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LES ÉDITIONS THÉMIS

Ongoing Challenges to U.S. Climate-related Disclosure

Thomas M. Madden and Gerlinde Berger-Walliser***

Les défis persistants de la divulgation d'informations liées au climat aux États-Unis

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Résumé

Le 12 mars 2024, la Securities and Exchange Commission (SEC) des États-Unis a voté l'adoption d'une version considérablement affaiblie des règles précédemment proposées dans le communiqué nº 33-11275 intitulé *The Enhancement and Standardization of Climate-Related Disclosures*

Abstract

The United States Securities and Exchange Commission voted to approve a substantially weakened version of previously proposed rules on March 12, 2024 in Release No. 33-11275, titled The Enhancement and Standardization of Climate-Related Disclosures for Investors – as was

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for Investors. Dans la semaine suivant ce vote, une série de recours contre ces règles finales a été déposée devant plusieurs cours d'appel à travers les États-Unis. Le 21 mars 2024, l'ensemble de ces recours a été regroupé devant la Cour d'appel du huitième circuit par une décision du United States Judicial Panel on Multidistrict Litigation, conformément à sa procédure de tirage au sort. Le 4 avril 2024, la SEC a émis une ordonnance suspendant l'application des règles finales, tout en soulignant clairement qu'elles relevaient pleinement de son pouvoir réglementaire et en réaffirmant son engagement à les défendre activement.

Cet article examine l'évolution de l'élaboration des règles de divulgation liées au climat de la SEC depuis ces événements, tout en retraçant leur origine dans le développement des pratiques de divulgation ESG issues des approches antérieures de la RSE. Il met également en lumière les lacunes des règles finales, qui ont été substantiellement affaiblies par rapport à la version initiale proposée.

Resumen

El 12 de marzo de 2024, la Comisión de Bolsa y Valores de los Estados Unidos (SEC, por sus siglas en inglés) aprobó una versión significativamente debilitada de las normas propuestas anteriormente en el comunicado nº 33-11275 titulado «The Enhancement and Standardization of Climate-Related Disclosures for Investors» (Mejora y estandarización de la información relacionada con el clima para los inversores). En la semana siguiente a esta votación, se interpusieron diversos recursos contra las normas definitivas ante varios tribunales de apelación de los Estados Unidos. El 21 de marzo de 2024, todos estos recursos se agruparon

the Proposing Release. Not more than a week after the Commission voted to approve the Final Rules, a host of challenges to them were filed in appellate courts across the United States. On March 21, 2024, all of the appellate challenges to the Final Rules were consolidated into the Eighth Circuit by order of the United States Judicial Panel on Multidistrict Litigation via its lottery process. Very shortly thereafter, on April 4, 2024, the SEC issued an order staying the Final Rules, pointedly noting that the Final Rules were soundly within its regulatory purview and committing itself to actively defending them.

This article addresses the ongoing development of the SEC's climate-related disclosure rulemaking in the ensuing time period while also tracing the origins of the Rules to developments in ESG reporting derived from preceding approaches to CSR. It also points to flaws in the Final Rules which were substantially weakened from the Proposed Rules.

Resumo

A Comissão de Valores Mobiliários dos Estados Unidos (SEC) aprovou uma versão substancialmente enfraquecida das regras previamente propostas em 12 de marco de 2024 no Comunicado No. 33-11275, intitulado O Aprimoramento e Padronização de Divulgações Relacionadas ao Clima para Investidores. Uma semana depois que a Comissão aprovou as Regras Finais, uma série de recursos contra elas foram protocolados em tribunais de apelação através dos Estados Unidos. Em 21 de marco de 2024 todos os recursos de apelação contra as Regras Finais foram consolidados no Oitavo Circuito por ordem do Painel Judiciário dos

ante la Corte de Apelación del Octavo Circuito, por decisión del Panel Judicial de Litigios Multidistritales de los Estados Unidos, de conformidad con su procedimiento de sorteo. El 4 de abril de 2024, la SEC emitió una orden suspendiendo la aplicación de las normas finales, al tiempo que dejaba claro que estas entraban plenamente dentro de su competencia reglamentaria y reafirmaba su compromiso de defenderlas activamente.

Este artículo analiza la evolución del proceso de elaboración de las normas de divulgación relacionadas con el clima de la SEC a partir de dichos acontecimientos, al tiempo que remonta su origen al desarrollo de las prácticas de divulgación ESG (ASG, Ambiental, Social y Gobernanza) derivadas de enfoques anteriores de la RSE (Responsabilidad social empresarial). Asimismo, pone de relieve las insuficiencias de las normas definitivas, que se han debilitado sustancialmente en comparación con la versión inicial propuesta.

Estados Unidos sobre Litigância em Múltiplos Distritos através de seu processo de loteria. Logo depois, em 4 de abril de 2024, a SEC emitiu uma ordem suspendendo as Regras Finais, declarando enfaticamente que as Regras Finais estavam plenamente dentro do seu âmbito regulatório e comprometendo-se a defendê-las ativamente.

Esse artigo examina a evolução das regras da SEC de divulgação relativas ao clima desde esses acontecimentos, rastreando sua origem no desenvolvimento das práticas de divulgação ESG derivadas das abordagens anteriores da RSE. Ele também aponta lacunas nas Regras Finais, que foram substancialmente enfraquecidas por comparação à versão inicialmente proposta.

摘要

美国证券交易委员会(SEC) 于2024年3月12投票通过了此前在题为《加强和标准化与气候相关的投资者信息披露》的第 33-11275 号公告，与之前的提案公告一样对此前提出的规则进行大幅削弱。在委员会投票批准最终规则后不到一周，针对这些规则的多项挑战在美国各地的上诉法院提起。2024年3月21日，所有对最终规则的上诉挑战通过美国多区诉讼司法小组的抽签程序合并至第八巡回法院。紧接着，在2024年4月4日，SEC发布了一项命令，暂停最终规则，并明确指出最终规则完全在其监管范围内，并承诺积极捍卫这些规则。

本文讨论了SEC气候相关披露规则制定的发展演变，同时追溯了这些规则的起源，认为其源于之前对企业社会责任（CSR）方法所衍生的环境、社会和治理（ESG）信息披露实践。它还指出了最终规则中的不足之处，这些规则与最初提案的版本相比已被大幅削弱。

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The advancement of climate-related corporate disclosure regulation in the United States has been in some form of active progress since at least 2020. The major development in such regulation was marked by the United States Securities and Exchange Commission's (SEC or Commission) proposal for mandatory climate-related reporting in Release No. 33-11042 (Proposing Release or Proposal), issued on May 11, 2022.[1] That Proposal was met with much criticism – including by way of over 24,000 comment letters (ranging from the highly oppositional to the greatly supportive).[2] This was part of a regular, though not regularly so voluminous, process in SEC and other administrative rulemaking in the U.S. structured to allow ample notice and an opportunity for affected parties to be heard so as to meet the demands of due process under the *Administrative Procedures Act* of 1946.[3]

Of course, many had been calling for SEC rulemaking on climate-related disclosure long before the Proposal and many were particularly critical of the SEC's focus on developing disclosure apparently to be limited to financially material information.[4] These criticisms came at a time when ESG (environmental, social and governance principles and standards) was becoming a new buzzword, albeit, in this context, very conflated with sustainability and environmental-oriented reporting, rather than more broadly inclusive reporting also covering additional social and governance matters.[5] Since that time, ESG has become increasingly politicized in U.S. partisan

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1 See *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Securities Act Release No. 33-11042, 17 CFR §§ 210, 229, 232, 239, and 249, 311-12 (May 11, 2022), online: <https://www.sec.gov/rules/proposed/2022/33-11042.pdf> (hereinafter "SEC Release No. 33-11042" or "Proposing Release" or the "Release").

2 Thomas M. Madden and Gerlinde Berger-Walliser, "Making Sense of ESG with the SEC", (2023) 25 *U. Pa. J. of Bus. Law* 927 at 951-961. (hereinafter "Making Sense").

3 *Administrative Procedure Act*, (2006)5 U.S.C. § 555 et seq.

4 See Ruth Jebe, "The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream", (2019) 56 *Am. Bus. L.J.* 645 at 647 (focusing criticism on the SEC's failure to expand its definition of materiality to include non-financial measures and attend to consequences to stakeholders); Cynthia M. Williams and Donna A. Nagy, "ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure", (2021) 99 *Tex. L. Rev.* 1453 at 1475-1481; Virginia Harper Ho, "Modernizing ESG Disclosure", 2022 *U. Ill. L. Rev.* 277 at 289 (criticizing SEC materiality limitations and comparing materiality definitions in various ESG reporting frameworks); Cynthia A. Williams, "The Securities and Exchange Commission and Corporate Social Transparency", (1999) 112 *Harv. L. Rev.* 1197 at 1201, 1238-1245, 1273-1298.

5 *Ibid.* See Making Sense, *supra* note 2 at 932.

battling.[6] The battle became particularly fraught over what became generally known as the SEC's naming rule, which is not the focus of this article.[7] The naming rule had to do with limitations on which mutual funds could call themselves ESG funds or the like.[8] While many have since perceived a growing anti-ESG backlash stemming from the naming rule together with the Proposed Rules and Final Rules, others have recently asserted that the backlash is actually overstated.[9]

In the midst of this partisan political tumult, the Commission voted to approve a substantially weakened version of the Proposed Rules on March 12, 2024 in Release No. 33-11275, *titled The Enhancement and Standardization of Climate-Related Disclosures for Investors* – as was the Proposing Release.[10] Tellingly, the Commission's vote was split along partisan lines, with Hester Peirce providing the most vocal opposition.[11] Among other criticisms, Peirce's dissenting statement decried the Final Rules as environmental regulation outside the scope of the Commissions' regulatory purview.[12] Versions of this criticism have been made repeatedly throughout the comment period of the Proposed Rules and have continued on through and past the adoption of the Final Rules and the quickly ensuing court challenges to them.

Not more than a week after the Commission voted to approve the Final Rules, a host of challenges to them were filed in appellate courts across the

6 The economist, "How ESG became part of America's culture wars", June 21, 2023, online: <https://www.economist.com/the-economist-explains/2023/06/21/how-esg-became-part-of-americas-culture-wars>.

7 *Investment Company Names*, Securities Act Release No. 33-11238, 17 CFR Parts 230, 232, 239, 270 and 274, online: <https://www.sec.gov/files/rules/final/2023/33-11238.pdf> (effective December 10, 2023) (setting what some have called the 80% rule in investment allocation for fund naming purposes).

8 *Ibid.*

9 Virginia Furness, "Anti-ESG backlash is overstated, JP Morgan exec says", *Reuters*, October 1, 2024, online: <https://www.reuters.com/sustainability/climate-energy/anti-esg-backlash-us-is-overstated-jpmorgan-exec-says-2024-10-01/>.

10 *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Securities Act Release No. 33-11275, 89 Fed. Reg. 21, 668 (Mar. 28, 2024) (hereinafter "Final Rules").

11 Hester Peirce, Commissioner, U.S. Securities & Exchange Commission, "We are NOT the Securities and Environment Commission – At Least Not Yet", Mar. 21, 2022, online: <https://bit.ly/3viMw7r>; George S. Georgiev, "The SEC's Climate Disclosure Rule: Critiquing the Critics", (2023) 50 *Rutgers L. Rec.* 101 at 105.

12 H. Peirce, *ibid*.

United States. First, a perennial fighter against regulation, the U.S. Chamber of Commerce, filed a petition challenging the Final Rules in the Fifth Circuit.[13] Additional anti-regulatory challenges to the Final Rules were filed in the Sixth, Eighth, and Eleventh Circuits.[14] Moreover, challenges seeking more robust regulation were filed in the Second Circuit and another in the D.C. Circuit.[15] (The petitions originally filed in the Second Circuit and D.C. Circuit have since been dropped.[16]) On March 21, 2024, all of the appellate challenges to the Final Rules were consolidated into the Eighth Circuit by order of the United States Judicial Panel on Multidistrict Litigation via its lottery process.[17] Very shortly thereafter, on April 4, 2024, the SEC issued an order staying the Final Rules.[18] In its order issuing the stay, the Commission pointedly noted that the Final Rules were soundly within its regulatory purview and committed itself to actively defending the Final Rules.[19]

This article addresses the ongoing development of the SEC's climate-related disclosure rulemaking. Part II discusses the foundational background of the SEC's Final Rules in ESG concepts and earlier notions of corporate social responsibility (CSR). Part III delves into the details of the Final Rules and their alteration, even in light of prior criticism of the Proposed Rules on which they are based. Part IV calls out the failure of the Final Rules to adequately address the paramount issue of accountability in climate-related corporate reporting. Part V concludes with a demand for

13 *Chamber of Commerce of the United States of America, et al. v. SEC*, 24-60109 (5th Cir. filed March 13, 2024).

14 *Ohio Bureau of Workers' Compensation, et al. v. SEC*, 24-3220 (6th Cir. filed March 20, 2024); *State of Iowa, et al. v. SEC*, 24-1552 (8th Cir. filed March 12, 2024); *State of West Virginian et al. v. SEC*, 24-10679 (11th Cir. filed March 6, 2024).

15 *Natural Resources Defense Council v. SEC*, 24-707 (2nd Cir. filed March 12, 2024); *Sierra Club, et al. v. SEC*, 24-1067 (D.C. Cir. filed March 13, 2024).

16 Motion to Dismiss Petition, *SEC v. Iowa*, 24-01522 (8th Cir. filed May 31, 2024).

17 See *ibid.* (the lottery process refers to the random assignment of the consolidated litigation to one of the circuit courts where challenges to the Final Rules were filed); *Petition for Review of an Order of the Securities & Exchange Commission*, *Texas Alliance of Energy Producers, et al. v. SEC,* 24-1626 (8th Cir. filed consolidated March 21, 2024); *In Re: Securities Exchange Commission, The Enhancement and Standardization of Climate-related Disclosures for Investor*, issued March 6, 2024, Consolidation Order, United States Judicial Panel on Multidistrict Litigation MCP No. 80 filed March 21, 2024 (hereinafter the "Consolidation Order").

18 *Order Issuing Stay*. *In the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors*, SEC Release No. 33-11280 (April 4, 2024).

19 *Ibid.*

U.S. courts to uphold the Final Rules even in the face of the challenges presently consolidated in the Eighth Circuit.

I. Origins and Limitations of Climate-related Reporting Regulation

The criticism of the rules mentioned above reflects a growing recognition of the inadequacy of financial disclosure to mitigate climate change.[20] This recognition has led some to outright reject the SEC's rule-making authority while others have criticized the SEC rules as an inadequate answer to corporate greenwashing and are calling for double-materiality standards following the European example instead.[21] We argue that albeit incremental, the SEC's rules are a step in the right direction. As we have explained in detail elsewhere, they are deeply rooted in a system of shareholder primacy that still permeates U.S. legal understanding of CSR and is reflected in the emergence and relative success of the ESG concept in the United States.[22] More far-reaching rules like the European Union's Corporate Social Responsibility Directive (CSRD) or Corporate Sustainability Due Diligence Directive (CSDDD) are based on stakeholder theory that is still a relatively new, although growing approach in U.S. legal literature and corporate strategy.[23] Legal approaches in a given country or region are intertwined with that region's understanding of CSR. This understanding evolves over time and is influenced by the socio-economic environment in which corporations operate.[24] As the following sections will illustrate, the SEC climate-related disclosure rules are a reflection of past and current understandings of CSR in the United States. It will require CSR to evolve from investor-oriented

20 *Supra* note 4 (and accompanying text).

21 See *supra* note 12 (and accompanying text) and generally, see Virginia Harper Ho, "Climate Disclosure Line-Drawing and Securities Regulation", (2023) 56 *UC Davis L. Rev*. 1875.

22 See generally, Making Sense, *supra* note 2.

23 Interestingly, the Harvard Business Review, in March 2024, in response to the so-called ESG backlash, published David M. Bersoff, Sandra J. Sucher, and Peter Tufano, "How Companies Should Weigh In on a Controversy", *Harv. Bus. Rev.,* Mar. 2024, online: <https://hbr.org/2024/03/how-companies-should-weigh-in-on-a-controversy> (indicating that business may be ahead of the legal development and ready to embrace stakeholder theory).

24 See generally, Gerlinde Berger-Walliser, "Comparative Capitalism, Contrasting American and European Systems", in Inara Scott (ed), *Sustainable Capitalism, Essential Work for the Anthropocene*, Salt Lake City, University of Utah Press, 2024 at 83.

notions of ESG to stakeholder oriented corporate purpose approaches for U.S. rulemaking to withstand current challenges and evolve.

A. Defining CSR and its relationship to corporate purpose

A vast scholarship has noted the difficulties in defining CSR.[25] Many traditional definitions emphasize the moral or ethical duties corporations have to society.[26] However, these definitions appear increasingly misplaced in an era in which regulators prescribe corporate duties that previously were considered voluntary ethical corporate behavior — such as attention to human rights due diligence, which is now mandated in the EU CSDDD.[27] In U.S. legal literature, CSR has generally been linked to discussions about corporate purpose that originated in the famous debate between law professors Adolf A. Berle and E. Merrick Dodd in the 1930s when corporations evolved from closely held private firms into modern public corporations owned by shareholders and operated by managers.[28] While Professor Berle argued for a broad fiduciary duty for corporate managers to act in the interest of a corporation's shareholders, Professor Dodd advocated that corporate managers owed a duty to act in the interest of society as a whole.[29] In the years that followed, the shareholder approach took over in the United States, while stakeholder theory became embedded in the economies of other jurisdictions, namely those of continental Europe.[30]

25 See Rosario Gonzales-Rodriguez *et al*., "The Social, Economic and Environmental Dimensions of Corporate Social Responsibility: The Role Played by Consumers and Potential Entrepreneurs", (2015) 24 *Int. Bus. Rev.* 836 at 838 (providing extensive review of variety of definitions of CSR). For a history of the evolution of the term, see Archie B. Carroll, "Corporate Social Responsibility: Evolution of a Definitional Construct", (1999) 38 *Bus Soc* 268.

26 In his widely cited normative model, Professor Archie Carroll defines CSR as a pyramid of economic, legal, ethical, and philanthropic social responsibilities that businesses should seek to fulfill: A. B. Carroll, *ibid.* at 289.

27 See generally, Gerlinde Berger-Walliser and Inara Scott, "Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening", (2018) 55 *Am. Bus. L.J.* 167.

28 See E. Merrick Dodd, Jr., "For Whom Are Corporate Managers Trustees?", (1932) 45 *Harv. L. Rev.* 1145 at 1148; Adolf A. Berle, Jr., "Corporate Powers as Powers in Trust", (1931) 44 *Harv. L. Rev.* 1049 at 1049; Adolf A. Berle, Jr., *The 20th Century Capitalist Revolution,* New York, Harcourt, Brace and Co, 1954 at169.

29 *Ibid.*

30 Scholars have argued that the U.S. shareholder approach is due to a unique American focus on property rights, individual ownership, and freedom of contract: Katherine

Still today, despite an increase in scholarly articles disputing a legally enforceable fiduciary duty for corporate managers to prioritize shareholders' over other stakeholders' interests, at least a cultural perception that it is the responsibility of business to increase profits of shareholders seems to prevail and is the basis for much of the opposition to the SEC's climate-related disclosure rules.[31] Even well-intentioned legal developments like the introduction of benefit corporation statutes in many U.S. states evidence how deeply rooted the idea of shareholder primacy remains in U.S. legal doctrine, as well as corporate culture. If it were generally accepted that a corporation may pursue other purposes than the maximization of profits, there would be no need for statutes that specifically authorize the pursuit of such corporate purpose.[32] As long as shareholder primacy prevails, more comprehensive CSR regulation will remain difficult to achieve in the U.S. context. The following section illustrates how the SEC disclosure rules are an ongoing expression of shareholder primacy on one hand, but also how CSR perceptions are evolving and may open the way to more comprehensive approaches in the future.

B. Shareholder primacy and stages of CSR

Against the backdrop of shareholder primacy, the rise, and at least temporary success, of ESG in the United States should not come as a surprise. ESG's basic premise is that primarily data-driven metrics help investors make better decisions about ESG risks and the value of a particular company.[33] As such, and before they were curtailed by the "ESG backlash"

V. Jackson, "Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis", (2011) 7 *Hastings Bus. L.J.* 309 at 313-314. For a comparison between the U.S. and European approach see also, generally, G. Berger-Walliser, *supra* note 24.

31 See G. Berger-Walliser and I. Scott, *supra* note 27 at 176 ("[A]t a minimum, there exists a cultural norm within the United States—and to a certain degree also in the UK market economy—that the responsibility of business is to increase the profits of shareholders, and that the interests of any other stakeholder groups must be subordinate to this goal." (citations omitted))

32 See G. Berger-Walliser and I. Scott, *ibid.* at 178 (comparing the U.S. style benefit corporation with European corporate forms for social enterprise).

33 See Thomas L. Hazen, "Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures", (2021) 23 *U PA J. Bus. L.* 740 at 745 (categorizing ESG "as a subcategory of CSR [that] uses a metric-driven format to measure a company's commitment to social responsibilities").

led by some state treasurers and attorneys general in the United States, ESG and related corporate disclosure was supported by big institutional investors as a means to "provide better risk-adjusted returns to investors."[34] Looking at it from this perspective, ESG as an instrument to manage risk and mandatory ESG disclosure is a welcome way to unify and make transparent what corporations are already reporting on a voluntary basis. Indeed, even before the advent of ESG, companies were using voluntary disclosure in an instrumental way to enhance shareholder value rather than a means to reduce their detrimental environmental impact. At worst, they were using it in greenwashing.[35] As such, ESG is nothing new. Rather, we see ESG as an iteration of strategic – or what we term instrumental – use of CSR.[36]

Strategic CSR can be traced back to the 1980s when strategy scholars began to link CSR, or what had largely been corporate philanthropy, to profitability and developed the notion of Corporate Social Performance (CSP) that places greater emphasis on outcomes and performance than earlier, mostly definitional, CSR iterations.[37] The "business case" for CSR was made and culminated in the use of CSR for competitive advantage in

[34] Larry Fink, "Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance", *BlackRock*, 2020, online: <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter>.

[35] See, e.g, Jason Czarnezki, Andrew Homan and Meghan Jeans, "Creating Order Amidst Food Eco-Label Chaos", (2015) 25 *Duke Envt'l L. & Pol'y F.* 281 (discussing the problem of sustainability related claims in labeling of food and responses to this as an early example of greenwashing); Silvia Ruiz-Blanco, Silvia Romero, and Belen Fernandez-Feijoo, "Green, blue or black, but washing–What company characteristics determine greenwashing?", (2022) 24 *Enviro. Dev. Sustain.* 4042 at 4042 (offering empirical research and concluding that "environmentally sensitive industries greenwash less than their counterparts in other industries, as well as companies following the GRI guidelines. Companies that issue a sustainability report and assure it greenwash less than those that do not."); John Lewis, "Corporate Social Responsibility/Sustainability Reporting among the Fortune Global 250: Greenwashing or Green Supply Chain?", (2016) 1 *Entrepreneurship, Bus. & Econ.* 347 (finding greenwashing among the majority of a sample of the Fortune Global 250 (FG250) primarily due to lacking detail and quantification in reporting). See also *Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088*, OJ, L 198/13, June 22, 2020.

[36] See Making Sense, *supra* note 2 at 937-43.

[37] *See* Archie B. Carroll, *supra* note 25 at 285-289 (defining CSP as "a more comprehensive theory under which CSR might be classified or subsumed").

the early 2000s.[38] Even the European Union endorsed what EU policy documents labeled "enlightened shareholder value," moving away from stakeholderism and the moral obligation that business owes to society inherent in earlier definitions of CSR towards the notion of "doing well by doing good."[39] The ESG concept and related ESG reporting are very much in line with the instrumental use of CSR, shifting the focus on investors' interest in transparency to effectively manage so-called ESG risks.[40]

However, at the same time that investors and companies have embraced ESG, scholars and regulators have become increasingly critical of corporate instrumental use of CSR or now ESG. The shift from voluntary to mandatory disclosure is but one example of this recent trend. To counterbalance the proliferation of strategic CSR, scholars have called for social "rectitude," i.e. an approach to CSR that "embodies the notion of moral correctness" in corporate actions and policy.[41] Others have issued calls to (re-) integrate ethical considerations into corporate decision making models to counter-balance instrumental use of CSR.[42] As business builds back from the disruption caused by recent crises like the Covid-19 pandemic and the war in Ukraine, many look for a renewed corporate purpose, which if taken mainstream, may open the way for even U.S. corporate legal doctrine to finally embrace stakeholder theory.[43]

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38 See generally Michael E. Porter and Mark R. Kramer, "Strategy & Society: The Link between Competitive Advantage and Corporate Social Responsibility", (2006) 84 *Harv. Bus. Rev.* 78.

39 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM/2011/0681 final, Oct. 25, 2011, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0681>. See G. Berger-Walliser and I. Scott, *supra* note 27 at 181 (stating the "European doctrine of 'enlightened shareholder value' imports Anglo-American concepts of shareholder primacy into formerly stakeholder-oriented EU member states") (citation omitted).

40 See Making Sense, *supra* note 2 at 943.

41 See generally, William C. Frederik, *Corporation be Good!: The Story of Corporate Social Responsibility*, Indianapolis, Dog Ear Publishing, 2006.

42 See, e.g., Thomas M. Madden, "Law and Strategy and Ethics?", (2019) 32 *Geo. J. L. Ethics* 181 (discussing law together with ethical implications as bound resources in the strategic project of achieving competitive advantage over rivals); Daniel Ostas and Gaston de los Reyes, "Aristotelian Decency as a Corrective for Compliance-Induced Environmental Racism", (2021) 34 *Geo. Env't L. Rev.* 33.

43 See generally, Virginia Munro, *CSR for Purpose, Shared Value and Deep Transformation. The New Responsibility,* Bingley, Emerald Publishing, 2020; Stuart Hart, *Beyond*

It is this evolution of CSR and its linkage to ESG, which forms the background against which the viability of the SEC climate-related disclosure rules and any CSR law-making must be assessed.

II. The SEC's Final Rules on Mandatory Climate-related Reporting

A. The long lead-up to the Final Rules

The Final Rules derive not simply from the current interest and controversy with ESG reporting, but from a long history of SEC rulemaking leading up to them. The most obvious precursor to the Proposal and subsequent Final Rules was the Commission's 2010 Climate Guidance, issued to respond to then-increasing climate-related reporting among issuers.[44] The 2010 Guidance sought to protect investors by instructing reporting companies and filers to address climate effects in existing parts of Reg. S-K[45] (generally governing qualitative disclosure).[46] This included discussing indirect and physical considerations in Reg. S-K's required MD&A (Management's Discussion & Analysis) and Risk Factors sections.[47] Moreover, the 2010 guidance was hardly the Commission's first look at climate-related regulation. The 2010 Guidance had been preceded by SEC discussion regarding environmental impact disclosure in MD&A going back as early as 1975.[48] This attention to climate-related disclosure regulation included

Shareholder Primacy: *Remaking Capitalism for a Sustainable Future*, Redwood City, Stanford University Press, 2024; I. Scott (ed), *supra* note 24.

44 *Commission Guidance Regarding Disclosures Related to Climate Change*, Securities Act Release No. 33-9106, at 2 (Feb. 8, 2010), online: <https://www.sec.gov/rules/interp/2010/33-9106.pdf> (hereinafter "2010 Climate Guidance") ("Many companies are providing information to their peers and to the public about their carbon footprints and efforts to reduce them.").

45 *Regulation S-K*: *Standard Instructions for Filing Forms Under Securities Act of 1933*, 17 CFR § 229.

46 2010 Climate Guidance, *supra* note 44.

47 2010 Climate Guidance, *ibid.* at 15-27 (MD&A includes management's general assessment of its business and market whereas as Risk Factors includes disclosures to inform investors as to particular volatility of pending developments that may impact corporate performance).

48 *Environmental and Social Disclosure*, SEC Release No. 33-5625, 40 *Fed. Reg.* 51656 (November 6, 1975) (explaining that the SEC has broad purview under the 1933 and 1934 Acts to regulate disclosure of information that is "necessary or appropriate in the

the SEC's express awareness of growing corporate reporting on climate-related issues based on third-party volitional standards or no standards at all.[49]

More recently, and more directly connected to the Final Rules, the Commission's Division of Enforcement established the Task Force on Climate and ESG Issues in March 2021— giving clear indication that the Commission was well aware of growing, broad-based reporting and had related concerns about its accuracy leading logically to the Proposed Rules Release.[50]

Indeed, beyond the SEC's own long history of awareness and growing regulatory address of increasing corporate reporting on climate-related matters is the SEC's express, deep reliance on the work of the Task Force on Climate Disclosure (TCFD).[51] This is addressed in the following subsection.

B. The TCFD Foundation to the Final Rules

Established by the Financial Stability Board (FSB) in 2009 by the Group of Twenty (G20) nations in response to the 2008 global financial crisis, the TCFD was created as an international working group to address climate-related concerns in business.[52] It was composed of internationally prominent business-people almost entirely from the financial sector; "including [those from] large banks, insurance companies, asset managers, pension funds, large non-financial companies, accounting and consulting firms, and credit rating agencies."[53] It was chaired by American business

public interest" or "to protect investors" which it found compatible with requiring disclosure consistent with the *National Environmental Policy Act* of 1969 (NEPA) under Nixon, preceding the formation of the Environmental Protection Agency (EPA) – though this is in no way cited to assert that the Final Rules are environmental regulation).

49 See Making Sense, *supra* note 2 at 41 (discussing in more details the SEC's long regulatory lead up the Proposal and the Final Rules.)

50 United States Securities and Exchange Commission, "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues", Press Release 2021-42, Mar. 4, 2021, online: <https://www.sec.gov/newsroom/press-releases/2021-42> (March 4, 2021).

51 SEC Release No. 33-11042 *supra* note 1 at 49 ("We have modeled the proposed disclosure rules in part on the TCFD disclosure framework."). See Financial Stability Board, "History of the FSB", online: <https://www.fsb-tcfd.org/about/>.

52 *Ibid.*

53 Task Force on Climate-related Financial Disclosures (TCFD), *Recommendations of the Task Force on Climate-related Financial Disclosures*, Final Report, June

mogul and former New York City Mayor, Michael Bloomberg. Its mandate was to encourage reporting companies to evaluate the effects of climate change on their businesses and to include that information in their reporting.[54] The work of the Task Force was to go forward to produce a volitional climate-related reporting framework that would result in consistent reporting that investors and insurers could rely on for decision-making.[55] It did so, creating a four-part scheme; (i) governance, (ii) strategy, (iii) risk management, and (iv) metrics and targets.[56]

The categories more specifically were broken down as follows. Governance was to promote disclosure of both board level and c-suite management level attention to climate-related risks and opportunities.[57] Strategy was to cover disclosure of actual and potential climate impacts (again, risks and strategies) on business strategy, financial planning, and resilience in the short, medium, and long term.[58] Risk management was intended to bring about discussion of the processes by which a reporting company identifies and assesses climate-related risks.[59] Metrics and targets was to focus on calculation and disclosure of Scopes 1, 2, and 3 greenhouse gas (GHG) emissions.[60]

Similarly, and very intentionally and explicitly, the Commission followed this framework and proposed rules that required disclosure on each of these parts both on a principles-basis and a line-item basis, making multiple additions on Reg. S-K and Reg S-X.[61]

The Commission was explicit in adopting the TCFD framework as the basis for the Proposed Rules and in clarifying that its motivation for the

2017, at iii, online: <https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf> (hereinafter "TCFD Final Report").

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 See Making Sense, *supra* note 2 at 956-964 (offering detailed discussion on the principles versus line-item disclosure debate and supporting the combination characterizing the Proposed Rules, giving particular attention and supporting to the need for GHG metrics akin to other requirements of Reg. S-X (*Application of Regulation S-X,* 17 CFR § 210) financial reporting).

pending regulation was chiefly to address the confusing mix of large-scale corporate climate-related reporting made on varied volitional guidance or no guidance at all.[62] The growth of ESG or climate-related reporting has only continued since the Proposed Rules Release, Part III C., offers further discussion on the scope of climate-related reporting under the Final Rules.

C. Will the Final Rules survive?

The Final Rules challenges that have been consolidated into the Eighth Circuit are real and predicting their outcome is likely foolhardy. At the time of this writing, the bases for the challenges are named in a number of amicus briefs filed in support of the petitioners seeking to kill the Final Rules. They include a brief from a group of finance and law professors led by Lawrence Cunningham; the same group that offered extensive criticism during the comment period for the Proposed Rules.[63] The Cunningham group makes arguments, *inter alia*, that the Final Rules are radically outside the SEC's purview and go far beyond the Commission's mandate to protect investors in order to meet the demands of climate activist interest groups.[64]

Another amicus brief in support of the challengers, filed by the Hamilton Lincoln Law Institute, claims that the Final Rules "exceed" the SEC's mission and fall within the purview of the Environmental Protection Agency (EPA).[65] Another amicus brief coming from certain Republican members of Congress argues that the Final Rules improperly require disclosure of

[62] SEC Release No. 33-11042, *supra* note 1 at 304 ("We anticipate the proposed rules will give rise to several benefits *by strengthening investor protection*, improving market efficiency, and facilitating capital formation. The primary benefit is that investors would have access to more consistent, comparable, and reliable disclosures with respect to registrants' climate-related risks, which is expected to enable investors to make more informed investment or voting decisions.")

[63] *Brief of Amici Curiae Law and Finance Professors in Support of Petitioners*, *Texas Alliance of Energy Producers, et al. v. SEC*, No. 24-1626 (8th Cir. filed March 21, 2024) (note that the Cunningham group refers to the Final Rules and Proposed Rules as the "Climate Rule" – this nomenclature itself constituting a bit of a distortion) (hereinafter "Cunningham Amicus"). See also Lawrence A. Cunningham et. al., *Proposal on Climate-Related Disclosures for Investors*, Apr. 25, 2022, at 3, online: <https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf> (hereinafter "Cunningham Letter").

[64] *Ibid.*

[65] *Brief of Amicus Curiae Hamilton Lincoln Law Institute in Support of Petitioners, Texas Alliance of Energy Producers, et al. v. SEC*, No. 24-1626 at 2 (8th Cir. filed March 21, 2024).

"immaterial" information that will barrage and confuse the investing public.[66] The notion expounded here, however inaccurate, is a familiar one – that non-financial material disclosure is beyond the scope of SEC regulation.[67]

A group known as Advancing American Freedom filed another amicus brief in support of the Petitioners.[68] That group's argument centers on the claim that the Commission has violated the separation of powers doctrine in acting with legislative powers to promulgate the Final Rules, while the Commission is part of the executive branch which has no such powers.[69]

Still more amicus briefs in support of Petitioners came from the states of Florida and Kansas,[70] the Business Roundtable,[71] the Buckeye Institute,[72] the American Chemistry Council,[73] and Americans for Prosperity.[74] In sum, these briefs together primarily offer variations of the central arguments that the Final Rules (i) are outside the scope of the SEC's regulatory purview and (ii) improperly require disclosure of information that is not financially material to investors. Certain of the briefs also offer secondary arguments on compelled speech and nondelegation.

In addition to these primary and secondary arguments, and perhaps most poignantly, several briefs raise the developing major questions doctrine and its application to the challenges to the Final Rules as the new U.S. federal standard of administrative rule-making review, discussed further. Indeed, at the time of this writing, the apparently changing standard of judicial review of administrative rule making and interpretation in the U.S.

66 *Brief of Certain Members of Congress as Amici Curiae in Support of Petitioners*, *Texas Alliance of Energy Producers, et al. v. SEC*, No. 24-1626 (8th Cir. filed March 21, 2024).

67 *Ibid.*

68 *Brief of Advancing American Freedom, Inc. as Amicus Curiae in Support of Petitioners, State of Iowa et al. v. SEC*, No. 24-1626 (8th Cir. filed March 21, 2024).

69 *Ibid.*

70 *Brief of Florida and Kansas as Amicus Curiae in Support of Petitioners, Texas Alliance of Energy Producers, et al. v. SEC*, No. 24-1626 (8th Cir. filed March 21, 2024).

71 *Brief of Amicus Curiae Business Roundtable in Support of Petitioners, Texas Alliance of Energy Producers, et al. v. SEC*, No. 24-1626 (8th Cir. filed March 21, 2024).

72 *Brief of The Buckeye Institute as Amicus Curiae in Support of Petitioners, State of Iowa, et al. v. SEC*, No. 24-1626 (8th Cir. filed March 21, 2024).

73 *Brief of American Chemistry Council as Amicus Curiae in Support of Petitioners, State of Iowa et al. v. SEC*, No. 24-1626 (8th Cir. filed March 21, 2024).

74 *Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioners, Texas Alliance of Energy Producers, et al. v. SEC*, No. 24-1626 (8th Cir. filed March 21, 2024).

generally has left in doubt exactly on what basis the Eighth Circuit will assess whether to uphold the Final Rules. Several of the briefs supporting Petitioners challenges to the Final Rules assert that the newly crafted major questions doctrine should apply to the Eighth Circuit's consideration of the Final Rules challenges. Indeed, very recent U.S. Supreme Court decisions have now cast doubt on the prior forty-year precedent of *Chevron*[75] deference-based review of administrative rulemaking.[76]

Under *Chevron*, when issues arose in their areas of subject matter expertise, unless directly addressed by Congress and unless agencies were arbitrary and capricious, their reasonable interpretation or promulgation addressing gaps and ambiguities would stand.[77] In *West Virginia v. EPA*[78] and *Biden v. Nebraska*[79], the US Supreme Court appears to have constructed a major questions doctrine that will now put the Court in the role of interpreting gaps and ambiguities in administrative rulemaking. These recent cases appear to construct a newly developing major questions doctrine supplanting *Chevron* deference. Under this would-be doctrine, where the subject matter of administrative rulemaking or interpretation is regarded as economically or policy-wise important, rather than reasonably deferring to agencies unless apparent gaps and ambiguities have been clearly addressed by Congress via enabling legislation or other Congressional directive, the Court has now put itself in the place of resolving any such gap or ambiguity.[80]

Though this potentially unsettled alteration in the mechanics of the judicial review of administrative rulemaking might lead one to believe that

75 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

76 See generally, Daniel E. Walters, "The Major Questions Doctrine at the Boundaries of Interpretive Law", (2024) 109 *Iowa L. Rev.* 465 (framing the major questions doctrine as historically an exception to *Chevron* deference test and discussing the Court's recent conversion of the test to a "clear statement rule" in *West Virginia* and *Biden*) and Daniel E. Walters, "Four Futures of Chevron Deference", (2024) 31 *Geo. Mason L. Rev.* 635 at 638 (providing more background on *Chevron* generally and proposing an explanatory model on judicial decision-making driven chiefly by policy preferences in a political context for the Court's creation and use of the doctrine and its interplay with judicial interpretation and administrative policymaking).

77 *Chevron*, *supra* note 75 at 837.

78 *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

79 *Biden v. Nebraska,* 143 S. Ct. 2355 (2023).

80 *Ibid.*

the Final Rules are doomed, we believe that even under the developing major questions doctrine, the SEC's Final Rules must stand.

Indeed, notwithstanding the arguments made in the many amicus briefs filed in support of Petitioners, we believe the Final Rules are well within the SEC's purview and, as a result, the Eighth Circuit's review of the rules need never reach an analysis under the major questions doctrine. Even if the Court did reach that analysis, the Court would be hard-pressed to find that Final Rules were not well within the SEC's purview as set out in the enabling legislation of the *Securities Act of 1933*[81] and the *Securities Exchange Act of 1934*.[82] Both the 1933 and 1934 Acts expressly state that the SEC was created and broadly empowered to regulate what is "...appropriate in the public interest and or for the protection of investors."[83]

Contra the Petitioners and their friends, the Commission is not and never has been limited to require disclosure only of material financial information. It is, rather, expressly empowered to require, and has properly required, disclosure that is in the interest of both investors and the public more generally. The materiality standard sometimes erroneously applied to all SEC regulation derives from federal court interpretation of SEC anti-fraud regulation, particularly the area of securities fraud litigated under Section 10(b) and Rule 10b-5 of the 1934 Act.[84] That common law definition derives from two U.S. Supreme Court precedents interpreting Section 10(b) securities anti-fraud provisions, *TSC* and *Basic*.[85] It is widely understood among scholars of U.S. securities law that the Court's definition of *material* in these cases, and its subsequent application by a number

81 *Securities Act of 1933*, 15 U.S.C. § 77k (hereinafter "1933 Act").

82 *The Securities Exchange Act of 1934*, 15 U.S. Code §78a, et seq. §78b (hereinafter "1934 Act").

83 See 15 U.S.C. 77g(a)(1), 78l(b)(1) and (g)(1).

84 15 U.S.C. §18j(b).

85 *SEC Release No. 33-11042*, *supra* note 4 at 67–69 (citing 17 C.F.R. §240.12b-2 (definition of "material")); *Basic Inc. v. Levinson*, 485 U.S. 224, 231, 232, & 240 (1988) (holding that information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision); *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438, 449 (1977) (an omitted fact is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available").

of federal courts, is, at the very least, highly flawed.[86] It is, moreover, misplaced when applied to general SEC regulatory powers full stop.[87]

Again, the SEC's mandate from Congress' enabling legislation is one that is intentionally broad – one that is clearly and obviously intended to hold open regulatory purview for future developments or issues that matter to investors and to the public generally but might not have been specifically identified in the 1930s at the time of the Commission's creation. Climate change is undeniably something that matters both to the investing public and to the general public as well. Thus, regulating climate-related disclosure is at the heart of the SEC's mandate. Moreover, ongoing voluminous climate-related reporting is something that many investors find, at best, confusing, if not entirely misleading – creating still further need for the SEC to protect investors by way of regulation like the Proposed and Final Rules.

Pointedly and appropriately, the expressly expansive purview clearly stated in the SEC's enabling legislation has long included more than information readily reduced to purely financially material disclosures.[88] Since at least its 2010 Guidance, the Commission has urged reporting companies to assess and disclose climate effects on their business and to discuss both indirect and physical considerations in that regard in responding to the requirements of Reg. S-K's MD&A and Risk Factor sections.[89]

Though those challenging the Final Rules may choose to ignore or deny it, the Commission was largely and expressly motivated to issue both the Proposed Rules and the Final Rules by the voluminous level of confusing and misleading climate-related reporting now well-established among most public corporations. Corporate climate-related reporting as of 2022 came from 90% of the Russell 1000 and 82% of the bottom half of the Russell 2000 stock index.[90] Whether called climate-related reports, sustainability reports, CSR (Corporate Social Responsibility) reports, or ESG (Environ-

86 See Thomas M. Madden, "Significance and the Materiality Tautology", (2015) 10 *J. Bus. & Tech. L.* 217 at 220-224 (discussing the problem of defining materiality tautologically as ex post, fact-based significance originating with *Basic*, *TSC*, and *Mills*).

87 G. S. Georgiev, *supra* note 11 at 115 (discussing the Commission's early regulation under Schedule A as well as the more recent scope of Reg. S-K).

88 *Ibid.*

89 2010 Climate Guidance, *supra* note 44 at 15-27.

90 Final Rules, *supra* note 10 at 626.

mental Social Governance) reports, this corporate reporting has become ubiquitous and is widely-supported among corporate executives as well as the investing public.[91] 479 of the S&P 500 now furnish some form of this reporting.[92] However, perhaps as a result of its great support, the volume and disparate presentation of all of this reporting is confusing to investors and to all manner of additional stakeholders, internal and external to corporations. There simply is a plethora of misleading information that the Commission must regulate to fulfill its mission to protect both the investing public, and the general public.[93]

Notwithstanding the Commission's broad mandate and the ample history of applying it to regulating the disclosure of climate-related information, the Final Rules, much more so than the Proposed Rules, are replete with added materiality qualifiers on much of the disclosure the Rules require.[94] The addition of these many materiality qualifiers included in the Final Rules is apparently the Commission's attempt to assuage critics of the Proposed Rules (which included far fewer such qualifiers). Many comment letters responding to the Proposed Rules sought greater liability protection for reporting companies by way, not only of a newly crafted safe harbor, but also by including in the rules additional materiality thresholds to many categories of required disclosure.[95]

The Commission justified its handling of materiality first and foremost by referencing its express general reliance on the TCFD proposal and the TCFD's materiality definition.[96] In addition, and we believe problematically,

91 Making Sense, *supra* note 2 at 943.

92 practicalESG.com, "New Data: S&P 500 Aren't Moving from 'ESG'", Jan. 2, 2024, online: <https://practicalesg.com/2024/01/new-data-sp-500-arent-moving-from-esg/>.

93 *See* Making Sense, *supra* note 2 at 932-942 (tracing the development of ESG from early versions of CSR, through CSP (Corporate Social Performance), to strategic CSR, to ESG).

94 See e.g. Final Rules, *supra* note 10 at 31(referencing added materiality qualifiers to disclosure of impacts of climate-related risks, use of scenario analysis, and maintained internal carbon price).

95 See e.g., *Letter from Richard C. Breeden, Former Chairman, SEC, et al. to Vanessa A. Countryman*, Sec'y SEC at 14-15 (June 17, 2022), online: <https://www.sec.gov/comments/s7-10-22/s71022-20132519-303005.pdf> (hereinafter "Past Commissioners' Letter") (claiming that the SEC overstepped its bounds with the Proposing Release, in part because the Release would require disclosure of "volumes of immaterial information.")

96 Final Rules, *supra* note 10 at 49. See also, Task Force on Climate-related Financial Disclosures, *Implementing the Recommendations of the Task Force on Climate-related*

the Commission continued to rely on the ill-defined and long-criticized financial or securities law definition of materiality derived from *TSC*[97] and *Basic*.[98] Of course, as discussed, while this definition is old news in the U.S., it is to many quite controversial and, particularly in the context of international climate-related disclosure, is often considered a nonstarter.[99]

D. State alternatives

In addition to the Final Rules, and mostly *because* of the immediate challenges to the Final Rules, both the states of California and New York have attempted to address climate-related disclosure regulation at the state level. Given the economic clout of either state, but particularly that of California, that is no insignificant development. California Governor Newsom eagerly signed into law two bills originating in the California Senate, the *Climate Corporation Data Accountability Act*, and the *Greenhouse Gases: Climate-Related Financial Risk Act*, upon passage by the California legislature in September of 2023.[100] Like the Final Rules, the California legislation is derived from the TCFD and GHG protocol frameworks.[101]

Greatly distinguished from the Final Rules, however, the California laws apply not just to publicly registered corporations or corporations going public under U.S. federal securities laws, but apply even to private companies doing business in California (which includes nearly all sizeable U.S.

Financial Disclosures, October TCFD Update, Oct. 2021 at iv, online: <https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf> (hereinafter "TCFD Update").

97 *TSC Industries, Inc. v. Northway, Inc.*, *supra* note 85. See Making Sense, *supra* note 2 at 972.

98 *Basic Inc. v. Levinson*, *supra* note 85.

99 See R. Jebe, *supra* note 4 at 647 and Making Sense, *supra* note 2 at 966.

100 *An act to add Section 38532 to the Health and Safety Code, relating to greenhouse gases, and making an appropriation therefor,* Senate Bill No. 253, Chap. 382, Oct. 7, 2023, online: <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB253>; *An act to add Section 38533 to the Health and Safety Code, relating to greenhouse gases, and making an appropriation therefor*, Senate Bill No. 261, Chap. 383, Oct. 7, 2023, online: <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB261>.

101 World Resources Institute and World Business Council for Sustainable Development, *The Greenhouse Gas Protocol. A Corporate Accounting and Reporting Standard*, Mar. 2024, online: <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf>.

private businesses) with revenue over$1 billion for the General Data Act and over$500 million for the Greenhouse Gas Act.[102] The New York legislation, including Senate Bill S897A, which is similarly titled and substantively similar to California's legislation, was last known to be in committee.[103]

Moreover, California's SB 261 requires covered companies to disclose GHG emissions in Scopes 1, 2, and 3.[104] In great distinction, the SEC's Finals Rules abandoned any coverage of Scope 3 GHG emissions (generally covering emissions of suppliers and customers) disclosure in the Proposed Rules.[105]

Not surprisingly, the Chamber of Commerce of the United States of America is again leading the charge to kill climate-disclosure regulation – this time at the state level in California.[106] Its suit names the state level agency, the California Air Resources Board (CARB) as defendant as it is the agency intended to enforce the new legislation.[107] The Chamber suit relies upon similar causes of action to its suit challenging the SEC Final Rules, including claims alleging compelled speech. It adds a claim that the California legislation violates federal supremacy under the dormant commerce clause of the U.S. Constitution.[108]

Reasoned analysis supports the survival of the Final Rules, albeit weaker than both the Proposed Rules and the state alternatives. The benefit of the survival of the California rules would be both to include more businesses within mandatory climate-related disclosure regulation, and to include in the required reporting Scope 3 metrics.

Notwithstanding our argument in support of the weakened Final Rules, we point out below their principal flaws as a way of highlighting areas for future regulatory enhancement.

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102 *Ibid.*

103 *Climate Corporate Accountability Act*, New York State Senate A4123 and S897; S5437; S7704 and S7705. online: <https://www.nysenate.gov/legislation/bills/2023/S897/amendment/A#:~:text=This%20legislation%20would%20require%20US,reports%20will%20be%20made%20public>.

104 SB 253 and SB 261, *supra* notes 100 et 101.

105 Final Rules, *supra* note 10 at 256.

106 *Chamber of Commerce of the United States of America et al. v. California Air Res. Bd., No. 2:24-cv-00801 (C.D. Cal. Jan. 30, 2024).*

107 *Ibid.*

108 *Ibid.*

III. Failures of the Final Rules

A. Weakened Disclosure

In general, the Final Rules are across the board substantially less demanding of reporting companies than were the Proposed Rules. One major reason for this is the aforementioned addition in the Final Rules of many materiality qualifiers, rendering disclosure by reporting companies highly discretionary and insulated from potential liability. Yet, beyond this, the Final Rules require substantially less information to be disclosed than the Proposed Rules and offer longer time frames on which that lesser disclosure must proceed, as well as substantially reduced assurance and related potential liability.

Under the Final Rules, unlike the Proposed Rules, Emerging Growth Companies (EGCs) and Smaller Reporting Companies (SRCs) escape having to disclose any GHG metrics at all.[109] Accelerated Filers' (AFs) disclosure of GHG metrics are phased in slowly after the effective date.[110] Large Accelerated Filers (LAFs) would be the most heavily regulated under the Final Rules.[111] Yet, even LAF's disclosure requirements are markedly weakened from the Proposed Rules. LAFs, like all other filers, no longer have to report anything in Scope 3.[112] Their reporting will initially be at the limited assurance level — subject not even to potential Section 11 liability — and need not be at the reasonable assurance level until eight years after the effective date of the Final Rules.[113] Moreover, even LAFs are broadly insulated from private liability by a new safe harbor, in addition to the expanded application of the *Private Securities Litigation Reform Act* (PSLRA) forward looking statements safe harbor, which we argued previously provides ample comfort.[114]

109 *Ibid.*

110 *Ibid.*

111 *See, e.g.,* Final Rules, *supra* note 10 at 29-30.

112 *Ibid.* at 257.

113 *Ibid.* at 262.

114 *Private Securities Litigation Reform Act*, Public Law 104-67, 109 Stat. 737; *ibid.* at 35 and 387. See Making Sense, *supra* note 2 at 976.

B. A Continuing Accountability Failure

In prior work, we termed the need for accountability for misleading and incomplete climate-related reporting, if not greenwashing, the "essential problem."[115] We pointed out that the means of redress for lacking and misleading reporting has been slow and/or losing lawsuits filed mostly under common law consumer fraud theories.[116] We looked hopefully to the Final Rules as a solution to this problem because the Proposed Rules at least offered the possibility of proactive SEC enforcement of mandatory climate-related reporting, but also because of the prospect of private rights of action under the new rules. This hope was dashed with the Final Rules' express denial of a private right of action and the granting of a new safe harbor for reporting companies on their disclosure under the Final Rules. This is not to again mention the myriad materiality qualifiers that the Commission added to appease the critics commenting on the Proposed Rules, so fearful of potential reporting company liability. As part of the accountability problem we delved into the continuing issue of the Commission's definition of *material* — so problematic in U.S. securities law and federal court interpretation.[117] The Final Rules are, on balance, substantially weaker than the Proposed Rules in large part because they limit and cushion the accountability mechanisms that securities regulation offers to ensure that corporate reporting is accurate and truthful. Yet, even with the more pronounced flaws of the Final Rules, we still believe that some version of mandatory, more uniform climate-related reporting is to the good. Certainly, this watered-down version is legitimately within the SEC's regulatory purview

115 *Ibid.* at 964.

116 *Ibid.* at 965 (discussing *Earth Island Inst. v. BlueTriton Brands*, 583 F. Supp. 3d 105, 2 (D.D.C. 2022) (alleging that "the company's representations about its sustainability practices misled and deceived D.C. consumers"); *Hanscom v. Reynolds Consumer Prods. LLC*, No. 43, 2022 U.S. Dist. Lexis 34057 at *1 (N.D. Cal. 2022) (accusing Hanscom of misleading claims as to the recycled material used in making the bags); *Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137, 145 (S.D.N.Y. 2022) (accusing Allbirds of inaccurate claims regarding the treatment of the sheep from which it sources its wool for athletic shoes); *Lee v. Can. Goose US, Inc.*, Nos. 20 Civ. 9809, 2021 U.S. Dist. Lexis 121084, at *2 (S.D.N.Y. 2021) (accusing Canada Goose of issuing misleading information regarding the use of coyote fur in its jackets); and *Connecticut v. Exxon Mobil Corp.*, Nos. 3:20-cv-1555, 2021 U.S. Dist. Lexis 111334 at *1 (D. Conn. 2021) (describing a suit brought on unfair trade practices).

117 *Ibid.* at 966 (noting the Commission's express reliance on *TSC* and *Basic* in defining the use and concept of materiality throughout the Proposed Rules Release); see also *supra* Part III.C.

and must survive the challenges recounted from briefs in the Eighth Circuit litigation.

With the Final Rules and with international developments, particularly in the European Union, our prior concerns with accountability and materiality have only deepened. With the Final Rules, the U.S. has, if anything, doubled down on pegging climate-related disclosure only to financial materiality defined by U.S. federal court interpretation of securities laws. Europe, on the other hand, has embraced double materiality — manifested in the Corporate Sustainability Reporting Directive (CSRD)[118] and more recently the Corporate Sustainability Due Diligence Directive (CS3D).[119] The CSRD took effect on January 5, 2023 and the CS3D, approved this May 15, 2024, will require certain staged reporting beginning in 2027.[120] Double materiality addresses not just the effect of climate change on business operations, risk, mitigation, transition, and the like, but the effects of business operations on external stakeholders. It has been described as including both outside-in and inside-out climate effects.[121] The European version, of course, is far more comprehensive and far more oriented toward general external stakeholder interest rather than U.S. regulation via the Final Rules — prescribed to investor concern over climate change effect on corporate financial performance.[122] This is very much in line with the shareholder versus stakeholder divide between America and Europe. It showcases how Europe is in the process of rectifying an overly instrumentalist approach to CSR, while the U.S. regulator affirms the prevalence of shareholder primacy in the United States even in an area of pressing public con-

118 *Directive 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU; Corporate Sustainability Reporting*, OJ, L 322/15, 16 Dec. 2022, art. 19 (hereinafter "CSRD").

119 Amendments adopted by the European Parliament on June 1, 2023 on the *Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, COM(2022) 71 final – C9-0050/2022 – 2022/0051(COD) (hereinafter "CS3D").

120 *Ibid.*

121 See, e.g. Giaovanni Stampelli, "ESG, Sustainability Disclosure, and Institutional Investor Stewardship", (2024) 81 *Wash. & Lee L. Rev. Online* 405 at 414-416 and Felix Mezzanotte, "Recent Law Reforms in EU Sustainable Finance: Regulating Sustainability Risk and Sustainable Investments", (2023) 11 *Am. U. Bus. L. Rev*. 215 at 242-245.

122 *Ibid.*

cern such as climate change.[123] It also is worth mentioning that unlike the Final Rules, but like the California legislation, EU regulation requires robust Scope 3 GHG calculations and disclosure. The Final Rules deepen the trench between U.S. federal sustainability regulation, State and international rule-making. Since globally operating corporations need to adapt to far-reaching international standards anyway, we doubt that U.S. companies will gain a competitive advantage from the watered-down climate-disclosure rules.

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Notwithstanding the very substantially weakened nature of the Final Rules, we continue to support their approval by the Commission as voted in March of 2024 and we argue that the Eighth Circuit must, through a reasoned application of the law, uphold the Final Rules. Forthcoming work will offer more developed discussion as to why the Eight Circuit is compelled to uphold the Final Rules even under the recently altered standards of review with the major questions doctrine discussed.[124]

123 See generally Antoine Masson, Hugues Bouthinon-Dumas, Jean-Michel do Carmo Silva, and W. Gregory Voss (eds), *The Oxford Handbook on Law & Management,* Oxford, Oxford University Press, 2026; Constance E. Bagley, "What's Law Got to Do With It?: Integrating Law and Strategy", (2010) 47 *Am. Bus. L.J.* 587; Constance E. Bagley, "Strategic Compliance Management", (2006) *Harv. Bus. Sch.* 9-806-173; Constance E. Bagley, *Managers and the Legal Environment. Strategies for the 21st Century,* 7th ed., Boston, Cengage Learning, 2013; George J. Siedel and Helena Haapio, *Proactive Law for Managers: A Hidden Source of Competitive Advantage*, London, Routledge, 2011; George J. Siedel and Helena Haapio, "Using Proactive Law for Competitive Advantage", (2010) 47 *Am. Bus. L.J.* 641; Robert C. Bird, "Pathways of Legal Strategy", (2008) 14 *Stan. J.L. Bus. & Fin.* 1; Robert C. Bird, "Law, Strategy, and Competitive Advantage", (2011) 44 *Conn. L. Rev. 61*; Robert C. Bird, "The Many Futures of Legal Strategy", (2010) 47 *Am. Bus. L.J.* 575; Larry A. DiMatteo, "Strategic Contracting: Contract Law as a Source of Competitive Advantage", (2010) 47 *Am. Bus. L.J.* 727; Daniel T. Ostas, "Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy", (2009) 46 *Am. Bus. L.J.* 487 (2009); David Orozco, "Strategic Legal Bullying", (2016) 13 *N.Y.U. J.L. & Bus.* 137; T. M. Madden, *supra* note 42 (together composing a body of law & strategy/law& management literature looking at law as a means of competitive advantage, but raising concern with purely instrumental applications of the approach.)

124 See *supra* at Part III.B.

Though it is particularly concerning that the Final Rules widen the gap between U.S. and EU approaches to climate-related disclosure regulation – especially over working concepts of materiality – we believe SEC regulation will still offer the most robust, consistent, and enforceable version of mandatory disclosure so needed in a world of rampant, disparate, and misleading reporting. The reality of the scale of corporate climate-related reporting is perhaps the most obvious argument for supporting the SEC Final Rules despite their flaws and continuous prioritization of shareholder interests over public interests. Protecting both the investing public and the general public from being misled by this reporting is at the heart of the SEC's mandate, specifically noted in both the 1933 and 1934 Acts.

It is further troubling that international business is presently confronted with varied regulatory approaches and disclosure requirements developing in Europe and the United States, and the Final Rules do not do anything to change that. On the contrary, as discussed, they deepen the differences between the EU and U.S. approach to climate regulation and CSR more generally. No doubt most global businesses (and their counselors) are grappling with how to manage these developing and, perhaps, further diverging frameworks.

More attention must now be directed to the harmonization of regulatory approaches among different jurisdictions, as reporting requirements varying among every nation state in the EU and the U.S. (federally or by state) will leave us with a problem too similar to the disparate volitional reporting now noted as problematic. Moreover, a cooperative and communicative, relational regulatory approach by these various jurisdictions — that includes harmonization — will go a long way toward making global businesses less oppositional to mandatory climate-related reporting and, therefore, likely enhance fully-compliant, forthcoming disclosure to best inform the investing public and general public on an issue of existential importance.