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The SEC's Ice-Cold Take on Climate Disclosure: Is the 2010 Interpretive Climate Guidance Working?

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THE SEC'S ICE-COLD TAKE ON CLIMATE DISCLOSURE: IS THE 2010 INTERPRETIVE CLIMATE GUIDANCE WORKING?

I. Introduction: The Heated Discussion on Climate Disclosure

In his opening remarks at the 2018 Austrian World Summit, António Guterres, Secretary-General of the United Nations, made a disturbing declaration — climate change represents an "existential threat" for all life on earth, especially humankind.[1] Guterres's remarks presented the stark reality of climate change while serving as an appeal to his international audience for increased global climate action.[2] From dramatically rising sea levels to natural disasters, the relentless forces of climate change will likely require the conjoined effort of government, business, and community to bring this existential threat to an end.[3]

Although environmental agencies, scientific coalitions, and green-minded entrepreneurs often get credit for leading the charge against climate change, an unexpected actor also belongs in this category: securities regulators.[4] Tasked with ensuring function-

1. United Nations, *Climate Change: An 'Existential Threat' to Humanity, UN Chief Warns Global Summit*, UN News (May 15, 2018), https://news.un.org/en/story/2018/05/1009782 (discussing Secretary-General's remarks at summit).

2. *Id.* (requesting help from financial community and local governments).

3. *See* U.S. Glob. Change Rsch. Program, Climate Science Special Report: Executive Summary 12-13 (D.J. Wuebbles et al. eds., 2017), https://science2017.globalchange.gov/downloads/CSSR2017_PRINT_Executive_Summary.pdf (summarizing Fourth National Climate Assessment report); Andrew Steer, *Business and Government Must Come Together for Strong Climate Action*, World Res. Inst. (Nov. 20, 2013), https://www.wri.org/insights/business-and-government-must-come-together-strong-climate-action (suggesting both private and public entities must support climate action).

4. *See, e.g.*, Laura Millan Lombrana et al., *How Europe's Small Businesses Are Fighting Climate Change*, Bloomberg (Oct. 22, 2020, 7:29 AM), https://www.bloomberg.com/news/articles/2020-10-21/how-europe-s-small-businesses-are-fighting-climate-change (discussing business initiatives to fund climate plans for small and medium-sized businesses); *see also What EPA Is Doing About Climate Change*, U.S. Env't Prot. Agency (Dec. 21, 2016), https://19january2017snapshot.epa.gov/climatechange/what-epa-doing-about-climate-change_.html (providing background on Environmental Protection Agency's climate change efforts); *The Coalition*, Climate & Clean Air Coal., https://www.ccacoalition.org/en/content/coalition (last visited Jan. 9, 2021) (describing international coalition of scientific institutions and businesses dedicated to protecting climate). Securities regulators are "[r]egulatory bodies . . . established by governments or other organizations to oversee the functioning and fairness of financial markets and the firms that engage in financial activity." Michael Schmidt, *Financial Regulators: Who They Are and What They Do*, Investopedia (Jan. 18, 2021), https://www.investopedia.com/articles/eco

ing markets, securities regulators across the globe wield immense power in their ability to provide investors with important information on a company's overall health — a power that could help direct more capital toward companies resilient to climate change.[5] Despite the potential use of regulatory power to combat climate change, the United States Securities and Exchange Commission (SEC) does not mandate comprehensive climate disclosure requirements that would provide investors with material information relating to the impact of climate on an investment.[6] Instead, a 2010 interpretive release governs the SEC's climate disclosure policy — a policy many claim to be ineffective.[7] Months after the SEC's 2020 amendments to modernize Regulation S-K — an update that refrained from providing concrete climate disclosure guidance — the question becomes whether the SEC should play a larger role in combating climate change by implementing mandatory disclosure requirements.[8]

This Comment examines the SEC's 2010 interpretive climate guidance and its effectiveness in producing materially important climate disclosure.[9] Section II provides background on both the materiality requirement for securities disclosure and the 2010 guidance.[10] Section III evaluates the 2010 guidance's effectiveness in producing material climate disclosure.[11] Section IV examines the

nomics/09/financial-regulatory-body.asp#:~:text=the%20SEC%20consists%20of%20five,among%20different%20levels%20of%20government (describing role of securities regulators).

5. *See* Mark Dwortzan, *Can Financial Disclosure of Climate Risk Accelerate Climate Action?*, MIT NEWS (Apr. 16, 2020), https://news.mit.edu/2020/can-financial-disclosure-climate-risk-accelerate-climate-action-0416 (suggesting financial disclosure can redirect capital to fight climate change). *See generally* Schmidt, *supra* note 4 (overviewing U.S. financial regulators and individual mandates).

6. *See* Public Statement by Allison Herren Lee, Commissioner, U.S. Sec. & Exch. Comm'n, *"Modernizing" Regulation S-K: Ignoring the Elephant in the Room* (Jan. 30, 2020), https://www.sec.gov/news/public-statement/lee-mda-2020-01-30 (suggesting current mandate is ineffective).

7. *See id.* (highlighting failure of 2010 guidance); *see also* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6295-97 (Feb. 8, 2010) [hereinafter SEC Guidance] (to be codified at 17 C.F.R. pts. 211, 231, 241) (summarizing SEC guidance regarding climate disclosure).

8. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 26, 2020), https://www.sec.gov/news/press-release/2020-192 (adopting rule amendments).

9. For a discussion of the effectiveness of the SEC's 2010 guidance, see *infra* notes 117-59 and accompanying text.

10. For a discussion of the SEC, the materiality standard, and the 2010 guidance, see *infra* notes 14-116 and accompanying text.

11. For a discussion of the effectiveness of the SEC's 2010 guidance, see *infra* notes 117-59 and accompanying text.

Taskforce on Climate-Related Financial Disclosures (TCFD) recommendations.[12] Lastly, Section V attempts to discern the future direction of the SEC's climate disclosure policy, with Section VI concluding the Comment.[13]

II. COOLING DOWN: A BACKGROUND TO THE SEC AND CLIMATE DISCLOSURE

Familiarization with the SEC's role in the securities industry and the application of the materiality standard in securities law is imperative to understanding securities disclosure.[14] Likewise, understanding Regulation S-K is necessary to discuss disclosure requirements and to provide a backdrop for the recent S-K amendments.[15] Regulation S-K is simultaneously essential to dissecting the SEC's 2010 guidance.[16]

A. The SEC and Materiality

In response to the 1929 stock market crash, which triggered a total lack of public trust in markets, Congress enacted the Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act).[17] The 1933 Act protects investors by requiring sellers to provide financial information surrounding publicly-offered securities and by forbidding fraud or misrepresentation in the sale of securities.[18] The 1934 Act created the SEC, a government regulatory agency whose primary purpose is to ensure individuals selling secur-

12. For a discussion of the TCFD framework, see *infra* notes 160-85 and accompanying text.

13. For a discussion of the future of SEC climate disclosure guidance, see *infra* notes 186-201 and accompanying text.

14. For a discussion of the SEC's creation and role, see *infra* notes 17-20 and accompanying text. For a discussion of the materiality standard, see *infra* notes 21-26 and accompanying text.

15. For a discussion of Regulation S-K disclosure requirements, see *infra* notes 27-48 and accompanying text.

16. For a discussion of the SEC's interpretive guidance on climate disclosure and Regulation S-K, see *infra* notes 71-116 and accompanying text.

17. *The Role of the SEC*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/role-sec (last visited Jan. 9, 2021) (reviewing creation of SEC); *see The Laws That Govern the Securities Industry*, INVESTOR.GOV [hereinafter *The Laws That Govern*], https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry (last visited Nov. 13, 2021) (explaining principal sources of securities legislation).

18. *See The Laws That Govern*, *supra* note 17 (stating goals of 1933 Act). The 1933 Act achieves these goals via a registration process for securities sold in the U.S. *Id.* (outlining registration process for domestic securities sales). Registration forces sellers to disclose financial information, resulting in informed decision-making when purchasing securities. *Id.* (explaining purpose of registration).

ities to the public disclose information surrounding possible investment risks.[19] Nearly one hundred years later, the SEC maintains its mission of guaranteeing investment information disclosure through a nationwide network of offices that implement and enforce disclosure rules based on federal securities law.[20]

A central tenet of U.S. securities law is the concept of materiality.[21] In the case of corporate disclosure, the SEC requires that entities issuing securities to the public disclose useful information that informs prospective investors of potential risks.[22] The issue with this requirement, however, is the difficulty in determining what information is considered useful and, therefore, necessary to disclose.[23]

In ferreting out useless information, legislators and, subsequently, the SEC introduced the concept of materiality into federal securities law in the late 1930s.[24] Information is material to an investment or shareholder voting decision if it enables the formation of inferences that would substantially impact a reasonable investor or shareholder's decision-making process.[25] Despite the existence

19. *See id.* (discussing SEC's purpose).

20. John H. Matheson, *Securities and Exchange Commission*, MIDDLE TEN. ST. U.: THE FIRST AMENDMENT ENCYCLOPEDIA, https://mtsu.edu/first-amendment/article/819/securities-and-exchange-commission (last visited Jan. 9, 2021) (describing modern-day SEC).

21. BUS. ROUNDTABLE, THE MATERIALITY STANDARD FOR PUBLIC COMPANY DISCLOSURE: MAINTAIN WHAT WORKS 1 (2015), https://s3.amazonaws.com/brt.org/archive/reports/BRT.The%20Materiality%20Standard%20for%20Public%20Company%20Disclosure.2015.10.29.pdf (introducing principle of materiality).

22. *Id.* (asserting federal securities law requirements); *see also* EVA SU, CONG. RSCH. SERV., IF11256, SEC SECURITIES DISCLOSURE: BACKGROUND AND POLICY ISSUES 1 (2019), https://crsreports.congress.gov/product/pdf/IF/IF11256 (discussing disclosure requirements).

23. *See* Yvonne Ching Ling Lee, *The Elusive Concept of "Materiality" Under U.S. Federal Securities Laws*, 40 WILLAMETTE L. REV. 661, 663-64 (2004) (arguing materiality is elusive concept); *see also* SU, *supra* note 22, at 2 (reviewing numerous policy issues associated with disclosure). Disclosure poses various issues ranging from the quality to the frequency of disclosure. *Id.* (listing disclosure policy issues). Over the last few years, policy debates surrounding disclosure have focused on information overload — concern over companies providing investors with too much information. *Id.* (suggesting correlation between rising disclosure requirements and investors' difficulty in finding pertinent information).

24. *See* BUS. ROUNDTABLE, *supra* note 21, at 3 (referencing introduction of materiality in securities law).

25. *See* Lee, *supra* note 23, at 662-64 (defining materiality standard); *see also* TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) (providing standard to measure materiality of investment information). Although the TSC standard attempts to clarify what information a corporation must disclose, critics argue the standard is somewhat elusive, balancing on the definition of a "reasonable investor" and the various contextual situations in which the standard may apply. *See* Lee, *supra* note 23, at 664, 663-65 (discussing issues with standard).

of a materiality standard, both the complexity of modern capital markets and the interconnectedness of the global economy lead many to believe the standard can only be applied retroactively.[26]

B. Regulation S-K Disclosure Requirements

The 1930s securities legislation not only introduced registration requirements, but also dictated the type of information companies must disclose to shareholders.[27] Of the many regulations the 1933 Act implemented, Regulations S-K and S-X deal primarily with corporate disclosure.[28] Regulation S-X governs the form and content of required financial statement disclosure.[29] In comparison, Regulation S-K focuses on a broad range of information such as proxy statements, periodic reports, and other filings required under the 1933 Act.[30]

Regulation S-K is separated into fourteen subparts governing securities disclosure requirements under the 1933 and 1934 Acts, as well as the Energy Policy and Conservation Act of 1975 (EPCA).[31] These subparts include disclosures related to mergers and acquisitions, asset-backed securities, and management.[32] Subparts requiring disclosure related to a registrant's oil production or mining activities are derived from the EPCA.[33]

By its nature, Regulation S-K presents the most advantageous vehicle for the institution of a standardized climate disclosure

26. *See* Roberta S. Karmel, *Disclosure Reform — The SEC Is Riding Off in Two Directions at Once*, 71 BUS. LAW. 781, 787, 789 (2016) (reviewing history of complex SEC-required disclosures); *see also* Lee, *supra* note 23 (suggesting difficulties exist in applying materiality standard).

27. ALEXANDER F. COHEN ET AL., LATHAM & WATKINS, FINANCIAL STATEMENT REQUIREMENTS IN U.S. SECURITIES OFFERINGS 1 (2021), https://www.lw.com/thoughtLeadership/us-financial-statements-guide (distinguishing Regulations S-K and S-X).

28. *Id.* (outlining 1933 Act's disclosure requirements).

29. *Id.* at 1-2 (differentiating S-X from S-K). *See generally* Form and Content of and Requirements for Financial Statements, 17 C.F.R. § 210 (2021) (specifying requirements for form and content of financial statements).

30. *Glossary: Regulation S-K*, THOMSON REUTERS (last visited Jan. 10, 2020) (describing S-K). *See generally* Standard Instructions for Filing Forms Under Securities Act of 1933, 17 C.F.R. § 229 (2021) (listing required disclosures under S-K).

31. 17 C.F.R. § 229 (providing subparts of S-K).

32. *Id.* §§ 229.400, 229.1000, 229.1100 (categorizing certain disclosure requirements).

33. *Id.* §§ 229.1200, 229.1300 (requiring disclosure of mining and oil producing operations); *see* Energy Policy and Conservation Act, 42 U.S.C. § 6383 (requiring SEC creation of disclosure policy related to energy production). *See generally* *Energy Policy and Conservation Act of 1975*, BALLOTPEDIA, https://ballotpedia.org/Energy_Policy_and_Conservation_Act_of_1975 (last visited Jan. 1, 2021) (providing background on EPCA).

framework.[34] Specifically, commentators and the SEC have identified four items in Regulation S-K most relevant to climate disclosure.[35] These items are: Item 101 (Description of Business); Item 103 (Legal Proceedings); Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations); and Item 105 (Risk Factors), formerly Item 503(c).[36]

Item 101 (Description of Business) requires registrants to disclose information and discuss the primary business behind the security for sale.[37] A description of business disclosure must include a discussion on the development of the business.[38] This discussion may cover a range of topics, including material changes to business strategy, information on revenue generating activities, or the impact of government regulation.[39]

Item 103 (Legal Proceedings) requires registrants to disclose material legal proceedings that extend beyond routine litigation.[40] The SEC suggests that bankruptcy, registrant directors or affiliates acting as an adverse party in litigation, or a proceeding material to the registrant's finances also represent material legal proceedings.[41] Item 103 describes proceedings that generally do not require disclosure, including damage suits not exceeding ten percent of assets and negligence claims considered an ordinary result of the registrant's business.[42]

Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A)) dictates that a registrant must provide managerial discussion relating to financial data

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34. Rick E. Hansen, *Climate Change Disclosure by SEC Registrants: Revisiting the SEC's 2010 Interpretive Release*, 6 BROOK. J. CORP. FIN. & COM. L. 487, 492 (2012) (examining SEC climate disclosure guidance).

35. SEC Guidance, *supra* note 7, at 6295 (referencing relevant S-K subparts); *see* Hansen, *supra* note 34, at 492-95 (discussing relevant S-K subparts).

36. SEC Guidance, *supra* note 7, at 6293-95 (reviewing relevant regulations).

37. Regulation S-K, Item 101, 17 C.F.R. § 229.101 (2021) (stating business description requirements).

38. *Practical Law Corporate & Securities, Registration Statement: Form S-1*, THOMSON REUTERS [hereinafter *Practical Law Corporate & Securities*] (last visited Jan. 16, 2021) (providing background on Item 101 disclosure).

39. *Id.* (suggesting various materials that can be discussed in Item 101 disclosure).

40. Regulation S-K, Item 103, 17 C.F.R. § 229.103 (2021) (calling for description of material legal proceedings); SEC Guidance, *supra* note 7, at 6293 (describing typical Item 103 disclosures).

41. 17 C.F.R. § 229.103(c) (listing potential material legal proceedings).

42. *Id.* § 229.103(b) (describing non-material legal proceedings).

typically found in financial statements and annual reports.[43] In Item 303, the SEC requires discussion of any information a registrant believes is necessary to understand the financial status of its business fully, as well as any "changes in financial condition and results of operations" from previous disclosures.[44] The SEC specifically dictates that businesses must disclose information illuminating topics such as a liquidity, capital resources, and operational results.[45]

Lastly, Item 105 (Risk Factors) requires that, wherever appropriate, a registrant discuss "material factors that make an investment in the registrant or offering speculative or risky."[46] The discussion must detail how each risk can potentially affect the registrant's securities.[47] Risks discussed should be specific to the registrant's business, and any risk deemed generic — as in it applies to a broad group of registrants — need not be discussed.[48]

C. SEC's 2010 Interpretive Guidance on Climate Change

Instead of creating a standardized disclosure regime, the SEC approached climate disclosure through interpretive guidance intended to clarify the type of disclosure that should naturally occur under existing regulations.[49] This interpretive guidance can be traced back to growing investor demand for climate disclosure in the early 2000s.[50] The SEC answered this demand in 2010 with interpretive guidance intended to provide investors with consistency in registrant reporting of climate-related material.[51]

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43. Regulation S-K, Item 303, 17 C.F.R. § 229.303 (2021) (providing information regarding required discussion relating to financial condition); Hansen, *supra* note 34, at 494 (summarizing Item 303).

44. 17 C.F.R. § 229.303(a) (describing requirements for full fiscal year disclosures).

45. *Id.* § 229.303(b)(1)-(5) (listing required information for disclosure under Item 303).

46. Regulation S-K, Item 105, 17 C.F.R. § 229.105(a) (2021) (requiring discussion of risk factors in disclosure).

47. *Id.* (discussing risk potential).

48. *Id.* (reviewing required risks to disclose under Item 105); *Practical Law Corporate & Securities*, *supra* note 38 (providing background on updated Risk Factors disclosure).

49. For a further discussion of the SEC's 2010 guidance, see *infra* notes 71-104 and accompanying text.

50. For a further discussion of investors pressuring the SEC, see *infra* notes 52-70 and accompanying text.

51. For a further discussion of the SEC's 2010 guidance, see *infra* notes 71-104 and accompanying text.

1. Demanding Change

By the mid-2000s, climate scientists warned the public of the inevitable, long-term consequences associated with climate change.[52] The scientific community argued that observable change in climate had already arrived in the form of rising sea levels and temperatures, as well as decreases in global snow and ice levels.[53] In 2007, the Intergovernmental Panel on Climate Change (IPCC) released the Fourth National Climate Assessment report for global policymakers.[54] This report echoed the bleak message of climate scientists everywhere — without mitigating action, climate change will continue with devastating consequences.[55]

Although the IPCC's report targeted global policy makers, its prediction of the planet's dire future resonated with a broader audience.[56] The science of climate change became impossible for business leaders and investors to ignore.[57] Thus, the mid-2000s presented a growing awareness among investors of the climate-related financial risks and opportunities businesses face across economic sectors and geographic borders.[58]

In 2007, a group of twenty-two institutional investors, state treasurers, and environmental activist groups submitted a petition to the SEC requesting climate risk disclosure guidance.[59] The petition argued that climate change produces concrete investment risks and opportunities of which registrants possess material information.[60] The petitioners asserted that despite registrants' awareness of this

52. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 2 (Rajendra K. Pachauri et al. eds., 2008), https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf (suggesting warming climate is unequivocal).

53. *Id.* (discussing observable impacts of changing climate over one-hundred-year period).

54. *See generally id.* (reporting changes in climate and suggesting actions to halt further change).

55. *Id.* at 19 (listing risks associated with changing climate).

56. PETITION FOR INTERPRETIVE GUIDANCE ON CLIMATE RISK DISCLOSURE, SEC FILE NO. 4-547, at 6 (Sept. 18, 2007) [hereinafter SEC PETITION], https://www.sec.gov/rules/petitions/2007/petn4-547.pdf (referencing IPCC's Fourth National Climate Assessment report).

57. *See generally id.* at 7 (suggesting impacts of climate change implicate business and investment).

58. *Id.* at 6-7 (asserting both risks and gains are associated with climate change).

59. *Id.* at 2-3 (stating reasons for petition); John M. Broder, *SEC Adds Climate Risk to Disclosure List*, N.Y. TIMES (Jan. 27, 2010), https://www.nytimes.com/2010/01/28/business/28sec.html (describing petitions influencing creation of climate risk disclosure guidance).

60. *See* SEC PETITION, *supra* note 56, at 2, 21 (describing climate risks registrants face).

information, disclosures failed to provide investors with relevant information surrounding climate risk.[61] Petitioners highlighted the increasing importance of this area to investors by emphasizing the climate risks public companies face, including changing regulatory, physical, and economic environments.[62] The petition, therefore, suggested that if the SEC is to uphold its mandate of ensuring securities market efficiency through disclosure, then it must address climate change.[63]

Instituting clear disclosure guidelines relating to climate is easier said than done.[64] From the mid-1990s to 2009, the SEC's track record for obtaining material climate-related information can only be described as dismal.[65] By 2008, just two years before the release of the interpretive guidance, only 5.5 percent of S&P 500 companies identified climate change as posing a strategic business risk in yearly disclosures.[66]

Despite the SEC's poor record of climate disclosure and the growing demand for material information, the Commission's decision to issue the interpretive guidance instead of amending Regulation S-K demonstrated internal hesitation to create definite disclosure requirements.[67] In a January 2010 meeting convened to discuss the guidance, Commissioners expressed concerns that the guidance would be interpreted as the SEC "taking a position" on climate change.[68] One Commissioner even questioned the productivity of the guidance, suggesting it only provides investors with useless information.[69] Notwithstanding these criticisms, Commissioners voted in favor of issuing the guidance.[70]

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61. *See id.* at 2, 45-48 (asserting lack of transparency regarding climate-related disclosure).

62. *Id.* at 21-22 (reviewing major climate risks).

63. *See id.* at 2 (suggesting disclosure leads to efficient markets).

64. *See generally* Hansen, *supra* note 34, at 508-10 (describing climate-related disclosure prior to 2010).

65. *See id.* at 509-10 (highlighting Form 10-K filings for S&P registrants between 1995 and 2008).

66. *Id.* (restating 2009 study on S&P registrants and climate disclosure); Kevin L. Doran & Elis L. Quinn, *Climate Change Risk Disclosure: A Sector by Sector Analysis of SEC 10-K Filings from 1995-2008*, 34 N.C. J. INT'L L. 721, 726 (2009) (studying climate-related disclosures prior to 2010).

67. *See SEC Issues Interpretive Guidance on Climate Change Disclosures*, GIBSON DUNN (Feb. 4, 2010), https://www.gibsondunn.com/sec-issues-interpretive-guidance-on-climate-change-disclosures/#_ftn2 (discussing Commissioners' deliberations on topic).

68. *Id.* (referencing dissenting Commissioners' worries).

69. *Id.* (highlighting Commissioner Troy Paredes's issue with guidance).

70. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Cli-

2. *Working With What We Have: The SEC's Interpretive Guidance*

Upon releasing the 2010 interpretive guidance, the SEC clarified that securities laws and regulations were not changing.[71] The interpretive guidance's introduction declares it is only meant to "assist companies in satisfying their disclosure obligations under the [existing] federal securities laws and regulations."[72] The guidance suggests, rather than requires, that registrants consider climate impacts when addressing Items 101, 103, 303, and 105 of Regulation S-K.[73] Although approaching climate disclosure in this manner might have been the most feasible option at the time, the SEC's failure to provide concrete regulations likely contributed to the lackluster performance of the interpretive guidance throughout the 2010s.[74]

In the interpretive guidance, the SEC first points to Item 101 as requiring climate-related disclosures.[75] The SEC suggests that Item 101 already requires companies to disclose the costs of complying with environmental laws.[76] Next, the SEC points to Item 103 disclosures.[77] The SEC again highlights environmental discussions, as Item 103 requires disclosure of litigation presenting potential monetary sanctions, expenditures, or deferred charges exceeding ten percent of a registrant's current assets.[78] The interpretive guidance then turns to Item 105.[79] Unlike the discussion of previous items, the SEC does not point to specific environmental requirements embedded in Item 105 concerning risk factors.[80]

Lastly, in its review of relevant Regulation S-K subparts, the interpretive guidance provides an in-depth discussion of the requirements under Item 303's MD&A section.[81] In this section, the SEC implies that the MD&A requirement is inherently flexible, compel-

mate Change (Jan. 27, 2010), https://www.sec.gov/news/press/2010/2010-15.htm (reviewing reasoning supporting passage of guidance).

71. *Id.* (stating guidance does not modify legal requirements).

72. SEC Guidance, *supra* note 7, at 6290 (summarizing guidance).

73. *See id.* at 6293-95 (explaining how S-K disclosure requirements cover climate-related disclosures).

74. For a further discussion of the impact of the SEC's 2010 guidance, see *infra* notes 117-59 and accompanying text.

75. SEC Guidance, *supra* note 7, at 6293 (discussing description of business relation to climate disclosure).

76. *Id.* (emphasizing Item 101 requirements).

77. *Id.* (referencing environmental disclosures under Item 101).

78. *Id.* at 6293-94 (reviewing Item 103).

79. *Id.* at 6294 (explaining Item 105).

80. *See* SEC Guidance, *supra* note 7, at 6294 (refraining from suggesting environmental requirements associated with Item 105).

81. *Id.* (discussing Item 303).

ling registrants to disclose new information based on evolving business trends.[82] The Commission notes that MD&A disclosure generally relates to liquidity and capital resources created through business operations and that registrants should work to identify and disclose material trends, events, or commitments that may impact these areas going forward.[83]

After identifying specific parts of Regulation S-K, the interpretive guidance attempts to link climate-related disclosures to these areas.[84] The SEC indicates that "[d]epending on the facts and circumstances of a particular registrant," the previously-summarized Regulation S-K items may require specific climate disclosures.[85] The Commission envisions four possible situations in which Regulation S-K triggers climate disclosure.[86]

First, the Commission connects the impact of possible environmental legislation and regulations to Items 101, 103, 105, and 303.[87] The SEC's primary argument is that relevant legislation or regulation has material financial impact on registrants.[88] From costs associated with "cap and trade systems" to changes surrounding profit and loss margins related to climate legislation or regulations, the SEC asserts Items 101, 103, 303, and 105 may all be implicated.[89]

Similarly, the interpretive guidance mentions the effects of international climate accords on registrants.[90] The SEC suggests that international accords related to climate may lead to disclosure requirements similar to those triggered by domestic legislation and regulation.[91] In an attempt to illustrate an international agreement impacting registrants across a broad spectrum of industries, the interpretive guidance references established international accords such as the Kyoto Protocol.[92]

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82. *Id.* (asserting MD&A naturally calls for climate disclosure).

83. *Id.* at 6294-95 (reviewing typical MD&A disclosures).

84. *Id.* (providing examples of climate-related information that may be required for disclosure).

85. SEC Guidance, *supra* note 7, at 6295 (introducing possible climate topics requiring disclosure).

86. *Id.* (highlighting possible disclosure requirements).

87. *See id.* at 6295-96 (explaining impacts of environmental legislation under S-K).

88. *Id.* (focusing SEC argument on legislation).

89. *Id.* at 6296 (listing consequences of regulation or legislation).

90. *See* SEC Guidance, *supra* note 7, at 6296 (introducing prospect of disclosure related to international accords).

91. *Id.* (suggesting impact of international treaties on business operations).

92. *Id.* (referencing Kyoto Protocol).

After identifying how domestic and international regulations may impact registrants' disclosure duties, the interpretive guidance adds that the indirect consequences of such regulation or development of business trends may lead to further disclosure requirements.[93] Here, the SEC emphasizes the broad market demand for new products and services or potential decreases in demand for older ones.[94] The interpretive guidance implies that due to climate change, there are both opportunities and risks in shifting market demands that investors should be aware of.[95] The SEC asserts that Items 303 and 105 could help to illuminate such opportunities.[96] The Commission also notes some business developments are so significant that Item 101 may warrant disclosure as well.[97] The interpretive guidance does not, however, provide an example of a climate-related scenario that could trigger a change in a registrant's core business, thereby prompting Item 101 disclosure.[98]

Lastly, the interpretive guidance focuses on how the physical impacts of climate change may trigger disclosure requirements.[99] Here, the SEC advances Item 105 as the appropriate vehicle for registrants and discusses the effects of severe weather on business operations.[100] In identifying the link between severe weather and business risk, the interpretive guidance references a Government Accountability Office (GAO) report proposing that the number of severe weather events brought on by climate change will continue to grow and present major risks to registrant property like factories and distribution centers.[101] The SEC encourages registrants to identify weather risks posed in individual regions where the registrant conducts business.[102] Such risks may include areas prone to coastal flooding and hurricanes, as well as areas more susceptible to

93. *Id.* (introducing indirect consequences of regulation or business trends as possible disclosure requirement).

94. *Id.* (highlighting how climate change influences demand).

95. SEC Guidance, *supra* note 7, at 6296 (suggesting both risks and opportunities are present).

96. *Id.* (listing S-K sections best suited to handle issues).

97. *Id.* (suggesting Item 101 requires disclosure).

98. *Id.* (noting Item 101 disclosure includes significant impact on business operations).

99. *Id.* at 6296-97 (introducing physical impacts of climate change requiring disclosure).

100. *See* SEC Guidance, *supra* note 7, at 6297 (referencing severe weather as major risk factor for businesses).

101. *Id.* (noting severe weather's impact on property).

102. *Id.* (listing potential weather risks based on business operation locations).

drought conditions.[103] Once identified, registrants should disclose the potential consequences of these weather-related events to investors.[104]

3. Regulation S-K Amendments

More than ten years after its publication, the SEC's 2010 guidance remains unchanged.[105] Over this period, however, the SEC actively updated other regulations.[106] In particular, the SEC adopted a slew of amendments to Regulation S-K at the end of 2020.[107]

These amendments target Regulation S-K subparts Items 101, 103, 303, and 105, which the 2010 guidance references as the most relevant regulations for increasing climate disclosure.[108] In a press release following the amendments' adoption, the SEC declared that modernization was the driving force behind the amendments.[109] These amendments introduced a variety of changes, particularly in MD&A requirements.[110] As the SEC has not introduced significant changes in nearly thirty years, the amendments present a major shift in disclosure requirements.[111]

One amendment to Item 101(c) requires registrants to expand evaluation and reporting of human capital.[112] The amendment re-

103. *Id.* (highlighting flooding and droughts).

104. *Id.* (asserting disclosure is next step after identifying material risks).

105. *See generally* SEC Guidance, *supra* note 7, at 6290-97 (providing last SEC-issued guidance relating to climate disclosure).

106. *See* Valerie Jacob et. al., *New Wave of Regulation S-K Amendments*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 22, 2020), https://corpgov.law.harvard.edu/2020/12/22/new-wave-of-regulation-s-k-amendments/ (reviewing recently-adopted S-K amendments).

107. *Id.* (citing S-K amendments adopted in November and August of 2020).

108. *See* Valerie Jacob et al., *SEC Changes Rules Affecting Risk Factors, Litigation and Business Description Disclosures by U.S. Public Companies*, FRESHFIELDS (Aug. 27, 2020), https://blog.freshfields.us/post/102ge4p/sec-changes-rules-affecting-risk-factors-litigation-and-business-description-dis (listing recent changes to S-K).

109. Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 26, 2020) [hereinafter SEC Adopts Rule Amendments], https://www.sec.gov/news/press-release/2020-192 (providing reasoning behind amendments).

110. Jacob et al., *supra* note 108 (discussing risk alterations to MD&A requirements).

111. *See* SEC Adopts Rule Amendments, *supra* note 109 (stating lack of update in nearly thirty years).

112. Elizabeth Bieber et al., *Practical Insights Into Incorporating New Human Capital Management Disclosures Into a Company's Annual Reports on Form 10-K*, FRESHFIELDS (Oct. 9, 2020), https://blog.freshfields.us/post/102ghzx/practical-insights-into-incorporating-new-human-capital-management-disclosures-in (discussing amendments to Item 101(c)).

quires registrants to provide a description of their human capital resources if doing so would give investors a better understanding of the registrants' business.[113] Interestingly, this topic gained traction with the SEC in a similar manner to that of late-2000s climate disclosure — by investor demand.[114] Institutional investors used open letters and other modes of public communication to draw SEC and registrant attention to human capital issues such as workplace diversity.[115] Unlike the previous demand for codified climate disclosure requirements, human capital disclosures found a way into the recent Regulation S-K amendments.[116]

III. THE COLD STREAK CONTINUES: ASSESSING THE EFFECTIVENESS OF THE 2010 GUIDANCE

Under the recent Regulation S-K amendments, the SEC's emphasis on enhancing human capital disclosures provides hope that other environmental, social, and governance (ESG) topics may one day have distinct disclosure requirements.[117] These amendments, however, also raise questions about the current state of climate disclosure; specifically, whether the 2010 guidance effectively produces material information related to climate that warrants completely bypassing the opportunity to create enhanced climate disclosure requirements via Regulation S-K's 2020 amendments.[118] An assessment of climate disclosure over the last ten years suggests the answer to that question is no.[119]

A. More of the Same: Another Decade of Inadequate Disclosure

Although socially-conscious investors and climate advocates initially celebrated the publication of the 2010 guidance, it appears to have brought little change to the disclosure landscape.[120] In a re-

113. *Id.* (summarizing amendment).

114. *See id.* (illustrating demand initiating SEC action).

115. *Id.* (referencing institutional investor work on human capital disclosure).

116. *Id.* (discussing human capital requirements); SEC Adopts Rule Amendments, *supra* note 109 (explaining human capital requirements).

117. *See* ASSET MGMT. ADVISORY COMM., U.S. SEC. & EXCH. COMM'N, RECOMMENDATIONS FOR ESG 1-2 (July 7, 2021), https://www.sec.gov/files/amac-recommendations-esg-subcommittee-070721.pdf (recommending ESG disclosure standards).

118. For a further discussion of the effectiveness of the SEC's 2010 guidance, see *infra* notes 120-59 and accompanying text.

119. For a further discussion of the investor reaction to and effectiveness of the interpretive guidance, see *infra* notes 120-59 and accompanying text.

120. *See* Alan R. Palmiter, Climate Change Disclosure: A Failed SEC Mandate 19-21 (Mar. 15, 2017) (unpublished manuscript), https://ssrn.com/abstract=2639181 (discussing immediate reaction to 2010 interpretive guidance).

port to Congress four years after the guidance's release, the SEC admitted no notable changes in the quality of climate-related disclosures had occurred since the guidance's inception.[121] In the same report, SEC senior staff suggest the 2010 guidance will not produce major shifts from generic climate disclosure that frequented 10-Ks prior to 2010.[122]

Despite the SEC's bleak review, there has been an increase in the quantity of climate disclosure since the interpretive guidance's publication.[123] Over the last ten years, the amount of climate-related disclosures has increased significantly.[124] In an attempt to measure yearly increases or decreases in climate-related disclosures, organizations like Ceres and the TCFD search hundreds of annual reports for references to climate.[125] In a 2020 survey of 10-K filings, sixty percent of surveyed registrants referenced climate change — a sixteen percent increase from 2010.[126] Although this increase seems impressive from the outside, the algorithms used to identify climate-related information search for extremely broad terms, such as "flooding" or "hurricane"; these terms are likely used in contexts outside of any material discussion involving climate and the registrant's business.[127] As such, forty percent of registrants surveyed evidently do not mention sufficiently broad topics to be flagged by the algorithms as discussing climate, let alone discussing the transitional and physical risks investors hope to see in 10-Ks.[128]

121. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-188, CLIMATE-RELATED RISKS: SEC HAS TAKEN STEPS TO CLARIFY DISCLOSURE REQUIREMENTS (2018), https://www.gao.gov/assets/gao-18-188.pdf (reviewing SEC's climate disclosure efforts).

122. *Id.* at 15 (discussing SEC's view of 2010 guidance).

123. *See* Parker Bolstad et al., *Flying Blind: What Do Investors Really Know About Climate Change Risks in the U.S. Equity and Municipal Debt Markets?* 3 (Brookings, Working Paper No. 67, 2020), https://www.brookings.edu/wp-content/uploads/2020/09/WP67_Victor-et-al.pdf (asserting large volume of climate disclosure).

124. *Id.* (stating volume of disclosures increased over last ten years).

125. *Id.* at 5 (describing climate disclosure documentation outside entities conducted).

126. *Id.* at 6 (depicting increase in registrants mentioning climate change in yearly filings).

127. *Id.* at 5 (explaining how Ceres and TCFD survey registrants).

128. Bolstad et al., *supra* note 123, at 5-6 (highlighting that even with algorithmic bias, forty percent of registrants fail to mention anything about climate); *see Climate Change: What Are the Risks to Financial Stability?*, BANK OF ENGLAND, https://www.bankofengland.co.uk/knowledgebank/climate-change-what-are-the-risks-to-financial-stability (last visited June 6, 2021) (describing physical and transitional risks). Physical risks represent weather events that impact industries or entire economies, whereas transition risks represent risks associated with shifts toward a carbon-free economy, such as regulatory impacts and industry-specific obsolescence. *Id.* (explaining different physical and transitional risks).

Although some stakeholders may celebrate the increased quantity of disclosure, this solves little without a similar increase in the quality of disclosure.[129] A majority of the disclosure released provides investors with generic, boilerplate information surrounding climate risk and opportunities.[130] Registrants consistently fail to disclose risks beyond general statements.[131] For example, Exxon Mobil's 2019 disclosure states that climate change "could make our products more expensive, less competitive, lengthen project implementation times, and reduce demand for hydrocarbons."[132]

An Ernst & Young report on climate disclosure highlights the difference between the quality and quantity of disclosure.[133] The report surveyed over 950 companies, assessing the quality of registrant disclosure based on governance, strategy, and risk management related to climate issues and finding that on average, the quality of climate disclosure graded at about twenty-seven percent.[134] The report asserts that although companies are increasingly discussing climate in their disclosures, they fail to reference climate change's impact on business operations.[135]

Furthermore, disclosure quality also appears to vary highly between industries.[136] Industries most exposed to the transitional risk associated with climate change — energy, banking, and transportation — provide the overall highest quality and quantity of disclosure.[137] Between 2009 and 2017, gas and electric utility companies' disclosures provided more than fifty percent of all climate risk dis-

129. *See* Bolstad et al., *supra* note 123, at 3-4 (stating disclosed information has no utility).

130. *See id.* (claiming climate disclosure remains generic); MADISON CONDON ET AL., ENV'T DEF. FUND, MANDATING DISCLOSURE OF CLIMATE-RELATED FINANCIAL RISK 2 (2021), https://policyintegrity.org/files/publications/Mandating_Climate_Risk_Financial_Disclosures.pdf (emphasizing poor quality of disclosures).

131. *See* Michael Panfil, *The SEC Should Require Companies to Disclose Climate Change Risk*, SLATE (Dec. 24, 2020, 12:30 PM), https://slate.com/technology/2020/12/sec-climate-change-financial-risk-disclosure.html (providing generic climate disclosures).

132. *Id.* (discussing generic disclosures).

133. Mathew Nelson, *How Can Climate Change Disclosures Protect Reputation and Value?*, EY (Apr. 27, 2020), https://www.ey.com/en_gl/climate-change-sustainability-services/how-can-climate-change-disclosures-protect-reputation-and-value (suggesting limited progress on climate-related disclosures).

134. *Id.* (discussing climate information quality).

135. *Id.* (concluding registrants are unsure how to discuss climate impact).

136. *See id.* (asserting certain industries provide higher-quality climate disclosures).

137. *Id.* (reviewing performance based on industry); *see* Bolstad et al., *supra* note 123, at 8 (depicting disclosure emphasis in select industries).

cussion.[138] Such high-quality disclosure is characteristic of these industries and is likely due to fossil fuel exposure, energy investment, and stringent government regulation.[139]

Even high-quality disclosure is silent on many important climate-related topics, like the physical risks of climate change.[140] No matter the industry, climate disclosures emphasize transition risks over physical risks.[141] Transition risks highlight change brought on by shifts to a low-carbon economy as well as changing government policies.[142] Although it is unclear why registrants seem to accentuate transition risks over physical risks, legislative pressures and litigation have subjected transition risks to a higher level of scrutiny.[143] With the growing physical impact of climate change, however, it is difficult to argue that transition risks pose any greater threat than physical risks.[144] Without providing an analysis of the physical climate risks a registrant faces, climate disclosures will remain filled with gaps and difficult to utilize.[145]

B. Keeping No One in Check: Minimal SEC Enforcement Perpetuates Lack of Disclosure

The SEC has done little to enforce disclosure of information the 2010 guidance intended to produce.[146] Within the first seven years of the guidance's publication, the SEC did not bring a single

138. *See* Bolstad et al., *supra* note 123, at 9 (graphing disclosure by industry for Russell 3000 companies).

139. Nelson, *supra* note 133 (explaining why certain industries are overrepresented).

140. *See* Bolstad et al., *supra* note 123, at 10-11 (dissecting disclosure quality problem).

141. *Id.* (questioning registrants' focus on transition risks); Nelson, *supra* note 133 (claiming physical risk disclosure falls behind transition risk disclosure).

142. Christian Bjørnæs, *Transitional Risk*, CICERO, https://cicero.oslo.no/en/CF-transitional-risk#:~:text=transitional%20Risk,disruptions%20to%20businesses%20or%20assets.&text=this%20has%20different%20angles%3A%20changes,carbon%20technologies%20and%20liability%20issues (last visited Feb. 12, 2021) (defining transitional risks).

143. Bolstad et al., *supra* note 123, at 11 (presenting possible explanation for focus on transition risks).

144. *See id.* (claiming physical risks are equally as important as transition risks).

145. Nelson, *supra* note 133 (asserting major problem with disclosures).

146. *See* Letter from Ceres to The Honorable Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n 1-2 (July 20, 2016), https://www.ceres.org/sites/default/files/Fact%20Sheets%20or%20misc%20files/Ceres%20Investor%20Letter%20SEC%20Concept%20Release%207-20-16.pdf (suggesting SEC's enforcement of interpretive guidance is insufficient and providing recommendations for improvement).

enforcement action to support its guidance.[147] The SEC also failed to monitor climate-related disclosure closely over this period.[148] In 2012, the SEC issued forty-nine comment letters to registrants requesting additional climate-related information.[149] That number dwindled to zero over the next three years.[150] According to Ceres, only six SEC comment letters mentioned climate or the 2010 guidance over the last four years.[151] This pales in comparison to the roughly 2,100 comment letters filed during the first nine months of 2018.[152]

In recent years, Trump-appointed Commissioners took aim at increased calls for climate disclosure, hindering SEC enforcement of the 2010 guidance.[153] Commissioner Hester Peirce publicly denounced calls for increased climate disclosure as "public shaming" of registrants based on "a frenzy of moral rectitude."[154] Although less virulent than Peirce, former SEC Chairman Jay Clayton pushed for continued use of the "principles-based" materiality standard, resisting calls for implementation of a standardized climate disclosure regime.[155]

Disgruntled with lackluster disclosure, investors have attempted to police climate disclosure only for the SEC to act as a

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147. *Id.* at 2 (referencing lack of SEC enforcement).

148. Condon et al., *supra* note 130, at 25 (citing lack of comment letters from SEC).

149. *Id.* (emphasizing number of SEC comment letters).

150. *Id.* (stating SEC did not issue comment letters in 2013).

151. VEENA RAMANI, CERES, ADDRESSING CLIMATE AS A SYSTEMIC RISK 31 (2020), https://www.ceres.org/sites/default/files/reports/2020-06/Financial%20Regulators%20FULL%20FINAL.pdf (reviewing number of letters issued between 2016 and 2020 and stating interpretive guidance "has been minimally enforced").

152. Jessica McKeon & Olga Usvyatsky, *A Look at Top SEC Comment Letter Issues in 2018*, AUDIT ANALYTICS (Dec. 4, 2018), https://blog.auditanalytics.com/a-look-at-top-sec-comment-letter-issues-in-2018/#:~:text=the%20number%20of%20SEC%20comment,first%20nine%20months%20of%202017 (providing background on comment letters SEC issued in 2018).

153. Condon, *supra* note 130, at 25 (reviewing issues with SEC enforcement of interpretive guidance).

154. *Id.* (stating Commissioner Peirce's view of climate disclosure).

155. *Id.* (providing Chairman Clayton's perspective on climate disclosure); *see* Spencer G. Feldman, *The SEC Proposes a Philosophical Shift to Principles-Based Disclosure in Response to Increasingly Irrelevant, Outdated and Immaterial Information in Public Filings*, MARTINDALE (Aug. 27, 2019), https://www.martindale.com/legal-news/article_olshan-frome-wolosky-llp_2519885.htm (explaining principles-based disclosure philosophy). Principles-based disclosure represents a system of disclosure requirements that do not follow a hardline rule, but provide "concepts" for a company to self-identify what should be disclosed. Feldman, *supra* (describing principles-based disclosure).

roadblock to that endeavor.[156] Shareholder climate resolutions increasingly ask companies to provide additional information on greenhouse gas reduction targets.[157] These attempts to coerce companies into providing climate-related disclosures frequently result in contested actions before the SEC.[158] The SEC, however, regularly rules to block and dismiss these resolutions entirely.[159]

IV. A HOT TAKE: THE TCFD RECOMMENDATIONS

Although the SEC's 2010 guidance is only seemingly successful in its ability to increase the amount of climate-related disclosure, the quantity of disclosure is only half the battle.[160] Luckily enough, the 2010 guidance is not the only available climate disclosure regime for U.S. public companies to follow.[161] In 2015, the Financial Stability Board (FSB) established the TCFD.[162] The TCFD was created after global leaders and central bankers were awakened to the reality that inadequate climate disclosure leaves investors in the dark.[163] The FSB tasked the TCFD with developing voluntary climate disclosure guidance that publicly traded companies could refer to in crafting their annual disclosures.[164]

In 2017, after two years of research and public engagement, the TCFD published eleven recommendations regarding climate disclosure.[165] The FSB intended that the recommendations apply

156. Condon, *supra* note 130, at 25 (suggesting SEC actively blocks investor climate proposals).

157. *See* David Hasemyer, *Investors Worried About Climate Change Run into New SEC Roadblocks*, INSIDE CLIMATE NEWS (May 3, 2019), https://insideclimatenews.org/news/03052019/shareholder-resolution-climate-change-sec-challenge-micromanage-trump/ (referencing investor proxy requests for climate disclosure).

158. *Id.* (stating almost two-thirds of resolutions energy and utility companies filed in 2019 were contested before SEC).

159. *Id.* (suggesting SEC has failed to aid investors with disclosure challenges).

160. For a further discussion of the SEC's 2010 guidance, see *supra* notes 49-104 and accompanying text.

161. For a discussion of the TCFD's climate disclosure recommendations, see *infra* notes 165-75 and accompanying text.

162. Condon, *supra* note 130, at 17 (discussing TCFD's creation).

163. TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, 2020 STATUS REPORT 2 (2020) [hereinafter TCFD STATUS REPORT], https://www.fsb.org/wp-content/uploads/P291020-1.pdf (noting TCFD's founding purpose).

164. *Id.* (emphasizing TCFD's purpose).

165. Press Release, Fin. Stability Bd., TCFD Report Finds Encouraging Progress on Climate-Related Financial Disclosure, but Also Need for Further Progress to Consider Financial Risks 2 (June 5, 2019) [hereinafter TCFD Report Finds Encouraging Progress], https://www.fsb.org/wp-content/uploads/R050619.pdf (highlighting 2017 rollout of TCFD Recommendations); *see* TASK FORCE ON CLI-

across varying industries and legal jurisdictions.[166] The TCFD built the recommendations around four "thematic areas" consisting of governance, strategy, risk management, and metrics and targets.[167] These thematic areas replicate the major operating aspects of publicly traded companies, with recommendations integrated in corresponding operational areas.[168]

The subsequent recommendations vary in scope.[169] Some recommendations are extremely broad, such as a recommendation under governance stating, "Describe the board's oversight of climate-related risks and opportunities."[170] Other recommendations are significantly more pointed, such as the recommendation suggesting that a registrant "[d]escribe the resilience of the organization's strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario."[171] Here, the TCFD specifically recommends that a registrant discuss how they will not only fare in global efforts to keep temperatures within 2°C of pre-industrial levels, but also how they plan to aid in that effort.[172] Such recommendations incorporate scenario analysis into registrant disclosure preparation.[173] Scenario analysis is designed to help registrants examine potential climate scenarios and assess how they might impact the registrant's business going forward.[174] The TCFD believes that incorporating forward-looking scenario analysis into disclosure recommendations enables registrants to provide investors with thoroughly analyzed climate disclosure.[175]

Although the 2017 recommendations report is more in-depth than the SEC's climate disclosure guidance, it is still unclear whether the TCFD recommendations are more effective in creating

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MATE-RELATED FIN. DISCLOSURES, RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 14 (2017) [hereinafter TCFD RECOMMENDATIONS], https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf (detailing recommendations for better communication of climate-related financial information).

166. TCFD Report Finds Encouraging Progress, *supra* note 165 (explaining eleven recommendations).

167. TCFD RECOMMENDATIONS, *supra* note 165 (describing thematic areas).

168. *Id.* at 13 (stating how recommendations tie into thematic areas).

169. *Id.* at 14 (presenting recommendations).

170. *Id.* (suggesting recommendations related to governance).

171. *Id.* (listing disclosure recommendations related to strategy).

172. TCFD RECOMMENDATIONS, *supra* note 165 at 14, 27 (integrating scenario analysis into recommendation).

173. *Id.* at 25 (overviewing scenario analysis).

174. *Id.* at 25-26 (expounding on scenario analysis).

175. *Id.* at 25 (stating purpose underlying scenario analysis).

material disclosure.[176] Similar to the 2010 guidance, the 2017 TCFD recommendations have not triggered substantial growth in the quality of climate-related disclosure.[177] In its 2020 status report, the TCFD declared that since the recommendations' 2017 inception, the number of companies using the eleven recommended disclosure areas increased by six percent.[178] The quantity increase, however, did not translate to a significant improvement in the quality of disclosure within financial filings.[179] The TCFD utilized artificial intelligence (AI) to research where companies were using the disclosure recommendations most, finding the recommendations were concentrated in sustainability reports and not official financial disclosures.[180] Unlike required financial filings, which are considered legally binding statements by a registrant, sustainability reporting is voluntary and meant to manage public perception of a company rather than provide material information to investors.[181]

Although companies use the recommendations to pad sustainability reports with TCFD terminology, worries surrounding business confidentiality and liability might be keeping registrants from incorporating the TCFD recommendations into financial disclosures.[182] In discussing recommendation implementation with companies, the TCFD notes an often-cited issue is the worry that scenario analysis might require disclosure of confidential business information.[183] Further, the TCFD study also noted that companies struggled in identifying the appropriate metrics to use in determining which information is relevant to investors.[184] To counter this

176. *Compare* TCFD RECOMMENDATIONS, *supra* note 165 (providing detailed suggestions regarding how registrants should approach climate disclosure), *with* SEC Guidance, *supra* note 7 (publishing broad guidance utilizing existing regulation).

177. *See* TCFD STATUS REPORT, *supra* note 163, at 4 (hinting quality of disclosure remains low).

178. *Id.* at 12 (suggesting increase of disclosure is related to recommendations).

179. *See id.* (stating more work is needed to increase climate-related disclosure).

180. *Id.* (noting companies apply majority of TCFD recommendations in sustainability reporting).

181. Chris Gaetano, *Rise of Sustainability Reporting Brings Questions of Motivation, Agenda*, NYSSCPA (Sept. 20, 2019), https://www.nysscpa.org/news/publications/the-trusted-professional/article/rise-of-sustainability-reporting-brings-questions-of-motivation-agenda (asserting hidden intentions fuel sustainability reporting).

182. TCFD STATUS REPORT, *supra* note 163, at 50 (citing confidentiality as issue in disclosure of material climate information).

183. *Id.* (highlighting fear of unnecessarily disclosing confidential business information).

184. *Id.* at 50-51 (discussing issues with metrics and targets).

issue, the TCFD merely notes that industries must develop their own methods to measure climate-related issues in order to support TCFD disclosure recommendations.[185]

V. THE FUTURE IS . . . COOLER? POSSIBLE MANDATORY CLIMATE DISCLOSURE UNDER THE BIDEN ADMINISTRATION

The TCFD recommendations' limited success indicates broader issues with climate disclosure beyond the SEC's principles-based guidance.[186] Whether the issue is registrants' failure to understand the impacts of climate change within their particular industries or the fear of public backlash linked with disclosure, it is imperative that the SEC identifies a proper catalyst to ensure financial disclosure is fully utilized in the fight against climate change.[187] After the SEC passed on an opportunity to create concrete disclosure requirements with the 2020 Regulation S-K amendments, however, there are significant doubts concerning the Commission's capability to tackle the climate disclosure problem moving forward.[188]

The recent change in presidential administration may provide hope for the future of climate disclosure efforts.[189] The Trump administration tirelessly targeted environmental regulation over the last four years.[190] In terms of investing and financial disclosure, the administration obstructed investors from seeking increased ESG disclosure and placed limitations on ESG investment strategies pursued by asset managers.[191] Now, however, with a newly inaugurated

185. *Id.* at 51 (suggesting industries must take lead on metrics and targets).

186. *See id.* at 4 (reviewing "success" of TCFD disclosure). For a further discussion of the SEC's 2010 climate guidance, see *supra* notes 49-104 and accompanying text.

187. *See* Gaetano, *supra* note 181 (suggesting purpose behind including information in sustainability reports but not financial disclosure); *see also* SEC PETITION, *supra* note 56, at 2 (referencing petition on importance of climate disclosure).

188. For a further discussion of the 2020 Regulation S-K Amendments, see *supra* notes 105-16.

189. For a further discussion of potential changes to climate disclosure under the Biden administration, see *infra* notes 191-201 and accompanying text.

190. *See generally* Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.*, N. Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html (reviewing Trump administration's impact on environmental regulation).

191. *See* Jessica DiNapolo & Ross Kerber, *Analysis: Sustainable Investing Advocates Hope for Friendlier U.S. Rules if Biden Wins*, REUTERS (Nov. 2, 2020), https://www.reuters.com/article/us-usa-election-biden-esg-analysis/analysis-sustainable-investing-advocates-hope-for-friendlier-u-s-rules-if-biden-wins-idUSKBN27I1K1 (examining environmental disclosure under Trump).

president accompanied by major personnel changes to key cabinet positions, investors are hoping to push climate disclosure in a more progressive direction.[192]

The reason for this optimism stems beyond the left's track record on climate disclosure.[193] During his run for the White House, then-candidate Biden openly pledged to implement mandatory disclosure of climate risks and carbon emissions data.[194] The Biden administration identified mandatory climate disclosure as a key tool to achieve the administration's goal of net-zero greenhouse gas emissions by 2050.[195] Although it remains unclear what a prescriptive SEC approach to climate disclosure will look like, the administration signaled in a January 2021 executive order that it will actively work to create a climate disclosure framework.[196] Due to the shift in SEC leadership composition to the ideological left, as well as presidential support for mandatory disclosure, law firms are now advising companies to prepare for new climate disclosure requirements in the near future.[197]

A possible approach to establishing mandatory climate disclosure, as seen by recent implementation in the United Kingdom, proposes that the SEC make TCFD disclosure recommendations mandatory.[198] A mandatory disclosure requirement would help

192. *See generally* Benjamin D. Stone, *During Biden Administration, SEC Will Require Climate Change Risk and ESG Disclosure*, NAT'L L. REV. (Dec. 29, 2020), https://www.natlawreview.com/article/during-biden-administration-sec-will-require-climate-change-risk-and-esg-disclosure (suggesting Biden administration looks to pursue better climate disclosure).

193. *Id.* (referencing major ESG and climate disclosure legislation proposed by Democrat-controlled Congress).

194. Esther Whieldon & Declan Harty, *Biden Plan to Make Companies Disclose Climate Risks Key to Decarbonization*, S&P GLOB. (Nov. 2, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/biden-plan-to-make-companies-disclose-climate-risks-key-to-decarbonization-60975902 (discussing President Biden's pledge to enhance climate disclosure).

195. *Id.* (suggesting 2050 goal is catalyst for mandatory climate disclosure).

196. Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7622 (Feb. 1, 2021) (recommending plan to combat climate change with disclosure).

197. *See* Bob Pisani, *What a Democrat-Controlled SEC Might Look Like and What it Would Mean for Markets*, CNBC (Nov. 12, 2020, 11:28 AM), https://www.cnbc.com/2020/11/11/what-a-democrat-controlled-sec-might-look-like-and-what-it-would-mean-for-markets.html (asserting Democrat-led SEC will create different regulatory environment). *See generally The Biden Administration: New Priorities in the Banking, Fintech and Derivatives Sectors*, GIBSON DUNN (Feb. 16, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/02/the-biden-administration-new-priorities-in-the-banking-fintech-and-derivatives-sectors.pdf (predicting disclosure trend under Biden administration).

198. Laura Tyson, *Joe Biden Must Take a Global Lead on Climate Risk Disclosure*, SUSTAINABILITY ACCT. STANDARDS BD. (Feb. 10, 2021), https://www.sasb.org/blog/joe-biden-must-take-a-global-lead-on-climate-risk-disclosure-financial-times/ (refer-

regulators produce consistent and comparable climate disclosure based on pre-established frameworks; all regulators would need to do is act as the enforcement mechanism.[199] Another suggested solution points to revisiting the 2010 guidance with the intention of updating and possibly building mandatory rules to support the guidance.[200] Regardless of which path the Biden administration takes concerning disclosure, enforcement is critical in ensuring companies produce material climate information.[201]

VI. CONCLUSION: DISCLOSING FOR A COOLER PLANET

Whatever the future of climate disclosure, regulators cannot rely on old formulas.[202] Ill-defined requirements, coupled with lacking regulatory enforcement, have contributed significantly to the stagnation of growth in quality climate disclosure.[203] Although voluntary regimes such as the TCFD and other ESG disclosure initiatives arguably provide a clearer pathway to material disclosure, the last decade suggests registrants may need more than the mere recommendations voluntary regimes provide.[204] Hopefully, the recent reshuffling in Washington, D.C. and growing investor demand will provide the proper stimulant for better climate disclosure.[205] Although disclosure itself may not solve climate change, the result-

encing recent U.K. actions involving TCFD disclosure); U.S. COMMODITY & FUTURES TRADING COMM'N, MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM 132-33 (2020), https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf (suggesting SEC incorporate TCFD recommendations into federal climate disclosure policy).

199. *See* U.S. COMMODITY & FUTURES TRADING COMM'N, *supra* note 198, at 132-33 (emphasizing TCFD disclosure principles and enforcement).

200. *Id.* (discussing revisiting 2010 guidance as possible solution).

201. *Id.* (referencing enforcement).

202. For a further discussion of the SEC's approach to climate disclosure, see *supra* notes 49-104 and accompanying text.

203. For a further discussion of the SEC's climate disclosure oversight, see *supra* notes 117-59 and accompanying text.

204. For a further discussion of the SEC's interpretive guidance, see *supra* notes 160-84 and accompanying text.

205. For a further discussion of investor demand, see *supra* notes 52-70 and accompanying text. For a further discussion of possible Biden administration changes, see *supra* notes 186-201 and accompanying text.

ing transparency undoubtedly creates a market that works to save the planet.[206]

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206. For a further discussion of the benefits of climate disclosure, see *supra* notes 4-5 and accompanying text.

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