstatements regarding its environmental performance after an environmental disaster revealed the falsity of their safety-related claims.[151] In one of the few examples of a federal climate-related disclosure case, the court in *Ramirez v. Exxon Mobil Corp*, denied a motion to dismiss by Exxon stating that the plaintiffs sufficiently alleged that the company: (i) made material misstatements regarding its use of proxy costs of carbon in formulating business and investment plans by using different proxy cost values in public statements than were used in internal documents; (ii) made material misstatements regarding its Rocky Mountain Gas Operation asset valuation; (iii) made material misstatements regarding a three-month loss by its Canadian Bitumen Operations in violation of generally accepted accounting

[147] Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1094 (1991).

[148] Panther Partners Inc. v. Ikanos Commc'ns, Inc., 681 F.3d 114, 122 (2d Cir. 2012).

[149] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[150] 17 C.F.R. § 240.12b-2 (2022).

[151] Hana V. Vizcarra, *The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures*, 50 ENV'T L. REP. 10106, 10112 (2020) (citing several cases involving oil spills or accidents demonstrating the "misalignment between the statement or omission and actual events").

principles ("GAAP"); and (iv) omitted material facts by failing to disclose the inadequacy of its reserves.[152]

Omissions, on the other hand, are only actionable if a duty to disclose exists or if the omission results in a material misunderstanding.[153] Regarding the duty to disclose, Section 13(a) of the Exchange Act requires public companies to make certain disclosures through filing annual, quarterly, and event-specific reports in Forms 10-K, 10-Q, and 8K respectively.[154] Regulation S-K, which was designed to harmonize disclosures for investors, requires registrants to provide a general management discussion which "[d]escribe[s] any known trends or uncertainties that have had or that are reasonably likely to have a material . . . unfavorable impact on . . . revenues or income from continuing operations."[155]

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[152] Memorandum Opinion and Order at 18-30, Ramirez v. Exxon Mobil Corp., No. 3:16-CV-3111 (N.D. Tex. Aug. 18, 2018), https://cases.justia.com/federal/district-courts/texas/txndce/3:2016cv03111/281276/62/0.pdf?ts=1534331209 [https://perma.cc/82U6-6UKJ]. This opinion is quite instructive in how a court may examine a 10b-5 or shareholder derivative suit relating to climate-related disclosures or omissions.

[153] Basic, Inc. v. Levinson, 485 U.S. 224, 240 (1988) (Materiality "depends on the significance the reasonable investor would place on the withheld or misrepresented information."); *see* 17 C.F.R. § 230.408(b) (2023) (governing prospectuses); *id.* § 240.12b-20 (reports); *id.* § 240.14a-9(a) (proxy statements).

[154] 15 U.S.C. § 78m. According to Vizcarra, *supra* note 151, at 10107 n.8, the "SEC disclosure requirements most relevant to climate disclosures include requirements to disclose material capital expenditures and the material effects of complying with environmental regulation (Item 101); material legal proceedings (Item 103); 'known trends or uncertainties' reasonably expected to have a 'material favorable or unfavorable impact' on the business and 'events that will cause a material change in the relationship between costs and revenues' — in particular 'material events or uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition' (Item 303); and 'the most significant factors that make the offering speculative or risky' (Item 503). 17 C.F.R § 229.101(c)(xii) (2019), § 229.103, § 229.303(a)(2)(ii), Instruction 3 for § 229.303(a), § 229.503."

[155] 17 C.F.R. § 229.303(b)(2)(ii). It is likely that this "trends and uncertainty" language may someday be relied upon with respect to climate change cases. As climate change harms become more severe and frequent, it may be impossible for a corporation to not acknowledge the trend. In addition, severe weather events may not be predictable with respect to a location but are becoming more and more frequent so as to prevent a company from failing to acknowledge the risk. However, the evaluation must include a determination of how such events would impact its revenue or continuing operations.

As of yet, there are few cases that provide guidance on the materiality issue in the context of climate change.[156] While some have suggested that climate change is not material,[157] it can (and has been) argued that climate disclosures are material given the interest expressed therein by the SEC,[158] CFTC,[159] public,[160] and institutional investors.[161] SEC Commissioner Allisson Herren Lee noted that by "some estimates, over 90% of U.S. equities by market capitalization are exposed to material financial impact from climate change. We are long past the point at which it can be credibly asserted that climate risk is not material. We

Given the supply chain issues seen in 2020 and 2021, and their direct effect on the revenues of many corporations' sales, supply chain interruptions from severe weather events must be considered. There are also so-called transitional risks that are likely to occur when a company fails to prepare for sudden changes in regulations regarding disclosures, GHG, or the environment.

[156] RENA S. MILLER, GARY SHORTER & NICOLE VANATKO, CONG. RSCH. SERV., R46766, CLIMATE CHANGE RISK DISCLOSURES AND THE SECURITIES AND EXCHANGE COMMISSION 10-11 (2022), https://crsreports.congress.gov/product/pdf/R/R46766 [https://perma.cc/3Q3K-2TBU]. The exception being in Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832, 839 (N.D. Tex. 2018), where the U.S. District Court for the Northern District of Texas denied a motion to dismiss stating that: "a reasonable investor would likely find it significant that ExxonMobil allegedly applied a lower proxy cost of carbon than it publicly disclosed." *See* discussion of state efforts in Part I.B.

[157] *See* Statement, Peirce, *supra* note 121; *see also* Statement, Gensler, *supra* note 121.

[158] *See* Statement, Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures [https://perma.cc/XAL9-KRWR].

[159] *See* Press Release, Commodity Futures Trading Comm'n, CFTC Extends Public Comment Period on Request for Information on Climate-Related Financial Risk (July 18, 2022), https://www.cftc.gov/PressRoom/PressReleases/8557-22 [https://perma.cc/2CM8-ANAR].

[160] *See* Caroline Flammer, Michael W. Toffel & Kala Viswanathan, *Shareholders Are Pressing for Climate Risk Disclosures. That's Good for Everyone.*, HARV. BUS. R. (Apr. 22, 2021), https://hbr.org/2021/04/shareholders-are-pressing-for-climate-risk-disclosures-thats-good-for-everyone [https://perma.cc/SF85-44XV].

[161] *See Net Zero: A Fiduciary Approach*, BLACKROCK (2021), https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter [https://perma.cc/38BV-SPS2]. BlackRock has come under criticism because it holds over $85 billion in coal company stock. *See* Oscar Williams-Grut, *BlackRock Accused of "Greenwashing" $85bn Coal Investments*, YAHOO! NEWS (Jan. 13, 2021, 2:00 AM), https://news.yahoo.com/blackrock-larry-fink-climate-letter-greenwashing-reclaim-finance-urgewald-070023916.html [https://perma.cc/S4KC-HRHM].

also know today that investors are not getting this material information."[162] The heightened interest seems to confirm that a reasonable investor would consider this information important to her trading decision.[163] Additionally, whether the proposed SEC rules regarding climate disclosures are enacted (and whether they will be upheld given a constitutional challenge), they serve as a signal that climate change risks are significant enough to impact investor decision-making.[164]

It is important to note that most of those that object to expanded climate change disclosures fail to acknowledge that it is not up to the corporation to decide what it wants to disclose. The test is whether a *reasonable investor* would view the information as important. In fact, material information is not limited to what the SEC requires companies to disclose. Rule 408 reads: "In addition to the information expressly

[162] Statement, Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, Regulation S-K and ESG Disclosures: An Unsustainable Silence (Aug. 26, 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26 [https://perma.cc/ZVG5-9NZV]. Similarly, Commissioner Caroline A. Crenshaw affirmed that "[t]he question of whether climate change and human capital are material concerns of investors is no longer academic. The 2019 PG&E bankruptcy after the tragic California fires and the more than $220 billion in damages to the U.S. economy from the 2017 hurricane season demonstrate that the risks posed by climate change are here, real, and quantifiable. Companies know how climate change is impacting their businesses, supply chains and the economy overall; so should their investors." Statement, Caroline Crenshaw, Comm'r, U.S. Sec. & Exch. Comm'n, Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105 (Aug. 26, 2020) (citations omitted), https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k [https://perma.cc/RFS9-GAJL].

[163] Vizcarra, *supra* note 151, at 10107 ("Four trends in the corporate-investor disclosure dance indicate that today's reasonable investor considers more and more climate-related information material: (1) the growing, consistent vocal interest by mainstream investors in climate-related information; (2) recent indications that investors use the climate information they get from companies and are seeking out and incorporating additional information; (3) companies' response to investor demands for more information; and (4) the consolidation of investment decisionmaking in the hands of a smaller number of fund managers, increasing the importance of their views on climate information and incentivizing them to portfolio-level climate impacts.").

[164] *See* Emily Strauss, *Climate Change and Shareholder Lawsuits*, NYU J.L. & BUS. (forthcoming) (manuscript at 41) ("As climate risk disclosures proliferate, investor and analyst interest in them is likely to increase, likely leading to more reports and thus more shareholder lawsuits in this area.").

required to be included in a registration statement, *there shall be added such further material information*, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading [emphasis added].”[165] In addition to S-K disclosures, misstatements or omissions made in voluntary sustainability or ESG reports could also lead to liability should they support a claim of securities fraud.[166]

### 2. In Connection with the Purchase or Sale of a Security

To bring a 10b-5 claim, the plaintiff must be a purchaser or seller of a security.[167] Securities have been defined to include a number of devices, including the public sale of shares of stock in a corporation.[168] The Supreme Court has indicated that 10b-5 only applies to purchases and sales executed “in the United States.”[169] The test is whether “irrevocable liability is incurred[,] or title passes within the United States.”[170] Relative to other elements, this element of a 10b-5 claim is fairly straightforward.

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[165] 17 C.F.R. §230.408(a) (2023).

[166] *See* Vizcarra, *supra* note 151, at 10108*; supra* Part II.A.1.

[167] 15 U.S.C. § 78(j)(b); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731-732 (1975) (The Court held that “[a] private damages action under Rule 10b-5 is confined to actual purchasers or sellers of securities”).

[168] Section 2(1) of the Securities Act defines a security as “any note, stock, treasury stock . . . bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights . . . or, in general, any interest or instrument commonly known as a ‘security,’ or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.” 15 U.S.C. § 77(b); *see also* SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (enunciating the test to determine whether a given device is a security).

[169] Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247, 273 (2010).

[170] Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 67 (2d Cir. 2012).

3. Scienter

The scienter element requires a showing of intent to defraud, knowledge of the falsity of the statement, or that the statement was made recklessly.[171] This element can be met by proving that the company possessed information showing that the statement was not true, or the statement was made without a reasonable basis. Obtaining corporate records has become easier in recent years due to the Delaware court's liberalization of Section 220 requirements.[172] Section 220 permits shareholders' access to corporate records as long as they are requested for a "proper purpose."[173] In the case of an omission, courts have pointed to the withholding of negative reports or studies as indicative of scienter. In *Matrixx Initiatives, Inc. v. Siracusano*, the Supreme Court noted that the Court of Appeals correctly concluded that "[w]ithholding reports of adverse effects of and lawsuits concerning the product responsible for the company's remarkable sales increase is 'an extreme departure from the standards of ordinary care,'" giving rise to a strong inference of scienter.[174]

As an example of withholding information, evidence has emerged that members of the energy industry actively misled the public on climate change for decades.[175] A study by two Harvard University researchers examined internal and external statements made by Exxon, Mobil, and ExxonMobil Corporation over a period of fifteen years and discovered that although internal reports demonstrated the negative impact of climate change, their public statements were intentionally designed to

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[171] Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 Geo. L.J. 967, 970 (2019).

[172] Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859 (2021).

[173] DEL. CODE ANN. tit. 8, § 220 (2010).

[174] 563 U.S. 27, 37 (2011) (citation omitted).

[175] *Id.*; *see also* DAVID ANDERSON, MATT KASPER & DAVID POMERANTZ, ENERGY AND POL'Y INST., UTILITIES KNEW: DOCUMENTING ELECTRIC UTILITIES' EARLY KNOWLEDGE AND ONGOING DECEPTION ON CLIMATE CHANGE FROM 1968–2017, at 5-6 (2017), https://www.energyandpolicy.org/wp-content/uploads/2021/09/Utilities-Knew-Documenting-Electric-Utilities-Early-Knowledge-and-Deception-on-Climate-Change.pdf [https://perma.cc/NM2Q-YPFE] (reporting on the electric industry's role in "ongoing efforts to spread disinformation about climate science and block legal limits on heat-trapping carbon dioxide emissions").

mislead the public and create doubt.[176] The internal documents clearly demonstrated that climate change was "real, human-caused, serious, and solvable," while their public-facing advertorials "overwhelmingly emphasized only the uncertainties, promoting a narrative inconsistent with the views of most climate scientists, including ExxonMobil's own."[177] In addition, their own internal communications, including those involving their public relations firm, emphasized their intent to create uncertainty regarding the greenhouse gas effect and their role in it.[178] The study concluded that ExxonMobil's public-facing communications were misleading. These and other reports may pave the way for scienter to become easier to plead in the context of climate-related misstatements and omissions as it is difficult for companies today to argue that their activities have no impact on the environment or if they discount the risks that climate change presents.[179]

With respect to forward-looking statements, a different issue arises as companies have been provided with somewhat of a safe harbor if statements were made in good faith and on a reasonable basis.[180] The Private Securities Litigation Reform Act of 1995 ("PSLRA") "codified and significantly expanded protections against claims that forward-looking statements were misleading by providing an avenue for summary dismissal without consideration of whether managers acted with scienter."[181] The safe harbor is limited because the PSLRA provides

[176] *See* Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communications (1977–2014)*, 12 ENV'T RSCH. LETTERS, Aug. 23, 2017, at 1, https://iopscience.iop.org/article/10.1088/1748-9326/aa815f [https://perma.cc/GCY8-EURY].

[177] *Id.* at 15.

[178] *See id.* ("This is characteristic of what Freudenberg et al term the Scientific Certainty Argumentation Method (SCAM) — a tactic for undermining public understanding of scientific knowledge. Likewise, the company's peer-reviewed, non-peer-reviewed, and internal documents acknowledge the risks of stranded assets, whereas their advertorials do not." (citations omitted)).

[179] *See* Wasim, *supra* note 139, at 1312-15 (citing investigations and studies demonstrating inadequate and misleading statement by corporations on climate change risks).

[180] *See* 15 U.S.C. §§ 77z-2(c)(1)(B)(ii), 78u-5(c)(1)(B)(ii).

[181] H. Scott Asay & Jeffrey Hales, *Disclaiming the Future: Investigating the Impact of Cautionary Disclaimers on Investor Judgments Before and After Experiencing Economic Loss*, 93 ACCT. REV. 81, 81, 90 (2018) ("Under the Reform Act, firms are not liable for inaccurate forward-looking statements if (1) the forward-looking statement is identified

that the forward-looking statement must be accompanied by "substantive and tailored" cautionary language.[182] The good faith requirement would exclude statements made with knowledge of their falsity or without any reasonable basis. In the SEC's request for comments regarding their proposed Climate Disclosure Rules, although they acknowledge the safe harbor provided by the PSLRA, they specifically note that there are limits to its protection and that it does not apply to registration statements.[183] As such, there is no protection for forward-looking statements made in a Form S-1 as part of an initial public offering nor can it be asserted in a shareholder derivative suit. In the context of the climate-related misstatements by Exxon discussed above, it is unlikely that a court would permit a PSRLA defense given this documented deception.[184]

as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or (2) the forward-looking statement is immaterial; or (3) the plaintiff fails to prove that the forward-looking statement was made by or with the approval of a firm representative who had actual knowledge that the statement was false or misleading.").

[182] *See* Kaufman v. Trump's Castle Funding, 7 F.3d 357, 371-72 (3d Cir. 1993); *see also* JAMES D. COX, ROBERT W. HILLMAN, DONALD C. LANGEVOORT & ANN M. LIPTON, SECURITIES REGULATION: CASES AND MATERIALS 584 (10th ed. 2021) ("[T]he first line of defense for a 'missed' forecast under the case law as well as the statutory safe harbor for forward-looking statements is not the reasonableness of its preparer's efforts but whether the forecast was accompanied by meaningful cautionary language.").

[183] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21352 n.219 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) ("The statutory safe harbors by their terms do not apply to forward-looking statements included in financial statements prepared in accordance with [GAAP]. The statutory safe harbors also would not apply to forward-looking statements made: (i) In connection with an initial public offering; a tender offer; an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program, an offering of securities by a blank check company; a roll-up transaction; or a going private transaction; or (ii) by an issuer of penny stock. *See* Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act. Also, the statutory safe harbors do not, absent a rule, regulation, or Commission order, apply to forward-looking statements by certain "bad actor" issuers under Section 27A(b)(1)(A) of the Securities Act and Section 21E(b)(1)(A) of the Exchange Act.").

[184] The PSLRA has been subject to much criticism. *See, e.g.*, Ann Morales Olazábal, *False Forward-Looking Statements and the PSLRA's Safe Harbor*, 86 IND. L.J. 595, 595-96

4. Reliance

Although reliance would seem to be a significant barrier to a 10b-5 claim because the shareholder may be unaware of the misstatement or omission at the time they purchased or sold the security, in the 1988 case *Basic v. Levinson*, the Supreme Court held that plaintiffs may invoke a rebuttable presumption of reliance supported by the "fraud-on-the-market" theory.[185] Under this theory, reliance is assumed because "the price of a company's stock is determined by the available material information regarding the company and its business" so that the stock price incorporates the material misstatement.[186] This is a rebuttable presumption.[187] When 10b-5 actions are filed by private individuals, plaintiffs do not have to show that they relied on a misrepresentation because it is considered a fraud on the market as a whole.[188] The reliance is on "tainted prices."[189] In June of 2021, the Supreme Court issued a further opinion on the reliance element, holding that the defendant bears the burden of proving that an alleged misrepresentation did *not* have an impact on the price of the security.[190] This holding is expected to make it easier to form classes and to demonstrate reliance to the common class.[191]

(2011) (explaining "semantic maneuvers to circumvent the safe harbor's straightforward, occasionally distasteful application").

[185] Basic Inc. v. Levenson, 485 U.S. 224, 249-50 (1988).

[186] *Id.* at 241; *see also* Gregory Day, John T. Holden & Brian M. Mills, *Fraud on Any Market*, 97 IND. L.J. 659, 687 (2022) ("In the years leading up to Basic, some courts strayed from the common law of fraud by loosening the plaintiff's burden of showing reliance and causation. The sea change came out of the Ninth Circuit in 1975 when it ruled in *Blackie v. Barrack* that materiality was enough to show reliance." (citations omitted)).

[187] *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 268 (2014).

[188] *See* Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 152-53 (2009) (explaining that with a "fraud on the market" case, the shareholder plaintiff does not have to prove individual reliance in a 10b-5 action because the stock price is assumed to incorporate material information making it a fraud upon the market as a whole).

[189] Day et al., *supra* note 186, at 688-89.

[190] Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951, 1962-63 (2021).

[191] Peter Vogel, *The U.S. Supreme Court Clarifies the Standards and Proof Required to Meet the Reliance Element of a Securities Fraud Claim*, PATTERSON BELKNAP (Feb. 24, 2022), https://www.pbwt.com/securities-litigation-insider/the-u-s-supreme-court-clarifies-

### 5. Causation and Economic Loss

While economic loss can be shown by a decrease in stock price, a plaintiff must still plead and prove that the material misstatement or omission *caused* the loss.[192] While causation may be clear in the event of an environmental disaster that results in a decrease in stock price,[193] tying the cause of a decrease due to a misstatement or omission regarding climate change risk will be more difficult. The argument would be that the positive misstatements or omitted negative information inflated the price that the investor paid because had the truth been disclosed regarding the risk, the stock price would have reflected that.[194] To show loss causation, the plaintiff may demonstrate that a subsequent disclosure of the alleged misstatement or omission (corrective disclosure) resulted in a negative share price impact.[195]

Because climate risks increase incrementally over time, there is usually not an immediate effect on stock price due to a failure to disclose.[196] However, there is "a growing body of data [that] can pinpoint significant and quantifiable consequences for corporations as a result of climate change."[197] The main risk from failing to address and prepare for the impact of climate change, according to Federal Reserve Board Governor Lael Brainard, is that any impact may "occur relatively quickly in the presence of 'tipping points.'"[198]

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the-standards-and-proof-required-to-meet-the-reliance-element-of-a-securities-fraud-claim#_ftn2 [https://perma.cc/RQ8W-F9SV].

[192] Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 344-47 (2005) (holding that the plaintiff must plead that the defendant's misstatements or omissions were the proximate cause of the plaintiff's loss).

[193] *See, e.g.*, *In re* Massey Energy Co. Sec. Litig., 883 F. Supp. 2d 597 (S.D.W. Va. 2012) (denying Motion to Dismiss upon the finding that loss causation was properly pled due to the statements made by the mining company regarding safety after a mine explosion killed 29 miners in West Virginia and the resulting decline in stock price).

[194] *See* Cooper, *supra* note 23, at 422-23.

[195] *In re* Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 511 (2d Cir. 2010).

[196] *See* Cooper, *supra* note 23, at 407.

[197] Wasim, *supra* note 139, at 1315.

[198] Speech, Lael Brainard, Governor, Fed, Rsrv. Bd., Building Climate Scenario Analysis on the Foundations of Economic Research (Oct.7, 2021), https://www.federalreserve.gov/newsevents/speech/brainard20211007a.htm [https://perma.cc/JZ2A-QQM3].

While admittedly plaintiffs face an uphill battle in these cases, the litigation still demonstrates that if a corporation makes misleading claims regarding its environmental performance or fails to disclose known or likely climate change risks, shareholders do have a legal route for bringing a fraud lawsuit. 10b-5 actions do not just apply to statements made in a corporation's SEC filings but also to the statements made on its website and in its sustainability reports.[199] In addition to potential 10b-5 fraud claims, misleading statements and omissions related to climate change may also spur SEC and state enforcement.[200] The potential for sudden and significant economic harm resulting from the failure to disclose true environmental risks should serve as a warning to corporations.[201] In the next Section we discuss actions against corporate boards directly.

[199] *See* Cooper, *supra* note 23, at 407, 436-37 (making the case for application of 10b-5 actions to "green misrepresentations"); *see, e.g.*, Letter from H. Roger Schwall, Assistant Dir., Off. of Nat. Res., Sec. & Exch. Comm'n, to Robert G. Gwin, CFO, Anadarko Petroleum Corp. (Sept. 16, 2016), https://www.sec.gov/Archives/edgar/data/773910/000000000016093302/filename1.pdf [https://perma.cc/V2A2-Z7YB] (stating "[p]lease reconcile this assertion in your proxy statement with your description of the climate change risks from your *CDP Report* as having a 'high' impact on your business and provide your analysis as to why you believe such 'uncertaint[ies]' do not constitute 'known trends or . . . uncertainties' requiring disclosure pursuant to Item 303(a) of Regulation S-K"(emphasis added)); Letter from Russell Mancuso, Branch Chief, Off. Elecs. & Mach., Sec. & Exch. Comm'n, to Olivier A. Filliol, CEO, Mettler-Toledo Int'l Inc. (Mar. 23, 2016), https://www.sec.gov/Archives/edgar/data/1037646/000000000016069396/filename1.pdf [https://perma.cc/KZ2A-29MX] (questioning statements made about their current operations in Sudan and Syria and noting "[t]he 2014 *Sustainability Report* posted on your website states that you have largely ceased business in Sudan" (emphasis added)).

[200] There is also the risk of direct suits for environmental damage caused by the corporation. *See, e.g.*, Adam J. Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation*, 24 J. ENV'T L. & LITIG. 75, 77 (2009) (explaining the possibility of direct action under ultra vires statutes). As discussed in Part I.B. above, state, and local governments are using state securities, consumer protection, and environmental laws to address these types of harms. Consumers could presumably also make use of state law making claims under state unfair and deceptive trade practices acts or purchase a small number of shares to make use of state corporate laws.

[201] *See* Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 110 (2017) ("The threat of damages for such statements can deter corporations from issuing false statements in the first place.").

### *B. Shareholder Derivative Suits: Caremark and Its Progeny*

Shareholder derivative lawsuits provide another avenue for investors to increase corporate accountability related to climate change risks.[202] The seminal 1996 case *In re Caremark*, firmly established that directors have a duty of oversight.[203] The rule known as the *Caremark* standard, requires boards to "be reasonably informed concerning the corporation, . . . sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance."[204] Two types of claims can be made under *Caremark*: (1) no reporting system existed for the board to become informed, or (2) a system did exist, but the board failed to monitor it and was therefore not apprised of the risks.[205] Although *Caremark* claims traditionally did not survive motions to dismiss given the application of the business judgment rule, between 2018 and 2020, a series of cases were allowed to proceed past the motion-to-dismiss stage.[206]

[202] For an example of what that might look like, see Jacob Hupart, *Shareholder Lawsuit Filed Against Shell Board of Directors in the UK Concerning Failure to Prepare for Climate Change*, JD SUPRA (Mar. 17, 2022), https://www.jdsupra.com/legalnews/shareholder-lawsuit-filed-against-shell-2716752 [https://perma.cc/82VU-96MX] (describing the 2022 derivative suit against Shell's Board of Directors in the U.K. "for an alleged failure to adequately prepare Shell for the impact of climate change"). *See* Strauss, *supra* note 164, at 43 (predicting an increase in climate-related derivative lawsuits).

[203] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 969-70 (Del. Ch. 1996) (providing that directors have a duty to "assure that a corporate information gathering and reporting systems exists which represents a good faith attempt to provide senior management and the Board with information respecting material acts, events or conditions within the corporation, including compliance with applicable statutes and regulations").

[204] *Id.* at 970.

[205] Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[206] *See, e.g.*, Roy Shapira, *A New Caremark Era: Causes and Consequences*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 18, 2021), https://corpgov.law.harvard.edu/2021/01/18/a-new-caremark-era-causes-and-consequences/ [https://perma.cc/7NJG-WSRA] (describing how *Caremark* claims have been allowed to proceed more recently). The business judgment rule provides great deference to a board's decision when made in good faith, with reasonable care, and with the reasonable belief that they are acting in the best interests of the company. *See* Rales v. Blasband, 634 A.2d 927, 932-33 (Del. 1993). In other words, a court will not substitute its judgment for that made by a board whose decision meets that threshold. In fact, some have argued that the business judgement rule would

With the revived *Caremark* standard, shareholders may also pursue derivative suits based on failure to assure that a reasonable information and reporting system exists regarding climate-related risks rather than a Section 10b-5 claim. With a shareholder derivative suit, board members can be found personally liable for a breach of their fiduciary duties to the corporation. In *Marchand v. Barnhill*, shareholders brought a derivative action against the board and two of the officers of Blue Bell Creameries USA, Inc. ("Blue Bell") after listeria-contaminated ice cream killed three people and Blue Bell's stock plummeted.[207] The shareholders claimed that the board breached its fiduciary duty to the corporation by failing to implement food safety reporting procedures.[208] The appellate court reversed the trial court's dismissal, stating that the plaintiffs had alleged facts sufficient to support their *Caremark* claim.[209] The court indicated that under *Caremark*, directors have a duty to oversee and monitor the corporation's operational viability, legal compliance, and financial performance.[210] Failure "to attempt to assure a reasonable information and reporting system existed" is a breach of the board's duty of loyalty to the corporation.[211]

Since *Marchand*, several other *Caremark* claims have survived the motion to dismiss stage.[212] Although the cases involved different

also protect a board for decisions made in pursuance of "environmental values and goals." *See, e.g.*, Light, *supra* note 48, at 181-85.

[207] 212 A.3d 805, 807 (Del. 2019).

[208] *Id.* at 816-17.

[209] *Id.* at 809, 824.

[210] *Id.* at 809.

[211] Allegations noted by the court included: (1) there was no board committee overseeing food safety; (2) there was no reporting system in place about food safety; (3) management knew about the growing listeria issues but did not report those issues to the board; and (4) the board minutes demonstrated that food safety was not discussed at its regular board meetings. *Id.* at 817. These allegations supported a "fair inference that no board-level system of monitoring or reporting on food safety existed." *Id.* at 824.

[212] *See, e.g.*, *In re* McKesson Corp. Derivative Litig., No. 17-cv-01850, 2018 WL 2197548, at *7 (N.D. Cal. May 14, 2018) (controlled substance compliance); *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188, at *18 (Del. Ch. June 3, 2022) (denying motion to dismiss in the pharmaceutical regulatory approval context); *In re* Boeing Co. Derivative Litig., No. CV 2019-0907, 2021 WL 4059934, at *26 (Del. Ch. Sept. 7, 2021) (lack of oversight of mission-critical plane safety); Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. CV 2019-0816, 2020 WL 5028065, at *2 (Del. Ch.

industries, they all support the premise that regulatory and legal compliance is "mission critical"[213] and that boards risk liability if they ignore their obligations to oversee these mission critical risks.[214] With a continued focus on the impact of climate change by regulators generally,[215] the SEC specifically,[216] and even former Delaware judges,[217] boards will become more active in climate change monitoring, particularly with respect to the agriculture, wine, commercial fishing, insurance, banking, energy, and utility industries.[218] Cases that have survived motions to dismiss generally involve type one *Caremark* claims

Aug. 24, 2020) (board ignored red flags regarding FDA noncompliance); Hughes v. Hu, No. CV 2019-0112, 2020 WL 1987029, at *9 (Del. Ch. Apr. 27, 2020) (lack of oversight by the audit committee); Inter-Marketing Grp. USA, Inc. v. Armstrong, No. 2017-0030, 2020 WL 756965, at *15 (Del. Ch. Jan. 31, 2020) (environmental compliance).

[213] Nick Penn, *Don't Fall Asleep at the Wheel: Delaware Boards Should Be on the Lookout for ESG Oversight Liability*, 106 MINN. L. REV.: DE NOVO (Mar. 3, 2022), https://minnesotalawreview.org/2022/03/03/dont-fall-asleep-at-the-wheel-delaware-boards-should-be-on-the-lookout-for-esg-oversight-liability/ [https://perma.cc/Z487-ACY9].

[214] *See* Pace & Trautman, *supra* note 24, at 778 ("[D]irectors now face a real risk of liability if they ignore 'mission critical' risks."); *see also* Strine et al., *supra* note 24, at 1897 ("[R]ecent *Caremark* decisions . . . have resulted in renewed attention to directors' oversight obligations.").

[215] *See supra* notes 41–44 and accompanying text.

[216] *See* Speech, Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, Climate, ESG, and the Board of Directors: "You Cannot Direct the Wind, But You Can Adjust Your Sails" (June 28, 2021), https://www.sec.gov/news/speech/lee-climate-esg-board-of-directors [https://perma.cc/T5JZ-HH8E] ("[B]oards increasingly have oversight obligations related to climate and ESG risks — identification, assessment, decision-making, and disclosure of such risks.").

[217] *See* E. Norman Veasey & Randy J. Holland, Caremark *at the Quarter-Century Watershed: Modern-Day Compliance Realities Frame Corporate Directors' Duty of Good Faith Oversight, Providing New Dynamics for Respecting Chancellor Allen's 1996* Caremark *Landmark*, 76 BUS. LAW. 1, 27 (2021) ("The board's oversight responsibilities also require it to establish and monitor programs relating to matters such as . . . ESG . . . .").

[218] *See, e.g.*, Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 VAND. L. REV. 1875, 1907 (2021) [hereinafter *Fiduciary Duties*] (explaining why a *Caremark* claim could be successful against companies in industries that face potential financial losses from climate change where the board does not take ownership of the risk); Michael Boyles, *7 Ways Climate Change Affects Global Businesses*, HBS ONLINE: BUS. INSIGHTS (Aug. 2, 2022), https://online.hbs.edu/blog/post/climate-change-affecting-businesses [https://perma.cc/YMW6-QCW6] (describing the industries that could potentially suffer climate changes' "most severe Impacts.").

— no oversight structure — such as when a board fails to have an assigned committee for its mission critical risks.[219]

Further, potential *Caremark* claims due to climate-related misrepresentations and failure to monitor environmental risks should be especially concerning for corporate boards. This is because although under Delaware law, the corporate charter may include a provision exculpating directors from a breach of their duty of care, it does not permit the board from being held personally liable for a breach of its duty of *loyalty* which includes the duty of oversight.[220] As such, directors ignore these risks at their own peril.

### *C. Shareholder Proposals*

While the threat of litigation can shape corporate behavior,[221] some shareholder initiatives do not require litigation at all. Shareholder activism, for example, is becoming a more common method to bring ESG issues to a board's attention, especially environmental concerns.[222]

[219] Briana Seyarto Flores, *Defining a "Good Faith" Director: Key Takeaways from Recent Court Rulings on Corporate Board Oversight*, JD SUPRA (Feb. 2, 2022), https://www.jdsupra.com/legalnews/defining-a-good-faith-director-key-1494952/ [https://perma.cc/2PTR-2VWT]. However, even when a reporting system exists, if the board ignores "red flags," the case will proceed past the motion to dismiss stage. *See, e.g.*, *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188, at *1, *18 (Del. Ch. Oct. 1, 2019) (denying motion to dismiss where the board turned a blind eye to management's overstatement of a drug's efficacy).

[220] *See* Cynthia Mabry, Kerry Berchem & John Goodgame, *Revisiting the Board's Oversight Role After* In re: Boeing Co., HAR. L. SCH. F. ON CORP. GOVERNANCE (June 1, 2022), https://corpgov.law.harvard.edu/2022/06/01/revisiting-the-boards-oversight-role-after-in-re-boeing-co/ [https://perma.cc/6HUF-FKKP]; *see also* Verified Complaint and Demand for Jury Trial at 81-82, Saratoga Advantage Tr. Energy & Basic Materials Portfolio v. Woods, No. 3:19-cv-16380 (D.N.J. Aug. 6, 2019), https://climatecasechart.com/wp-content/uploads/case-documents/2019/20190806_docket-319-cv-16380_complaint.pdf [https://perma.cc/EL3K-LG8J].

[221] *See, e.g.*, Kimberly A. Houser & Kathryn Kisska-Schulze, *Disrupting Venture Capital: Carrots, Sticks and Artificial Intelligence*, 13 U.C. IRVINE L. REV. 901, 931 (2023) (explaining how the loss aversion heuristic motivates behavior change and the threat of sanctions can lead to greater legal compliance); Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL'Y REV. 1 (2015) (explaining how the possibility of litigation can impact behavior due to reputational risk).

[222] Climate-related shareholder proposals have made up the majority of environmental shareholder proposals since 2018. Abigail Gampher, *ANALYSIS: SEC Rule*

As discussed below, these initiatives can be less costly and time-consuming and range from shareholder proposals to proxy fights.

SEC Rule 14a-8 permits shareholders to submit proposals relating to important social or policy issues for consideration at a company's annual meeting.[223] These proposals are "the most widely used and least expensive means of shareholder activism [that] are typically part of a multifaceted campaign of sustained engagement between an activist and the board or corporate management."[224] Along with the actual proposal, the shareholders are permitted to provide supporting statements.[225] The number of shareholder proposals addressing climate change issues is increasing as investors have become very concerned about its impact on their investments.[226] As of mid-2022, over 800 shareholder proposals had already been filed, the majority focusing on the environment, which is a significant increase from 2021.[227]

Companies are only permitted to exclude a proposal from their proxy statement if the shareholder does not meet the eligibility requirements[228] or the subject matter falls within one of the thirteen exceptions in Rule 14a-8.[229] When a company believes it has grounds for exclusion, it can seek a "no-action letter" from the SEC.[230] In November

*to Upset Environmental Shareholder Proposals*, BLOOMBERG L. (Oct. 14, 2022, 2:00 AM PDT), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-sec-rule-to-upset-environmental-shareholder-proposals [https://perma.cc/27TB-YBFM].

[223] 17 C.F.R. § 240.14a-8 (2023). *See generally* Virginia Harper Ho, *From Public Policy to Materiality: Non-Financial Reporting, Shareholder Engagement, and Rule 14a-8's Ordinary Business Exception*, 76 WASH. & LEE L. REV. 1231 (2019) [hereinafter *Public Policy to Materiality*] (explaining Rule 14a-8's long-term use in "shareholder activism around 'public policy and social issues'").

[224] Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 661 (2016).

[225] 17 C.F.R. § 240.14a-8(a).

[226] *See* Treviño et al., *supra* note 138.

[227] Elizabeth Ising, Thomas J. Kim, Ronald O. Mueller, Lori Zyskowski & Geoffrey E. Walter, *Gibson Dunn Discusses Shareholder Proposal Developments for the 2022 Proxy Season*, CLS BLUE SKY BLOG (July 29, 2022), https://clsbluesky.law.columbia.edu/2022/07/29/gibson-dunn-discusses-shareholder-proposal-developments-for-the-2022-proxy-season/ [https://perma.cc/4ETD-7M2F].

[228] 17 C.F.R. § 240.14a-8(f).

[229] 17 C.F.R. § 240.14a-8(i).

[230] 17 C.F.R. § 240.14a-8(m).

2021, the SEC narrowed a corporation's ability to exclude ESG proposals from its proxy statements resulting in an increase in ESG proposals.[231] The SEC rescinded Staff Guidance under the previous administration and reversed no-action decisions to broaden the scope of permissible shareholder proposals involving "significant social policy issues."[232] In the wake of this change, fewer shareholder proposals have been excluded.[233]

In response to this increase in shareholder activism, companies have been more willing to negotiate with investors on these proposals.[234] Although the threshold to assert shareholder proposals is fairly low, those initiated by institutional shareholders are given more weight. Institutional investors currently hold eighty percent of all stock in the S&P 500.[235] Today, BlackRock, Inc., State Street Global Advisors, and the Vanguard Group, known as the Big Three, together manage $22 trillion in assets.[236] To put that in perspective, the value of all of the shares in the S&P 500 is $38 trillion.[237] These institutional investors' interest in ESG disclosures stem from their desire to mitigate systemic risks, of

[231] Eleazer Klein, Adriana Schwartz, Danny Goldstein & Abraham Schwartz, *ESG, Professional Perspective — SEC Staff Guidance Paves Way for More ESG Proposals*, BLOOMBERG L. (Jan. 2022), https://www.bloomberglaw.com/product/health/document/XBMS0HFS000000?resource_id=88977b9d4399e7b44389f427511e5d2c [https://perma.cc/W3LF-GR39].

[232] Announcement, U.S. Sec. & Exch. Comm'n., Shareholder Proposals: Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021), https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals [https://perma.cc/F5TP-GGFS] (effective date note: At 85 FR 70294, Nov. 4, 2020, §240.14a-8 was amended by adding paragraph (b)(3), effective Jan. 4, 2021 through Jan. 1, 2023).

[233] Ising et al., *supra* note 227.

[234] *See id.*

[235] Jacob Greenspon, *How Big a Problem Is It That a Few Shareholders Own Stock in So Many Competing Companies?*, HARV. BUS. REV., https://hbr.org/2019/02/how-big-a-problem-is-it-that-a-few-shareholders-own-stock-in-so-many-competing-companies (last updated Feb 22, 2019) [https://perma.cc/C5QQ-FTYR].

[236] Farhad Manjoo, *What BlackRock, Vanguard and State Street Are Doing to the Economy*, N.Y. TIMES (May 12, 2022), https://www.nytimes.com/2022/05/12/opinion/vanguard-power-blackrock-state-street.html [https://perma.cc/3WA6-JGNS].

[237] *Id.*

which climate-related risks comprise a large part.[238] As Harvard Law scholar Alexander I. Platt notes, the Big Three have used their concentrated power "to discipline culpable companies and managers" with engagement, voting, and litigation.[239] They have brought a slew of securities fraud cases, recovered billions of dollars, and successfully replaced board members who attempted to stimy requested disclosures.[240] They have also been effective in getting companies to commit to reducing their GHG emissions.[241] Shareholders have much more power today over corporate policy than they did even ten years ago.[242]

In 2022, ninety percent of climate-related shareholder proposals called for reports on climate-related risks or methane/GHG emission reports.[243] A key report demonstrated that driven by engagement from Climate Action 100+ investor signatories, seventy-five percent of their focus companies have committed to achieve net zero emission by 2050, ninety-two percent have instituted some level of board oversight on climate change, and ninety-one percent have aligned with TCFD recommendations on climate change planning.[244] While effective

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[238] *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 381-84 (2020).

[239] Platt, *supra* note 136, at 1453-54.

[240] *See id.* at 1458.

[241] José Azar, Miguel Duro, Igor Kadach & Gaizka Ormazabal, *The Big Three and Corporate Carbon Emissions Around the World*, 142 J. FIN. ECON. 674, 676 (2021). ("Since a full-scale regulatory solution to the emissions externality problem faces severe coordination frictions across countries, corporate governance is regarded as an alternative way of addressing climate change. In particular, large diversified institutions are increasingly viewed as catalysts in driving firms to reduce their carbon emissions." (citations omitted)).

[242] *But see* Ho, *Public Policy to Materiality*, *supra* note 223, at 1235.

[243] Gampher, *supra* note 222.

[244] *Climate Action 100+ Net Zero Company Benchmark Shows Continued Progress on Net Zero Commitments Is Not Matched by Development and Implementation of Credible Decarbonisation Strategies*, CLIMATE ACTION 100+ (Oct. 13, 2022), https://www.climateaction100.org/news/climate-action-100-net-zero-company-benchmark-shows-continued-progress-on-net-zero-commitments-is-not-matched-by-development-and-implementation-of-credible-decarbonisation-strategies/ [https://perma.cc/J9U6-8TQ8] (explaining that out of the 166 focus companies, 100 are considered "systemically important emitters").

regarding net zero commitments, Climate Action 100+ notes that many of their more prescriptive recommendations, especially those around decarbonization, have a long way to go.[245]

Another way for shareholders to assert their power is through proxy battles. Because shareholders are able to vote for board members, there has been an increase in shareholder action seeking to replace board members with those who will address climate change risks.[246] In 2021, a proxy battle at Exxon ensued after board members refused to take action to reduce CO2 emissions or expand climate risk disclosures.[247] As a result of this proxy fight with Engine No. 1, a small hedge fund, Exxon lost three board seats, due to the Big Three's support for Engine No. 1's proposal.[248] Although this hedge fund only owned 0.02% of Exxon's shares, it was able to demonstrate Exxon's governance failure on environmental issues and align its cause with the Big Three.[249]

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[245] *See id.* Climate Action 100+ is coordinated by Asia Investor Group on Climate Change ("AIGCC"); Ceres ("Ceres"); Investor Group on Climate Change ("IGCC"); Institutional Investors Group on Climate Change ("IIGCC") and Principles for Responsible Investment ("PRI"). These organizations, along with investor representatives from AustralianSuper, California Public Employees' Retirement System ("CalPERS"), GAM Investments, Generali Insurance Asset Management ("Generali Group") and Sumitomo Mitsui Trust Asset Management form the global Steering Committee for the initiative.

[246] *See* Chuck Callan, Paul DeNicola & Matt DiGuiseppe, *2022 Proxy Season Preview*, HARV. L. SCHOOL F. ON CORP. GOVERNANCE (Mar. 14, 2022), https://corpgov.law.harvard.edu/2022/03/14/2022-proxy-season-preview/ [https://perma.cc/ZQ7J-PM8W]. For evidence that shareholder dissent votes can negatively impact directors, see Reena Aggarwal, Sandeep Dahiya & Nagpurnanand R. Prabhala, *The Power of Shareholder Votes: Evidence from Uncontested Director Elections*, 133 J. FIN. ECON. 134, 151 (2019) (finding evidence of that shareholder dissent votes can result in negative consequences for directors).

[247] *See* Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html [https://perma.cc/9SEW-VRSL].

[248] *Id.*

[249] Thomas Ball, James Miller & Shirley Westcott, *Was the Exxon Fight a Bellwether?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 24, 2021), https://corpgov.law.harvard.edu/2021/07/24/was-the-exxon-fight-a-bellwether/#:~:text=Conclusion,that%20focus%20on%20E%26S%20issues [https://perma.cc/ZPP8-3CVD].

Despite the increase in shareholder proposals relating to climate change in 2022, fewer were approved.[250] This could be because some of the proposals were dismissed after successful negotiations or may be a reflection of concerns over inflation and Russia's war on Ukraine.[251] A number of proposals specifically on GHG targets and other disclosure resolutions were approved though.[252] Around fifty-two percent of ExxonMobil shareholders approved a proposal calling on the company to provide an audited report assessing the impact of a net-zero emissions policy on its financial statements.[253] Ninety-eight percent of Chevron's shareholders approved a proposal from Mercy Investment Services, a socially responsible asset manager for the Sisters of Mercy, requiring the board to provide a report on "the reliability of Chevron's methane emission disclosures."[254]

While CalPERS, the nation's largest state pension fund, has authorized engagement with their investee companies on climate change and environmental practices to assure long-term value

[250] Martha Carter, Matt Filosa, Sydney Carlock & Sean Quinn, *ESG and the Bear: What to Make of the 2022 Proxy Season*, TENEO (Aug. 15, 2022), https://www.teneo.com/insights/articles/esg-and-the-bear-what-to-make-of-the-2022-proxy-season/ [https://perma.cc/T8FT-YRJ9] ("Investors filed a record number of shareholder proposals at S&P 500 companies (137) in 2022. While only 54 went to a vote, this represented twice as many such proposals voted in 2021 (27). These proposals received less support overall than in 2021: 33% on average in 2022 versus 54% in 2021. However, the lower support levels are not driven by a lack of focus on climate issues, but can be attributed to: Certain climate-related shareholder proposals becoming more prescriptive (and such proposals are less likely to receive a no-action response from the SEC than in the past); Many proposals were withdrawn due to settlements with the target companies; A challenging economy; and Global unrest due to the war in Ukraine.").

[251] *Id.* ("The 2022 proxy season was marked by external turbulence with a considerable ESG impact. In the wake of the still ongoing pandemic, companies faced new black swan events such as the war in Ukraine and navigated rising inflation, high oil prices and continued supply chain issues.").

[252] *Id.* ("All [ten] passing proposals requested that companies prepare reports, typically on GHG targets or other climate-related issues, rather than adopting new policies.").

[253] Maxine Joselow, *Investors Reject Climate Proposals Targeting Exxonmobil, Chevron*, WASH. POST (May 26, 2022, 7:49 AM EDT), https://www.washingtonpost.com/politics/2022/05/26/investors-reject-climate-proposals-targeting-exxonmobil-chevron/ [https://perma.cc/FH69-GC6J].

[254] *Id.*

creation,[255] some states with strong fossil-fuel ties, like Texas, have sought to divest their state pensions and prevent local governments from entering into contracts with financial firms that take climate risks into account in their investments, equating them to companies with "links to foreign terrorist organizations."[256] These types of actions appear to be more political than financial as the divestment in Texas alone is likely to cost pensioners and local governments hundreds of millions of dollars.[257] Additionally, this position ignores the reality that the Big Three do not support every climate-related proposal.[258]

According to Sandra Boss, Global Head of Blackrock Investment Stewardship ("BIS") and Michelle Edkins, Managing Director of BIS, their stewardship of investor's assets requires a case-by-case approach to shareholder proposals.[259] According to BIS, proposals with climate action plans that clearly explain how the energy transition will impact a company's business model and financial performance that are

[255] *CalPERS Mission & Vision*, CALPERS, https://www.calpers.ca.gov/page/about/organization/calpers-story/our-mission-vision#investment-beliefs (last visited Dec. 11, 2022) [https://perma.cc/2U8W-3PJA].

[256] Catherine Clifford, *Texas accuses 10 financial companies, including BlackRock, of "boycotting" energy companies and orders state pension funds to divest from holdings*, CNBC (Aug. 25, 2022, 2:49 PM EDT), https://www.cnbc.com/2022/08/25/texas-says-10-companies-including-blackrock-boycotting-energy-.html [https://perma.cc/44BV-YXWP].

[257] *Id. See generally* Daniel G. Garrett & Ivan T. Ivanov, *Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies* 13 n.17 (Hutchins Center, Working Paper No. 85) (analyzing data from the first eight months after the law was enacted, the authors concluded Texas cities will pay an additional $302 million to $532 million in interest on $32 billion in bonds).

[258] In 2022, Blackrock indicated that they planned on voting in favor of fewer climate-related shareholder proposals than they did in 2021, explaining that they would not vote for proposals that "are unduly prescriptive and constraining on the decision-making of the board or management, call for changes to a company's strategy or business model, or address matters that are not material to how a company delivers long-term shareholder value." Catherine Clifford, *Blackrock to Vote for Fewer Climate Shareholder Provisions in 2022 than 2021*, CNBC (May 11, 2022, 1:47 PM EDT), https://www.cnbc.com/2022/05/11/blackrock-to-vote-for-fewer-climate-provisions-in-2022-than-2021.html [https://perma.cc/A4R7-YCYR].

[259] Sandra Boss & Michelle Edkins, *BlackRock on Climate-Related Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 12, 2022), https://corpgov.law.harvard.edu/2022/05/12/blackrock-on-climate-related-shareholder-proposals/ [https://perma.cc/54NG-VKET].

supported by quantitative information such as GHG emission targets are more likely to be supported by BIS.[260] Similarly, BIS may support climate-related proposals that encourage corporations' disclosure of how their political activities support their long-term strategy.[261]

The increasing use and acceptability of ESG proposals show that they are successful in motivating corporations to engage with shareholders on these issues.[262] In fact, the risk of reputational harm may be a major impetus for boards to better monitor and account for the corporation's environmental impacts and lead to better governance.[263] Companies with "good governance" will strengthen their attractiveness to investors, employees, and consumers.[264] Additionally, such shareholder pressure is effective. In an empirical study of 265 U.S. public companies, it was demonstrated that "companies are more likely to disclose climate risk information following environmental shareholder activism."[265] This study demonstrated that in the absence of mandated disclosures, shareholder activism increases these voluntary disclosures, especially

[260] *See id.*

[261] *Id. See generally* BLACKROCK, 2022 CLIMATE-RELATED SHAREHOLDER PROPOSALS MORE PRESCRIPTIVE THAN 2021, https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf (last visited Dec. 12, 2022) [https://perma.cc/HFM4-Z8ZA] ("Similarly, we may support climate-related proposals that encourage companies to provide investors with comprehensive and accessible information on how their corporate political activities support their long-term strategy.").

[262] Andrew Swart & Patricia Muricy, *Trend 5: ESG: Corporate Governance Adding to Competitive Advantage: Emerging Risks Mandate Greater Oversight*, DELOITTE INSIGHTS (Feb. 1, 2021), https://www2.deloitte.com/us/en/insights/industry/mining-and-metals/tracking-the-trends/2021/strengthen-governance-and-human-rights-in-mining.html [https://perma.cc/WE5R-Y4QE] ("[I]nvestor demands for improved environmental performance have seen mining companies restructuring their portfolios and committing to ambitious carbon reduction programs.").

[263] *Id.* ("Good governance is often seen as a way to protect against downside risk, but it can also be seen as adding to competitive advantage. Companies with strong governance systems make themselves more attractive to investors given ESG pressure, strengthen their attractiveness to host governments and communities, and also help to attract some of the best talent.").

[264] *Id.*

[265] Caroline Flammer, Michael W. Toffel & Kala Viswanathan, *Shareholder Activism and Firms' Voluntary Disclosure of Climate Change Risks*, 42 STRATEGIC MGMT. J. 1850, 1874 (2021).

when brought by institutional shareholders.[266] These disclosures are also effective in motivating environmentally friendly behavior.[267]

With government regulation in flux and increasing shareholder attention on climate-related issues, companies would be wise to increase transparency in how they are preparing for potential disruptions caused by both the physical and transition risks associated with climate change.[268] Failing to do so puts corporations at risk because of the potential for 10b-5 actions to be filed for any misstatements and omissions, shareholder derivative suits for a board's failure of oversight, and shareholder proposals and proxy battles resulting in a board being replaced. Because of the ability of shareholders to take on a more important role in confronting corporations on climate-related risks, corporations would be well-served to prepare for these bottom-up efforts, especially at the board level. In the following Part we discuss how disclosure risks can be managed.

## III. MANAGING CLIMATE-RELATED RISKS

As should be clear, climate-related information is important to investors and there has been an enormous uptick in requests to corporations to provide GHG emission data, secure commitments to net zero targets, and to explain how they are managing climate change risks. While the SEC proposal rules are in flux, companies cannot afford to minimize the potential for shareholder action. Although governmental agencies do not have the resources to review every

[266] *Id.* ("We further find that environmental shareholder activism is particularly effective if it is initiated by institutional investors, and even more so if it is initiated by institutional investors that have a long-term horizon.").

[267] *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 188-96 (2008) (discussing how disclosure of information about energy use, chemical releases, and other environmental impacts can focus managerial or consumer attention on acts that would otherwise be invisible, and how such disclosures have reduced negative environmental impacts); Light, *supra* note 48, at 167 (discussing how disclosures can motivate behavior).

[268] *See* Stephen Kim Park, *Legal Strategy Disrupted: Managing Climate Change and Regulatory Transformation*, 58 AM. BUS. L.J. 711, 741-43 (2021) (suggesting a resilience-focused strategy to climate change and other disruption).

sustainability report or verify information in public filings,[269] the companies that continue to mislead the public or fail to divulge their climate-related risks could be subject to an onslaught of investor-driven action. Failure to act now could result in litigation[270] as well as financial[271] and reputational[272] harm. To help corporations modernize their strategy to address these risks, we next offer a series of recommendations.

### *A. Acknowledge Reality of Climate Change Risks*

First, to properly align corporate strategy with the risks presented by the top-down and investor-driven actions described herein, an

[269] In the future it is likely that artificial intelligence will be implemented to track and verify GHG emissions. *See generally* Jonathan Shieber, *CarbonChain is Using AI to Determine the Emissions Profile of the World's Biggest Polluters*, TECHCRUNCH (Aug. 21, 2020, 7:57 AM), https://techcrunch.com/2020/08/21/carbonchain-is-using-ai-to-determine-the-emissions-profile-of-the-worlds-biggest-polluters/ [https://perma.cc/NG2S-FMJZ] (describing how three data scientists created an AI-powered platform to track GHG emissions for commodity supply chains).

[270] *See generally* Wasim, *supra* note 139, at 1332-42 (explaining how allegations of securities fraud could result from failure to disclosue the effects of climate change on a corporation's operations and finances).

[271] *See generally* Gianni Guastella, Matteo Mazzarano, Stefano Pareglio & Anastasios Xepapadeas, *Climate Reputation Risk and Abnormal Returns in the Stock Markets: A Focus on Large Emitters*, 84 INT'L REV. FIN. ANALYSIS, Nov. 2022, at 1 ("Reputation risk is among the possible climate transition risks companies face, especially in emission-intensive industries. Failing to meet stakeholders' expectations about the contribution to climate goals might influence investors' strategies and produce financial damages."). The Council views climate-related financial risks as an emerging threat to the financial stability of the United States.

[272] *See* Peter A. Atkins, Marc S. Gerber & Kenton J. King, *Directors' Oversight Role Today: Increased Expectations, Responsibility and Accountability — A Macro View*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 10, 2021), https://corpgov.law.harvard.edu/2021/05/10/directors-oversight-role-today-increased-expectations-responsibility-and-accountability-a-macro-view/[https://perma.cc/2J2S-GYCP] (In addition, if a board is perceived to have failed in its oversight duties, can lead to "shareholders or other parties publishing negative public commentary regarding and rankings of the company and/or targeted directors; shareholders affirmatively proposing dissident directors in election contests, engaging in withhold vote campaigns targeted against specific directors or submitting shareholder proposals; and issue-specific entities or groups initiating protest activity, such as consumer boycotts."). *See generally* Swart & Muricy, *supra* note 262 (explaining how relegating ESG to a "backstage role" can result in a trust deficit and reputational damage).

organization first must acknowledge the reality of climate change as well as its contributions thereto. The erstwhile strategy of denial and obfuscation[273] is no longer a viable option, as the world has experienced fifteen climate disaster events with more than one billion dollars in losses already this year.[274] And as these events are reported, public concern grows, with sixty percent of Americans viewing climate change as a major threat to the well-being of the United States.[275]

This first step is most important, especially for the companies who have contributed most to global warming. When geographer Richard Heede studied emissions data from 1854 to 2010, he concluded that just ninety entities are responsible for two-thirds of global emissions of GHG.[276] Not surprisingly, most of the companies are in the fossil fuel industry.[277] The need for energy companies to acknowledge their role in climate change cannot be overstated. This could have a real impact as all of the key decision-makers from these companies "could all fit on a

[273] *See, e.g.*, JOHN COOK, GEOFFREY SUPRAN, STEPHAN LEWANDOWSKY, NAOMI ORESKES & ED MAIBACH, GEORGE MASON UNIV. CTR. CLIMATE CHANGE COMMC'N, AMERICA MISLED: HOW THE FOSSIL FUEL INDUSTRY DELIBERATELY MISLED AMERICANS ABOUT CLIMATE CHANGE (2019), https://www.climatechangecommunication.org/wp-content/uploads/2023/09/America_Misled.pdf [https://perma.cc/8AXK-9HBY] (explaining how the fossil fuel industry's disinformation campaign caused the current global warming crisis); Supran & Oreskes, *supra* note 176 (finding that the Exxon's climate change denial message to the public conflicted not only with the scientific community's knowledge but with the findings of ExxonMobil's own scientists based on a review of 187 climate change communications).

[274] *Billion-Dollar Weather and Climate Disasters*, NAT'L CTRS. FOR ENV'T. INFO., https://www.ncei.noaa.gov/access/billions/ (last visited Dec. 6, 2022) [https://perma.cc/HG2T-TPPC].

[275] Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate*, PEW RSCH. CTR. (June 23, 2020), https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/ [https://perma.cc/TZJ3-S6XW].

[276] Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATIC CHANGE 229, 238 (2014).

[277] Douglas Starr, *Just 90 Companies Are to Blame for Most Climate Change, This "Carbon Accountant" Says*, SCIENCE (Aug. 25, 2016), https://www.science.org/content/article/just-90-companies-are-blame-most-climate-change-carbon-accountant-says [https://perma.cc/YF5G-YAYN].

Greyhound bus or two."[278] The Department of Justice recently created an Office of Environmental Justice to target major polluters, especially those impacting low income, indigenous communities and communities of color.[279] However, almost every industry is impacted or will be impacted by climate change[280] and should not shirk their obligation to consider the impact of climate change on their operations. The next Section discusses the importance of corporate governance and how corporate boards could engage with the full spectrum of climate change risk.

### *B. Implement Governance Aligned with Climate Change Risks*

Second, a board must consider climate change risks to fulfill its corporate governance obligations. As discussed in Part II, courts in the "new *Caremark* era" have been more willing to scrutinize board oversight as a component of its duty of loyalty to the corporation. Failure to meet its duty of loyalty can subject directors to personal liability as Delaware law prohibits corporations from indemnifying board members for this breach.[281]

Illinois Law scholar, Cynthia Williams, has identified a plethora of physical, economic, and litigation climate change risks that companies face of which directors should be aware.[282] For companies with property in coastal areas or areas prone to drought, the physical risks of climate change are not just possible, but likely.[283] Other companies face economic risks as demand for their carbon-intensive products declines.[284] Fossil fuel companies are currently facing the most scrutiny

[278] Suzanne Goldenberg, *Just 90 Companies Caused Two-Thirds Of Man-Made Global Warming Emissions*, GUARDIAN (Nov. 20, 2013, 11:07 EST), https://www.theguardian.com/environment/2013/nov/20/90-companies-man-made-global-warming-emissions-climate-change [https://perma.cc/E2TT-TTCJ].

[279] Julia Kane Grist, *A New Office of Environmental Justice Is Announced*, GOV'T EXEC. (May 7, 2022), https://www.govexec.com/management/2022/05/new-office-environmental-justice-announced/366650/ [https://perma.cc/3M5J-8273] (explaining that these communities tend to be impacted the most).

[280] Williams, *Fiduciary Duties*, *supra* note 218, at 1885.

[281] DEL. CODE ANN. tit. 8, §102(b)(7)(i) (2022).

[282] Williams, *Fiduciary Duties*, *supra* note 218, at 1884.

[283] *See id.* at 1907.

[284] *Id.*

as they continue to be sued for their contributions to climate change and are the targets of proxy fights.[285] Separately, companies who are not delivering on their commitments to reduce emissions also face litigation risks.[286]

Legal compliance is always mission critical, but boards can identify additional mission critical risks by considering how severely the company's reputation would be harmed by failing to address a particular issue.[287] For some corporations, failure to attend to climate change could impact their ability to recruit talent, raise money, or retain customers.[288] Companies should prepare now for enhanced disclosures and take particular care to familiarize themselves with their obligations. This is especially true for multinational corporations who may be subject to the laws of numerous jurisdictions.

Heeding lessons from *Caremark* and its progeny as well as shareholder initiatives in the form of proposals and proxy battles, a corporate board should take care to be "reasonably informed" of its specific climate-related risks.[289] Based on the failures identified by the court in *Marchand*, a corporation could accomplish this by forming a board committee that oversees the identified climate risks, creating a system to report on these climate risks to the board, responding to climate risks that are reported, and regularly discussing the climate risks at board meetings.[290] All such actions should be documented in a company's

[285] *See supra* Parts II.A. and II.B.

[286] Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties*, 2022 COLUM. BUS. L. REV. 732, 742 [hereinafter *Mission Critical ESG*].

[287] *Id.* at 746.

[288] *Id.* at 740.

[289] SARAH BARKER, CYNTHIA WILLIAMS & ALEX COOPER, COMMONWEALTH CLIMATE & L. INITIATIVE, FIDUCIARY DUTIES AND CLIMATE CHANGE IN THE UNITED STATES 24 & nn.71–72 (2021), https://ccli.ubc.ca/wp-content/uploads/2021/12/Fiduciary-duties-and-climate-change-in-the-United-States.pdf [https://perma.cc/M4QL-TF9C].

[290] Allegations noted by the court included: (1) there was no board committee overseeing food safety; (2) there was no reporting system in place about food safety; (3) management knew about the growing listeria issues but did not report those issues to the board; and (4) the board minutes demonstrated that food safety was not discussed at its regular board meetings. These allegations "supporting a fair inference that no board-level system of monitoring or reporting on food safety existed." Marchand v. Barnhill, 212 A.3d 805, 809, 824 (Del. 2019).

minutes including how long the discussions lasted.[291] Further, appointing at least one board member with climate-credentials could help the board fulfill its oversight duties[292] and potentially circumvent a proxy fight with activist shareholders.[293] Blackrock has indicated that it wants its "portfolio companies to add at least one board member with climate credentials."[294] Additionally, boards may wish to form a separate committee dedicated to ESG matters rather than adding to the audit committee's workload.[295] The reporting system should include internal controls to accurately monitor and report on climate-related issues.

Failing in its oversight duties can subject board members to shareholder derivative suits. This is especially concerning given the birth of the new *Caremark* era in combination with the ability of shareholders to access corporate records due to a change in Delaware corporate law. In recent years, courts have been more liberal in interpreting Section 220 of the Delaware Corporate Code which permits shareholders to request corporate records to include a wider range of materials.[296] This is enormously beneficial to shareholders filing derivative suits under the *Caremark* standards in meeting their pleading obligations.

### C. *Disclose Climate Change Risks and Impacts*

Third, stating the obvious, publicly traded companies must, at a minimum, fulfill their existing disclosure obligations with respect to climate change risks. As discussed in Part I, to comply with the SEC's 2010 guidance, a registrant should disclose climate-related risks that

[291] Mabry et al., *supra* note 221.

[292] See *supra* Part II.B. for a discussion of the board's oversight duties.

[293] *See* Williams, *Fiduciary Duties*, *supra* note 218, at 1901.

[294] Pace & Trautman, *supra* note 24, at 838 (citing Williams, *Fiduciary Duties*, *supra* note 218, at 1900-01).

[295] With proposed cybersecurity disclosure rules, a board's ESG oversight responsibilities continue to expand. An already overworked audit committee may have difficulty keeping up with these new responsibilities. *See* Press Release, U.S. Sec. Exch. Comm'n., SEC Proposes Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies (Mar. 9, 2022), https://www.sec.gov/news/press-release/2022-39 [https://perma.cc/E6XT-3LDN].

[296] Shapira, *Mission Critical ESG*, *supra* note 286, at 1873.

have a material effect on its businesses.[297] However, research demonstrates that companies are not meeting these disclosure requirements.[298] According to that guidance, public companies should disclose, when material, the impacts of climate legislation and regulation, international accords relating to climate change, indirect consequences of regulation or business trends, as well as the potential physical impacts of climate change.[299]

As examples, companies who are subject to emissions caps would need to disclose the likely loss of revenue to investors.[300] Businesses who primarily produce carbon-intensive products that will likely be phased out should disclose the risks to their operations, as they will become casualties of the indirect consequences of regulation and trends. As for companies with significant property holdings in coastal areas or companies who insure such coastal properties, they would need to disclose the risk of loss as sea levels rise and weather events become more extreme.

Even when the risks are not material, it may behoove companies to voluntarily disclose climate risks, as companies that do "achieve a higher valuation post disclosure, suggesting that investors value to the voluntary disclosure of the firm's exposure to climate change risks."[301] By disclosing their climate change risks, companies signal their understanding of the nature of these risks and can assure investors that they have a plan to mitigate the risks.[302] Ultimately, the disclosure may strengthen relations with shareholders and enhance corporate reputation.[303]

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[297] SEC 2010 Climate Guidance, *supra* note 50, at6289.

[298] Rohan Hamden, *XDI's Research Shows Most Companies Underestimate and Under-Report the Costs of Climate Change*, CLIMATE & CAP. MEDIA (Mar. 22, 2022), https://www.climateandcapitalmedia.com/xdis-research-shows-most-companies-underestimate-and-under-report-the-costs-of-climate-change/ [https://perma.cc/27B2-NKUF].

[299] SEC 2010 Climate Guidance, *supra* note 50, at 6296-97; *see also* Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties*, 2020 UTAH L. REV. 313, 349.

[300] 87 Fed. Reg. at 21,464-65.

[301] Flammer et al., *supra* note 265, at 1853.

[302] *Id.* at 1872.

[303] *Id.*

Citing the Supreme Court's materiality definition, SEC Chair Gensler noted that climate change requests have been made by investors with over $130 trillion in assets.[304] These disclosures, of course, should be verified prior to publishing and any forward-looking statements should be accompanied by substantive and tailored cautionary language.[305] The 2020 SEC's guidance on MD&A in discussing non-financial disclosures, which specifically mentions environmental disclosures, made it clear that the company should provide adequate context for an investor to understand the metric and any additional information needed to "make the presentation of the metric, in light of the circumstances under which it is presented, not misleading."[306] It also suggests that the company consider whether there is an existing regulatory disclosure framework, such as GAAP, Regulation G, or Item 10 of Reg. S-K.[307]

[304] Statement, Gensler, *supra* note 121.

[305] To meet the safe harbor requirement under the PSLRA. *See* Securities Exchange Act of 1934, ch. 404, sec. 21E, §102(b), 109 Stat. 753 (1995) (codified as amended at 15 U.S.C.A. § 78u-5).

[306] Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 33-10751, Exchange Act Release No. 34-88094, 85 Fed. Reg. 10568, 10569 (Feb. 25, 2020) (to be codified at 17 C.F.R. pts. 211, 231, and 241), https://www.sec.gov/files/rules/interp/2020/33-10751.pdf [https://perma.cc/54PD-6HJ3] (The company should provide a narrative that enables investors to see a company "through the eyes of management," so these metrics should not deviate materially from metrics used to manage operations or make strategic decisions. Citing Rule 408(a) [17 CFR 230.408(a)] and Rule 12b-20 [17 CFR 240.12b-20]).

[307] *Id.* at 10569-70 (citing "Regulation G [17 CFR 244.100-244.102]. See also Item 10(e) of Regulation S-K. [17 CFR 229.10(e)]"). The guidance also states: "We would generally expect, based on the facts and circumstances, the following disclosures to accompany the metric:

- A clear definition of the metric and how it is calculated;
- A statement indicating the reasons why the metric provides useful information to investors; and
- A statement indicating how management uses the metric in managing or monitoring the performance of the business.

The company should also consider whether there are estimates or assumptions underlying the metric or its calculation, and whether disclosure of such items is necessary for the metric not to be materially misleading."

Even under a voluntary GHG regime, rates of emissions disclosure are increasing, as a study of 1,000 large companies found that fifty percent of the companies reported GHG emissions, up from forty percent from the prior year.[308] If the SEC's newly proposed rules become effective, any public company that identifies climate-related risks totaling one percent or higher of a total line item in its financial statements would be required to disclose GHG emissions from its operations and its use of electricity, steam, heat or cooling.[309] In addition, public companies who have set emissions targets would have to disclose GHG emissions from both upstream and downstream activities in its value chain.[310] The American Institute of Certified Public Accountants ("AICPA") released its Attestation Engagements on Sustainability Information Guide (Including Greenhouse Gas Emissions Information) providing guidelines for auditors on applying the attestation standards to sustainability reports or metrics.[311] Companies may consider expanding their auditor's role to include ESG Assurance as part of their contract.[312]

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[308] Diana Olick, *One-Third of the Largest US Companies Don't Disclose Any of Their Environmental Impact*, CNBC (Apr. 28, 2022, 2:58 PM EDT), https://www.cnbc.com/2022/04/28/one-third-of-largest-us-companies-dont-disclose-climate-impact.html [https://perma.cc/XN5K-FBM6].

[309] Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21374 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249). The SEC's newly proposed rules, though, depart from this materiality standard. *Proposed SEC Climate Disclosure Rule*, BLOOMBERG L. (Aug. 15, 2022), https://pro.bloomberglaw.com/brief/proposed-sec-climate-disclosure-rule/ [https://perma.cc/X25W-R6VW].

[310] A registrant would have to disclose Scope 3 GHG emissions and intensity "if material, or if the registrant has set a GHG emissions reduction target or goal that includes Scope 3 emissions." Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21345.

[311] *Sustainability Assurance*, AICPA, https://us.aicpa.org/interestareas/businessindustryandgovernment/resources/sustainability/sustainability-assurance-and-other-services (last visited Dec. 12, 2022) [https://perma.cc/5497-G3DG].

[312] Natalie Runyon, *The Growing Role of Audit in ESG Information Integrity and Assurance*, THOMSON REUTERS (Oct. 27, 2022), https://www.thomsonreuters.com/en-us/posts/tax-and-accounting/esg-audit-integrity/ [https://perma.cc/FXJ4-DB9C] ("ESG assurance obtained from a certified public accountant, 'involves the evaluation of processes, systems, and data, as appropriate, and then assessing the findings in order to support an opinion based on an examination [reasonable assurance] or conclusion based on a review [limited assurance],' according to the Center for Audit Quality.").

### *D. Live Up to Pledges*

Finally, and most importantly, companies must live up to their climate pledges. Already over 700 of the largest publicly traded companies have made commitments to be net zero by 2050 and two-thirds of S&P 500 companies have set emission reduction targets.[313] Research, however, indicates that most organizations are not on schedule to meet these commitments.[314] Also frustrating to the public and shareholders, companies' messaging about their commitments is inconsistent with the actual pledges they have made.[315] As discussed in Parts I and II, overpromising on and overstating climate efforts may lead to enforcement actions as well as consumer and shareholder litigation.[316]

To improve goodwill and reduce the legal risks relating to these pledges, companies must first align their PR, sustainability reports, and messaging with the substance of their pledges. Once the public statements accurately reflect the true commitments, the companies must undertake to operationalize their climate pledges. This step requires management to determine what is required to achieve the targets that have been set, establish key performance indicators ("KPIs"), and implement systems for reporting and tracking of the indicator data.[317] As with any organizational goal, executive compensation should then be aligned with achievement of the established KPIs.[318] Companies that align marketing, management, and

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313 John Goddard, *Why Companies Aren't Living Up to Their Climate Pledges*, HARV. BUS. REV. (Aug. 11, 2022), https://hbr.org/2022/08/why-companies-arent-living-up-to-their-climate-pledges [https://perma.cc/7VNL-WZB5].

314 Lance Lambert, *Only 11% of Companies are Hitting Their Emissions Goals*, FORTUNE (Nov. 1, 2021, 11:55 AM PDT), https://fortune.com/2021/11/01/companies-emissions-goals-climate-change-carbon-footprints/ [https://perma.cc/ASV2-KWHX] (reporting that 11% of companies have reduced their emissions in line with their targets).

315 DAY ET AL., *supra* note 32, at 5.

316 *See supra* Parts I, II.

317 Goddard, *supra* note 313; *see also* L.E.K. GLOB. CORP. SUSTAINABILITY SURV., PUTTING SUSTAINABILITY AT THE HEART OF STRATEGY 3 (2022), https://www.lek.com/sites/default/files/PDFs/LEK-global-corporate-sustainability-survey.pdf [https://perma.cc/2SSU-LTSD] (reporting that less than a third of companies have enterprise-level KPIs in place).

318 Goddard, *supra* note 313.

operations with their climate pledges will be better positioned to reap the benefits of their efforts.[319]

## CONCLUSION

As companies contemplate potential SEC disclosure rules and states ramp up decarbonization laws and enforcement actions based on public nuisance, physical harm, fraudulent disclosures, and violation of consumer protection laws, companies are on notice that they can no longer ignore the potential impact of climate change on their operations. In this article, we highlighted the uncertainty around regulatory action and the potential for increased shareholder action. With investors hungry to understand how the companies they invest in are preparing for physical and transition climate risks, corporations must first evaluate and then disclose their own exposure.

Much of what investors seek involves clear disclosures regarding GHG emissions, and an explanation of how the corporation is preparing for climate change, so that they can properly evaluate the continued viability of the companies they invest in. There is also interest in commitments to achieving net zero carbon emissions. While some have argued that none of this information is material, it is not for corporations to decide. What matters is what investors consider as important, and they have been quite clear that climate change data is vital to their investment decisions. With the lack of action from the federal government, uncertainty around the SEC's disclosure rules, and varying levels of state action, it appears that bottom-up investor driven action will be the driving force that holds corporations accountable.

## POSTSCRIPT

On March 28, 2024, the SEC's final rule for "The Enhancement and Standardization of Climate-Related Disclosures for Investors" came into effect.[320] The rule pertains to Part I.A of this Article. The Article was finalized prior to such date and addresses the immediately prior draft of the rule.

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[319] *Id.*

[320] Fed. Reg. 21668 (Mar. 28, 2024), (Mar. 6, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).