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

Patrick Dunbar

Follow this and additional works at: https://digitalcommons.law.villanova.edu/elj

Part of the Administrative Law Commons, Banking and Finance Law Commons, Business Organizations Law Commons, Environmental Law Commons, Organizations Law Commons, and the Securities Law Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/elj/vol33/iss1/2

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
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-

2. Id. (requesting help from financial community and local governments).
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 economics/09/financial-regulatory-body.asp#:~:text=the%20SEC%20consists%20of%20five,among%20different%20levels%20of%20government (describing role of securities regulators).


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.
Is the 2010 Interpretive Climate Guidance Working?

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

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. Likewise, understanding Regulation S-K is necessary to discuss disclosure requirements and to provide a backdrop for the recent S-K amendments. Regulation S-K is simultaneously essential to dissecting the SEC’s 2010 guidance.

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). 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. 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.
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).
22. Id. (asserting federal securities law requirements); see also EVA SU, CONG. RSLCH. 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 standard.


28. Id. (outlining 1933 Act’s disclosure requirements).


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

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

framework. Specifically, commentators and the SEC have identified four items in Regulation S-K most relevant to climate disclosure. 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).

Item 101 (Description of Business) requires registrants to disclose information and discuss the primary business behind the security for sale. A description of business disclosure must include a discussion on the development of the business. 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.

Item 103 (Legal Proceedings) requires registrants to disclose material legal proceedings that extend beyond routine litigation. 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. 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.

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.

---

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).
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.\footnote{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).} 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.\footnote{17 C.F.R. § 229.303(a) (describing requirements for full fiscal year disclosures).} The SEC specifically dictates that businesses must disclose information illuminating topics such as a liquidity, capital resources, and operational results.\footnote{Id. § 229.303(b)(1)-(5) (listing required information for disclosure under Item 303).}

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.”\footnote{Regulation S-K, Item 105, 17 C.F.R. § 229.105(a) (2021) (requiring discussion of risk factors in disclosure).} The discussion must detail how each risk can potentially affect the registrant’s securities.\footnote{Id. (discussing risk potential).} 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.\footnote{Id. (reviewing required risks to disclose under Item 105); Practical Law Corporate & Securities, supra note 38 (providing background on updated Risk Factors disclosure).}

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.\footnote{For a further discussion of the SEC’s 2010 guidance, see infra notes 71-104 and accompanying text.} This interpretive guidance can be traced back to growing investor demand for climate disclosure in the early 2000s.\footnote{For a further discussion of investors pressuring the SEC, see infra notes 52-70 and accompanying text.} The SEC answered this demand in 2010 with interpretive guidance intended to provide investors with consistency in registrant reporting of climate-related material.\footnote{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

53. Id. (discussing observable impacts of changing climate over one-hundred-year period).
54. See generally id. at 6 (reporting changes in climate and suggesting actions to halt further change).
55. Id. at 19 (listing risks associated with changing climate).
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).
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. 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. 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.

Instituting clear disclosure guidelines relating to climate is easier said than done. From the mid-1990s to 2009, the SEC’s track record for obtaining material climate-related information can only be described as dismal. 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.

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. 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. One Commissioner even questioned the productivity of the guidance, suggesting it only provides investors with useless information. Notwithstanding these criticisms, Commissioners voted in favor of issuing the guidance.

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).
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. 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.” The guidance suggests, rather than requires, that registrants consider climate impacts when addressing Items 101, 103, 303, and 105 of Regulation S-K. 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.

In the interpretive guidance, the SEC first points to Item 101 as requiring climate-related disclosures. The SEC suggests that Item 101 already requires companies to disclose the costs of complying with environmental laws. Next, the SEC points to Item 103 disclosures. 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. The interpretive guidance then turns to Item 105. Unlike the discussion of previous items, the SEC does not point to specific environmental requirements embedded in Item 105 concerning risk factors.

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. In this section, the SEC implies that the MD&A requirement is inherently flexible, compel
ling registrants to disclose new information based on evolving business trends. 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.

After identifying specific parts of Regulation S-K, the interpretive guidance attempts to link climate-related disclosures to these areas. 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. The Commission envisions four possible situations in which Regulation S-K triggers climate disclosure.

First, the Commission connects the impact of possible environmental legislation and regulations to Items 101, 103, 105, and 303. The SEC’s primary argument is that relevant legislation or regulation has material financial impact on registrants. 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.

Similarly, the interpretive guidance mentions the effects of international climate accords on registrants. The SEC suggests that international accords related to climate may lead to disclosure requirements similar to those triggered by domestic legislation and regulation. 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.

---

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).
IS THE 2010 INTERPRETIVE CLIMATE GUIDANCE WORKING? 49

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 gui-
dance 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. 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.
factors-litigation-and-business-description-d (listing recent changes to S-K).
109. Press Release, U.S. Sec. & Exch. Comm’n, SEC Adopts Rule Amend-
ments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors
Under Regulation S-K (Aug. 26, 2020) [hereinafter SEC Adopts Rule Amend-
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 Cap-
tal Management Disclosures Into a Company’s Annual Reports on Form 10-K,
FRESHFIELDS (Oct. 9, 2020), https://blog.freshfields.us/post/102ghzx/practical-in-
sights-into-incorporating-new-human-capital-management-disclosures-in (discuss-
ing 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-
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. 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.

Despite the SEC’s bleak review, there has been an increase in the quantity of climate disclosure since the interpretive guidance’s publication. Over the last ten years, the amount of climate-related disclosures has increased significantly. 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. In a 2020 survey of 10-K filings, sixty percent of surveyed registrants referenced climate change — a sixteen percent increase from 2010. 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. 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.

122. Id. at 15 (discussing SEC’s view of 2010 guidance).
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. A majority of the disclosure released provides investors with generic, boilerplate information surrounding climate risk and opportunities. Registrants consistently fail to disclose risks beyond general statements. 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.”

An Ernst & Young report on climate disclosure highlights the difference between the quality and quantity of disclosure. 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. The report asserts that although companies are increasingly discussing climate in their disclosures, they fail to reference climate change’s impact on business operations.

Furthermore, disclosure quality also appears to vary highly between industries. Industries most exposed to the transitional risk associated with climate change — energy, banking, and transportation — provide the overall highest quality and quantity of disclosure. 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).
132. Id. (discussing generic 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).
IS THE 2010 INTERPRETIVE CLIMATE GUIDANCE WORKING?  53

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

In recent years, Trump-appointed Commissioners took aim at increased calls for climate disclosure, hindering SEC enforcement of the 2010 guidance. Commissioner Hester Peirce publicly denounced calls for increased climate disclosure as “public shaming” of registrants based on “a frenzy of moral rectitude.” 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.

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

---

147. Id. at 2 (referencing lack of SEC enforcement).
148. Id. at 25 (citing lack of comment letters from SEC).
149. Id. (emphasis on 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”).
153. Id. (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).
Shareholder climate resolutions increasingly ask companies to provide additional information on greenhouse gas reduction targets. These attempts to coerce companies into providing climate-related disclosures frequently result in contested actions before the SEC. The SEC, however, regularly rules to block and dismiss these resolutions entirely.

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. Luckily enough, the 2010 guidance is not the only available climate disclosure regime for U.S. public companies to follow. In 2015, the Financial Stability Board (FSB) established the TCFD. The TCFD was created after global leaders and central bankers were awakened to the reality that inadequate climate disclosure leaves investors in the dark. The FSB tasked the TCFD with developing voluntary climate disclosure guidance that publicly traded companies could refer to in crafting their annual disclosures.

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

---

156. Condon, supra note 130, at 25 (suggesting SEC actively blocks investor climate proposals).
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).
164. Id. (emphasizing TCFD’s purpose).
across varying industries and legal jurisdictions. The TCFD built the recommendations around four “thematic areas” consisting of governance, strategy, risk management, and metrics and targets. These thematic areas replicate the major operating aspects of publicly traded companies, with recommendations integrated in corresponding operational areas.

The subsequent recommendations vary in scope. Some recommendations are extremely broad, such as a recommendation under governance stating, “Describe the board’s oversight of climate-related risks and opportunities.” 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.” 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. Such recommendations incorporate scenario analysis into registrant disclosure preparation. Scenario analysis is designed to help registrants examine potential climate scenarios and assess how they might impact the registrant’s business going forward. The TCFD believes that incorporating forward-looking scenario analysis into disclosure recommendations enables registrants to provide investors with thoroughly analyzed climate disclosure.

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

---

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. Similar to the 2010 guidance, the 2017 TCFD recommendations have not triggered substantial growth in the quality of climate-related disclosure. 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. The quantity increase, however, did not translate to a significant improvement in the quality of disclosure within financial filings. 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. 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.

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. 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. Further, the TCFD study also noted that companies struggled in identifying the appropriate metrics to use in determining which information is relevant to investors. 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).
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.
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

---


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


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


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-
Is the 2010 Interpretive Climate Guidance Working? 61

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

Patrick Dunbar*

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

* J.D. Candidate, May 2022, Villanova University Charles Widger School of Law; B.A., Political Science, 2015, University of Massachusetts, Amherst. To my family and friends - thank you for the love and support.