
NOTE

STANDARDIZING CORPORATE
DISCLOSURE OF CLIMATE RISKS

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INTRODUCTION

A number of financial regulators and central banks have warned that climate change poses a systemic risk to markets around the globe.¹ Yet the U.S. Securities and Exchange Commission

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[†] This Note was written as SEC’s draft rule was pending. The SEC adopted the final rule just prior to publication of the Note and, as such, the Note takes a cursory look at differences between the proposed and final rules and the initial lawsuits challenging the rule. The analysis provided here remains relevant to the implications of, and ongoing challenges to, the SEC’s climate disclosure rule.

¹ See, e.g., Pierpaolo Grippa et al., *Climate Change and Financial Risk*, FIN. & DEV. Dec. 2019, at 26, 28, <https://www.imf.org/en/Publications/fandd/issues/2019/12/climate-change-central-banks-and-financial-risk-grippa>; Alan

(SEC) has long hesitated to mandate that publicly traded companies disclose climate change-related risks. In the absence of regulation, major investors, including BlackRock and Vanguard, have complained that they lack the information required to make informed decisions about the valuation of companies.² This lack of information may cause capital to be misallocated, thereby delaying the clean energy transition and exacerbating the threat of widespread financial instability.³ In March 2022, the SEC proposed a rule that would mandate publicly traded companies to disclose information related to their climate risks and greenhouse gas emissions.⁴ The proposed rule received over twenty-four thousand comments.⁵ After a series of delays, the long awaited final rule was adopted on March 6, 2024.⁶

This Note explores the potential impact of the SEC's climate disclosure rule and the controversy surrounding it. Part I provides background on existing U.S. federal climate-related disclosure regulations and the substance of the rule. Part II analyzes the merits of policy-based criticism of the proposed regulation. The final rule triggered a flurry of lawsuits.⁷ Part III addresses legal challenges,

Rappeport & Christopher Flavelle, *U.S. Warns Climate Poses 'Emerging Threat' to Financial System*, N.Y. TIMES, Oct. 21, 2021, at B7.

² See George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 RUTGERS L. REC. 101, 124 (2022); *BlackRock Supports Consistent Climate-Related Disclosures; Urges Global Coordination*, BLACKROCK (June 2022), <https://www.blackrock.com/corporate/literature/whitepaper/spotlight-blk-supports-consistent-climate-related-disclosures-urges-global-coordination-june-2022.pdf>; Letter from John Galloway, Principal and Inv. Stewardship Officer, The Vanguard Grp., Inc., to Vanessa A. Countryman, Sec'y, SEC (June 11, 2021), <https://www.sec.gov/comments/climate-disclosure/c1112-8906800-244148.pdf>.

³ See Lisa Benjamin, *The SEC and Climate Risk*, 40 UCLA J. ENV'T L. & POL'Y 1, 16 (2022).

⁴ See *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249) [hereinafter Proposed Rule].

⁵ See Press Release, SEC, SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors, (Mar. 6, 2024), <https://www.sec.gov/news/press-release/2024-31>.

⁶ See *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 89 Fed. Reg. 21,668 (Mar. 28, 2024) [hereinafter Final Rule].

⁷ See Marianne Lavelle, *Republicans Are Primed to Take on 'Woke Capitalism' in 2023, with Climate Disclosure Rules for Corporations in Their Sights*,

including the claim that the SEC has overstepped its authority, the possibility of a court invoking the major questions doctrine, a First Amendment violation, and an Administrative Procedure Act (APA) challenge to the adequacy of the SEC's cost-benefit analysis. This Part also addresses the possibility that Congress might exercise its oversight powers to hinder the climate disclosure rule or to shore up the SEC's authority to regulate in this arena. Part IV examines other opportunities for federal, state, and private action to mitigate climate-related financial risks. The Note concludes by exploring what the future might hold for the SEC's regulation.

I. BACKGROUND ON CLIMATE-RELATED DISCLOSURE REGULATIONS

A. *The SEC's 2010 Climate Disclosure Guidance*

As climate change accelerates, investors have increasingly sought information on the climate-related risks that companies face.⁸ The Securities Act Rule 408 and the Exchange Act Rule 12b-20 require companies to report any risk they believe to be material—that is, where there is “a substantial likelihood that a reasonable investor would consider it important in deciding how to vote” or make an investment decision.⁹ In 2010, the SEC promulgated climate disclosure guidance encouraging public companies to report any financially material climate change-related risks.¹⁰ The SEC issued this

INSIDE CLIMATE NEWS (Jan. 3, 2023), <https://insideclimatenews.org/news/03012023/republicans-disclosure-rules-esg/>; *infra* Part III.

⁸ See Emma Ricketts, *Republicans Eye the SEC's Climate-Related Disclosure Regulations, Should They Take Control of Congress*, INSIDE CLIMATE NEWS (Nov. 7, 2022), <https://insideclimatenews.org/news/07112022/republicans-sec-climate-disclosures>.

⁹ See 17 C.F.R. § 240.12b-2 (“The term ‘material,’ when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.”). See also 17 C.F.R. § 230.408; 17 C.F.R. § 240.12b-20.

¹⁰ See Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290 (Feb. 8, 2010). See also Avery Ellfeldt, *Proposed SEC Climate Rules Have Sparked a Fight over Indirect Emissions*, E&E NEWS (Mar. 22, 2022), <https://www.scientificamerican.com/article/proposed-sec-climate-rules-have-sparked-a-fight-over-indirect-emissions>.

guidance after investor groups, nonprofits, and government officials from eleven states filed a rulemaking petition in 2007.¹¹

Although the SEC provided some guidance on how to decide which climate-related risks are material, the current 2010 guidance left it up to companies to determine whether a given risk is, in fact, material.¹² This lack of standardization allowed companies to cherry-pick which climate-related risks to disclose.¹³ Carbon-intensive companies tend to face higher transition risks—that is, anticipated financial losses if the government imposes regulations that limit fossil fuel emissions.¹⁴ Executives at these companies, whose investors would most greatly benefit from understanding these heightened risks, may have an incentive to under-disclose their risks to prevent stock prices from dipping.¹⁵ Other companies may, in good faith, omit climate-related disclosures because of “ambiguity about when climate change rises to the threshold of materiality.”¹⁶

¹¹ See GARY SHORTER, CONG. RSCH. SERV., R42544, SEC CLIMATE CHANGE DISCLOSURE GUIDANCE: AN OVERVIEW AND CONGRESSIONAL CONCERNS 6–7 (2013). See also Cal. Pub. Emp. Ret. Sys. et al., *Petition for Interpretive Guidance on Climate Risk Disclosure* 1–3 (Sept. 2007), <http://www.sec.gov/rules/petitions/2007/petn4-547.pdf>.

¹² See CFTC: MKT RISK ADVISORY COMM., MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM 93–94 (2020), <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

¹³ See Madison Condon, *Market Myopia's Climate Bubble*, 2022 UTAH L. REV. 63, 108 (2022) [hereinafter Condon, *Climate Bubble*].

¹⁴ See Richard Mattison, et al., *The Big Picture on Climate Risk*, S&P GLOBAL, <https://www.spglobal.com/en/research-insights/featured/special-editorial/the-big-picture-on-climate-risk> (last visited Feb. 17, 2024).

¹⁵ See Ellfeldt, *supra* note 10 (“The rules, if finalized, also would require publicly listed companies to disclose information such as how extreme weather events and the clean energy transition might affect their business and how they are preparing for those possible outcomes.”); Yevheniia Antoniuk, *The Effect of Climate Disclosure on Stock Market Performance: Evidence from Norway*, 31 SUSTAINABLE DEV. 1008, 1018 (2022) (“The underperformance of [a higher climate risk] portfolio can be a sign of divestment from companies with higher climate risk and a shift to lower climate risk companies.”).

¹⁶ MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM, *supra* note 12, at 97–98.

The underreporting of climate risks has been compounded by the fact that the SEC has been inconsistent in its efforts to encourage companies to follow its 2010 guidance. Although the Commission initially sent forty-nine letters to companies advising on the quality of their climate-related disclosures, these efforts soon faltered.¹⁷ The SEC did not issue a single such letter in 2013 and issued just six letters between 2016 and 2020.¹⁸ In 2021, the SEC renewed its efforts to encourage adequate climate disclosures. In September 2021, the Commission released a “Sample Letter to Companies Regarding Climate Change Disclosures.”¹⁹ Between July 2021 and March 2023, the Commission sent 104 letters to companies regarding their compliance with the disclosure guidance.²⁰

As a result, the SEC’s 2010 guidance did little to encourage disclosure of reliable, company-specific information that helps investors understand and compare the climate risks companies face.²¹ The SEC itself acknowledged that no notable change in climate risk disclosures had occurred within the first year of issuing the guidance.²² Ten years later, the U.S. Government Accountability Office found that companies were continuing to inconsistently report their exposure to climate-related risks in regulatory filings.²³ Many companies decline to disclose any climate-related risks, while others include boilerplate language but omit the company-specific information investors would require to meaningfully assess climate

¹⁷ See Madison Condon et al., *Mandating Disclosure of Climate-Related Financial Risk*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 745, 748 (2022) [hereinafter Condon et al., *Mandating Disclosure*].

¹⁸ See *id.*

¹⁹ See *Sample Letter to Companies Regarding Climate Change Disclosures*, SEC, <https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures> (last visited Apr. 2, 2024).

²⁰ See Jacob H. Hupart et al., *A Quantitative Analysis of Comment Letters Issued by the SEC Concerning Climate Change Disclosures*, MINTZ (June 8, 2023), <https://www.mintz.com/insights-center/viewpoints/2151/2023-06-07-quantitative-analysis-comment-letters-issued-sec>.

²¹ See Condon et al., *Mandating Disclosure*, *supra* note 17, at 778.

²² See *id.* (citing U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-188, CLIMATE-RELATED RISKS: SEC HAS TAKEN STEPS TO CLARIFY DISCLOSURE REQUIREMENTS 15 (2018), <https://www.gao.gov/assets/gao-18-188.pdf>).

²³ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 18, 22, 26, 42 (2020).

risks.²⁴ There are various levels of emissions disclosure. Scope 1 emissions are a company's direct greenhouse gas emissions; Scope 2 emissions are emissions from energy the company purchases; and Scope 3 emissions are emissions generated by a company's supply chain.²⁵ As of 2020, "one third of S&P 500 companies [did] not disclose their own (Scope 1) emissions," one of the simpler and more basic reporting metrics.²⁶

The inconsistency in how and when companies disclose climate-related risks makes it difficult for investors to assess and compare companies' exposure to such risks. Even when companies do include company-specific data in their annual reports, investors cannot necessarily rely on that data's accuracy because voluntary reporting is not scrutinized by the SEC to the same degree as mandatory disclosures.²⁷

Until recently, the SEC had declined to issue mandatory climate disclosure regulations. In 2018, academics, investor groups, and state treasurers at the California Public Employees' Retirement System signed a petition requesting that the SEC issue mandatory Environmental, Social, and Governance (ESG) disclosure rules.²⁸ The following year, the SEC received a separate petition to address companies' false and misleading statements on climate change.²⁹ The SEC did not respond to either petition, and omitted climate-related disclosure requirements from the modernizing rules on corporate disclosures that it promulgated in 2019 and 2020.³⁰ During

²⁴ See MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM, *supra* note 12, at 94.

²⁵ See Proposed Rule, 87 Fed. Reg. 21,334 (Apr. 11, 2022).

²⁶ Condon, *Climate Bubble*, *supra* note 13, at 108–09.

²⁷ See *id.* at 109.

²⁸ See Cynthia A. Williams & Jill E. Fisch, *Petition to the Securities and Exchange Commission for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure* (Oct. 1, 2018), <https://www.sec.gov/files/rules/petitions/2018/petn4-730.pdf>.

²⁹ See Letter from Steve Milloy, Dir., Energy and Env't Legal Inst., to Vanessa Countryman, Acting Sec'y, SEC, *Petition for Action Regarding Misleading Climate Disclosures* (Aug. 13, 2019), <https://www.sec.gov/rules/petitions/2019/petn4-751.pdf>.

³⁰ See FAST Act Modernization and Simplification of Regulation S-K, 84 Fed. Reg. 12,674 (Apr. 2, 2019) (to be codified at 17 C.F.R. pts. 229, 230, 239, 240, 249, 270, 274, 275); FAST Act Modernization and Simplification of Regulation

this period, the SEC not only declined to act on climate-related disclosures—it blocked a series of shareholder proposals seeking climate-related disclosures.³¹ The SEC’s inaction, which spanned both Democratic and Republican administrations, has largely been attributed to agency inertia, business resistance, and concern that a court will strike down the regulation.³²

B. *International Efforts*

While U.S. regulation faltered, international efforts to promote financial stability in the face of climate change ramped up, resulting in disclosure frameworks that affect a number of United States-based multinational companies. In 2015, the Financial Stability Board, an international body that protects financial stability, launched the Taskforce on Climate-Related Financial Disclosures (TCFD).³³ The Taskforce developed a framework to provide consistent information that investors could use to assess and compare companies’ climate risks.³⁴ This framework includes disclosures related to “governance, strategy, risk management, and metrics and targets.”³⁵ Notably, the companies disclosing under TCFD must share both Scope 1 and Scope 2 emissions, and Scope 3 emissions if “material” to climate-related risks.³⁶ Although TCFD is a voluntary program, a number of countries, including Brazil, Japan, and countries in the European Union, have made these disclosures

S-K (Correction), 84 Fed. Reg. 13,796 (Apr. 8, 2019) (to be codified at 17 C.F.R. pts. 229, 230, 232, 239, 240, 249, 270, 274, 275); Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726 (Oct. 8, 2020) (to be codified at 17 C.F.R. pts. 229, 239, 240).

³¹ See Condon et al., *Mandating Disclosure*, *supra* note 17; Benjamin, *supra* note 3, at 28.

³² See Benjamin, *supra* note 3, at 3.

³³ See Ricketts, *supra* note 8. A number of other voluntary frameworks for climate-related disclosures have been developed as well, including the Climate Disclosure Standards Board, the Global Reporting Initiative, Integrated Reporting, and the Sustainability Accounting Standard Board. See MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM, *supra* note 12, at 88–89.

³⁴ See Ricketts, *supra* note 8.

³⁵ Condon, *Climate Bubble*, *supra* note 13, at 108.

³⁶ See TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, IMPLEMENTING THE RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 7 (2021), https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf.

mandatory for large publicly-traded companies.³⁷ TCFD guidance has therefore become the standard for a broad array of banks, regulators, and investors across the globe.³⁸ Although the SEC is a member of the board that created TCFD, the United States has declined to mandate these disclosures.³⁹ Additionally, a number of United States-based companies have voluntarily signed onto the TCFD framework, although they tend to disclose only a subset of the TCFD's recommended information.⁴⁰ In 2021, only four percent of participating companies made all eleven of the TCFD-recommended disclosures.⁴¹ A number of companies reported challenges in fully implementing the TCFD framework, emphasizing that it was difficult to "conduct climate-related scenario analysis" and estimate Scope 3 emissions.⁴²

C. U.S. Developments Under the Biden Administration

As projected climate-risk levels have escalated, so have investors' requests for reliable and standardized climate disclosures.⁴³ Under the Biden administration, the SEC renewed its efforts to encourage uniform climate disclosure. In March 2021, the SEC created the Enforcement Division Task Force to target any material deficiencies or misleading statements in climate risk disclosure under the existing regulations, which require companies to report material risks but defer to companies on whether a given climate-related risk

³⁷ See Georgina Gustin, *SEC Proposes Landmark Rule Requiring Companies to Tell Investors of Risks Posed by Climate Change*, INSIDE CLIMATE NEWS (Mar. 22, 2022), <https://insideclimatenews.org/news/22032022/sec-climate-change-risks/>.

³⁸ See Benjamin, *supra* note 3, at 11.

³⁹ See *id.* at 59. Of course, TCFD disclosures are mandatory for United States-based companies operating in countries that require TCFD disclosures.

⁴⁰ See Michael R. Littenberg et al., *Ten Thoughts on the SEC's Proposed Climate Disclosure Rules*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 30, 2022), <https://corp.gov.law.harvard.edu/2022/04/30/ten-thoughts-on-the-secs-proposed-climate-disclosure-rules/>.

⁴¹ See TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURE, 2022 STATUS REPORT (Oct. 2022), <https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf>.

⁴² *Id.*

⁴³ See Condon, *Climate Bubble*, *supra* note 13, at 107–08.

is material.⁴⁴ The SEC staff subsequently sent letters to a number of companies seeking additional information on climate-related disclosures.⁴⁵

In May 2021, President Biden issued Executive Order 14,030 expressing that inaction on climate-related financial risks “threatens the competitiveness of U.S. companies and markets, the life savings and pensions of U.S. workers and families, and the ability of U.S. financial institutions to serve communities.”⁴⁶ The Order declares that the Biden administration will advance “consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk.”⁴⁷

D. *The SEC’s Climate Disclosure Rule*

The following year, in March 2022, the SEC published a proposed rule titled “The Enhancement and Standardization of Climate-Related Disclosures for Investors.”⁴⁸ The regulation would require public companies to disclose how climate risks like extreme weather and the clean energy transition would affect their bottom line in the short-, medium-, and long-term, and how they are preparing to mitigate these risks.⁴⁹

Under the final rule, adopted in March 2024, large accelerated filers and accelerated filers will be required to report their direct greenhouse gas emissions (Scope 1) and emissions associated with their electricity usage (Scope 2).⁵⁰ These emissions disclosures will

⁴⁴ See Jeffrey M. Karp & Edward R. Mahaffey, *The Status of Two Pending Rules That Would Require Disclosure of Climate Risks*, ENV’T & ENERGY LEADER (Jan. 11, 2023), <https://www.environmentalleader.com/2023/01/the-status-of-two-pending-rules-that-would-require-disclosure-of-climate-risks/>.

⁴⁵ See *id.*

⁴⁶ Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 20, 2021).

⁴⁷ *Id.*

⁴⁸ Proposed Rule, 87 Fed. Reg. 21,334 (Apr. 11, 2022).

⁴⁹ See *id.*

⁵⁰ See Final Rule, 89 Fed. Reg. 21,668, 21,674 (Mar. 28, 2024). The proposed rule initially required all publicly traded companies to disclose Scope 1 and Scope 2 emissions, along with methodology used and any data gaps or changes in methodology, but the SEC scaled back this requirement in its final rule. See Proposed Rule, 87 Fed. Reg. at 21,344–45, 21,387–88.

be subject to review by third-party groups and auditors.⁵¹ Companies will also be required to disclose how their board manages climate risks.⁵²

The final rule scaled back mandatory climate disclosures in a number of ways—most notably by dropping the proposed rule’s controversial Scope 3 disclosure provision.⁵³ The SEC’s proposed rule would have required companies to disclose Scope 3 emissions, which are generated by suppliers and customers and tend to comprise the majority of a company’s greenhouse gas emissions,⁵⁴ if the company determined that these emissions were “material” to investors.⁵⁵ Former Commissioner Allison Herren Lee asserted that Scope 3 emissions are essential to understanding a company’s greenhouse gas emissions, which inform the climate-related risk to which it is exposed.⁵⁶ However, after extensive criticism⁵⁷ that

⁵¹ See Final Rule, 89 Fed. Reg. at 21,744; Proposed Rule, 87 Fed. Reg. at 21,346.

⁵² See Final Rule, 89 Fed. Reg. at 21,674; Proposed Rule, 87 Fed. Reg. at 21,359–60.

⁵³ See Statement, Caroline A. Crenshaw, Comm’r, SEC, A Risk by Any Other Name: Statement on the Enhancement and Standardization of Climate-Related Disclosures (Mar. 6, 2024), https://www.sec.gov/news/statement/crenshaw-statement-mandatory-climate-risk-disclosures-030624#_ftnref11 (“today’s final rule excludes requirements to disclose Scope 3 GHG emissions, despite comments making it abundantly clear that they represent a key metric for investors in understanding climate risk, particularly transition risk”).

⁵⁴ See Proposed Rule, 87 Fed. Reg. at 21,345.

⁵⁵ Something is “material” if there is “a substantial likelihood that a reasonable investor would consider [Scope 3 emissions] important when making an investment or voting decision.” Proposed Rule, 87 Fed. Reg. at 21,378. See also Littenberg et al., *supra* note 40. The SEC had suggested in its proposed rule that to determine if emissions are material, “registrants should consider whether Scope 3 emissions make up a relatively significant portion of their overall [greenhouse gas] emissions.” Proposed Rule, 87 Fed. Reg. at 21,379.

⁵⁶ See Statement, Allison Herren Lee, Comm’r, SEC, Shelter from the Storm: Helping Investors Navigate Climate Change Risk (Mar. 21, 2022), <https://www.sec.gov/news/statement/lee-climate-disclosure-20220321>.

⁵⁷ Progressives also criticized the proposed rule’s mandatory Scope 3 disclosure provision, asserting that the materiality standard is amorphous and would create a loophole for major polluters to avoid disclosing the full scope of their emissions, and an incentive to shift carbon-intensive activities to suppliers in order to obscure the company’s true carbon footprint. See Ellfeldt, *supra* note 10. Progressives pointed to the failure of the SEC’s 2010 climate disclosure guidance, whose

requiring such data would be overly burdensome for companies to collect,⁵⁸ the SEC removed this provision from its final rule.⁵⁹

II. POLICY-BASED CRITICISM OF AND SUPPORT FOR THE SEC'S PROPOSED RULE

The SEC's proposed climate disclosure rule was met with controversy. Opponents, including the U.S. Chamber of Commerce, have asserted that the rule would impose a high administrative and cost burden on companies with little benefit.⁶⁰ These critics claim that compelled climate-related disclosures "will overload investors with non-material information," distracting them from important information.⁶¹ SEC Commissioner Hester Peirce, a Trump appointee, maintains that the vast majority of the disclosures relating to physical climate change risks would be of little use to investors because they require a great deal of speculation.⁶² Others have expressed a fear that the new disclosure requirements would expose companies to a wave of securities lawsuits by investors who identify misstatements or omissions in annual reports.⁶³ They are concerned that

deference to company determinations about materiality resulted in inconsistent and incomplete disclosures. *See id.* Five hundred groups and individuals submitted a joint comment letter advocating for mandatory reporting of emissions from the company's whole value chain. *See Benjamin, supra* note 3, at 45. Additionally, a group of Democratic senators encouraged the SEC to strengthen the provision by requiring "a firm quantitative threshold for determining materiality of Scope 3 emissions." Bill Flook, *Republicans Launch Resolution, Letters Seeking to Scrap SEC Climate Rules*, WG&L (June 21, 2022).

⁵⁸ *See Ellfeldt, supra* note 10. For example, a group of one hundred representatives from both political parties signed a letter expressing concern about how Scope 3 emissions requirements could affect small farms, which lack the means to gather the emissions data that might be required to do business with public companies. *See Ricketts, supra* note 8.

⁵⁹ *See Crenshaw, supra* note 53.

⁶⁰ *See Federal Securities Law Reports, No. 3046*, WOLTERS KLUWER, Nov. 18, 2022.

⁶¹ Benjamin, *supra* note 3, at 29.

⁶² *See Soyoung Ho, SEC Plans to Finalize Climate Change Disclosure Rule in the Next Few Months*, WG&L (Jan. 6, 2023); *Biography: Commissioner Hester M. Peirce*, SEC, <https://www.sec.gov/about/commissioners/hester-m-peirce> (last visited Feb. 18, 2024).

⁶³ *See Virginia Milstead & Sophie M. Mancall-Bitel, Climate-Related Securities Suits May Increase with New SEC Standards*, REUTERS (Jan. 31, 2022, 10:30

investors may leverage the regulation to pressure companies to take action on climate change.⁶⁴

Critics also argue that the rule imposes unnecessary costs on companies by pressuring them to prepare for a clean energy transition “that Congress has not and may never mandate,” which will lead to “reduced investment returns, reduced attractiveness of public capital markets, and a misallocation of capital.”⁶⁵ Some have expressed concern that the rule would discourage investment in American energy, which would cause energy prices to soar.⁶⁶

SEC commissioners have defended the rule in a number of meetings and public appearances. SEC Chair Gary Gensler has explained that the rule was drafted in response to a demand from “investors, probably representing well over fifty trillion dollars of assets” who sought more consistency and comparability in climate-related reporting.⁶⁷ Those seeking mandatory climate disclosures include BlackRock, State Street, Vanguard, and Calpers—a group that together manages much of Americans’ savings.⁶⁸ The SEC maintains that the rule will protect investors by providing them with consistent and reliable information.⁶⁹ Former Commissioner Lee emphasized that mandatory disclosure regulations were needed, given that the SEC’s 2010 guidance deferred to companies’ self-assessment of materiality and had therefore failed to garner detailed and reliable disclosures.⁷⁰ Furthermore, the requirement to disclose how

AM), <https://www.reuters.com/legal/legalindustry/climate-related-securities-suits-may-increase-with-new-sec-standards-2022-01-31/>.

⁶⁴ *See id.*

⁶⁵ Benjamin, *supra* note 3, at 31.

⁶⁶ *See* Flook, *supra* note 57.

⁶⁷ Soyoung Ho, *Supreme Court’s EPA Ruling Is Significant to SEC Climate Disclosure Rulemaking, Chair Gensler Says*, WGL-ACCTALERT Vol. 16 No. 199 (Oct. 17, 2022). *See ESG Newsletter*, SULLIVAN & CROMWELL LLP (Oct. 25, 2022), <https://www.sullcrom.com/esg-newsletter-oct-2022>; Ricketts, *supra* note 8.

⁶⁸ *See* Georgiev, *supra* note 2, at 124.

⁶⁹ *See SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, SEC (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46>.

⁷⁰ *See* Statement, Allison Herren Lee, Comm’r, SEC, “Modernizing” Regulation S-K: Ignoring the Elephant in the Room (Jan. 30, 2020), <https://www.sec.gov/news/public-statement/lee-mds-2020-01-30>.

a company's board is managing climate risks may encourage companies to develop climate expertise among leadership.⁷¹

Although the SEC has carefully avoided statements to this effect, many environmental groups and shareholder rights activists support the rule because it is predicted to help incentivize companies to shift capital away from high-risk fossil fuels.⁷² Due to the longstanding regulatory gap, investors have lacked the information they need to make informed decisions about the valuation of companies, causing capital to be misallocated and delaying the clean energy transition while physical and financial damage from climate change intensify.⁷³ Transparency on climate risks may motivate investors to shift their capital towards lower-emissions, lower-risk companies.⁷⁴ This transparency might also provide investors with information necessary to pressure companies to take concrete steps to mitigate climate risks, via shareholder proposals or otherwise.⁷⁵ In the future, stock trading platforms could develop tools that aggregate emissions data, allowing individual investors to identify and invest in lower-carbon companies. Furthermore, reliable data on company emissions may provide other government agencies with visibility that will enable them to craft effective climate-related regulations in the coming decades.

Proponents of the rule theorize that mitigating climate change will ultimately protect the stability of the market. A 2015 report by the Economist described climate change as a systemic risk that could have devastating effects on the entire market.⁷⁶ A majority of

⁷¹ See Littenberg et al., *supra* note 40.

⁷² See *id.*; Jonathan D. Uslaner & Ryan Dykhouse, *Forewarned Is Forearmed: Shareholders to Benefit from New SEC Climate Disclosure Rules*, REUTERS (May 6, 2022), <https://www.reuters.com/legal/legalindustry/forewarned-is-forearmed-shareholders-benefit-new-sec-climate-disclosure-rules-2022-05-06/>.

⁷³ See Benjamin, *supra* note 3, at 16.

⁷⁴ See Benoit Nguyen & Jean-Stéphane Mésonnier, *Do Mandatory Climate-Related Disclosures by Financial Institutions Speed Up Fossil Fuel Divestment?*, PRINCIPLES FOR RESPONSIBLE INV.: P.R.I. BLOG (July 30, 2021), <https://www.unpri.org/pri-blog/do-mandatory-climate-related-disclosures-by-financial-institutions-speed-up-fossil-fuel-divestment/8139.article>.

⁷⁵ See Uslaner & Dykhouse, *supra* note 72; Benjamin, *supra* note 3, at 37.

⁷⁶ See ECONOMIST INTELLIGENCE UNIT, *THE COST OF INACTION: RECOGNISING THE VALUE AT RISK FROM CLIMATE CHANGE* 17 (2015), <https://impact.economist.com/sustainability/net-zero-and-energy/the-cost-of-inaction>.

funds invested in public corporations belong to pension funds or mutual funds, meaning that the financial losses that climate change threatens could jeopardize the financial stability of average Americans.⁷⁷ Experts estimate that climate change could cause the United States to suffer financial losses anywhere between \$4 and \$43 trillion over the next five decades.⁷⁸ Climate change could destabilize markets across the globe, as thirty percent of global assets under management are currently at risk.⁷⁹ According to a 2021 Sustainability Accounting Standards Board report, sixty-eight of seventy-seven industries, collectively worth \$45.1 trillion, face climate-related risks, including both physical damage to property and “sudden and disorderly changes in carbon-intensive asset values resulting from government policies and consumer preferences.”⁸⁰

While the potential financial benefits of averting these financial losses are high, the SEC’s rule would impose compliance costs that the SEC estimates could range from \$197,000 to over \$739,000, depending on the company⁸¹—with the proposed rule originally estimating a total of \$3.9 billion to \$10.2 billion per year.⁸² Critics warn that the SEC may be underestimating the actual cost, as it did with the 2002 Sarbanes-Oxley Act, which the SEC predicted would cost companies \$91,000 but ended up costing a number of bigger companies millions of dollars each year.⁸³ The climate disclosure rule’s compliance costs are projected to hit smaller companies harder, as the costs represent a greater share of smaller companies’ revenues.⁸⁴

Proponents of the rule insist that the financial burden on companies may be mitigated by the fact that there is significant overlap between the SEC’s new rule and the TCFD recommendations, with

⁷⁷ See Benjamin, *supra* note 3, at 32.

⁷⁸ See *id.*

⁷⁹ See *id.* at 36.

⁸⁰ Bill Flook, *Prospect of Third-Party Climate Disclosure Standard-Setter Haunts Republicans*, WG&L (June 16, 2021). See Benjamin, *supra* note 3, at 36.

⁸¹ See Final Rule, 89 Fed. Reg. 21,668, 21,875 (Mar. 28, 2024).

⁸² See Proposed Rule, 87 Fed. Reg. 21,334, 21,439 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

⁸³ See Lorraine Woellert, *The Cost of Climate Regulation*, POLITICO (Apr. 21, 2022), <https://www.politico.com/newsletters/the-long-game/2022/04/21/the-cost-of-climate-regulation-00026694>.

⁸⁴ See *id.*

which many companies are already familiar.⁸⁵ A 2021 U.S. Chamber survey found that two-thirds of companies currently share information with shareholders about climate-related issues,⁸⁶ and this rule might require companies to standardize and publicize internal data to which they already have access. Nonetheless, the high cost of compliance remains a serious concern, with opponents warning that actual costs will exceed SEC estimates.⁸⁷

III. LEGAL CHALLENGES

As predicted, the SEC's final climate disclosure rule faced immediate challenge in court.⁸⁸ The agency received nine separate lawsuits, including one by a group of Republican-led states, which have been consolidated in the Eighth Circuit Court of Appeals.⁸⁹ While two of the nine lawsuits were filed by environmental groups demanding more rigorous disclosure requirements, the remainder of the petitioners seek to have the regulation struck down, rather than

⁸⁵ See Cynthia M. Krus, *Q 30:17 How Do the Sec's Proposed Regulations Fit into The Current Regulatory Framework?*, CORP. SEC'Y'S. ANSWER BOOK 30:17 (2023). There are a number of slight differences between the SEC's proposed and final rules and the TCFD recommendations. See Yaroslav Alekseyev et al., *SEC's Climate Proposal vs. TCFD: What You Need to Know*, LINKLATERS (May 23, 2022), <https://www.linklaters.com/en-us/knowledge/publications/alerts-newsletters-and-guides/2022/may/19/secs-climate-proposal-vs-tcf-what-you-need-to-know1>.

⁸⁶ See Woellert, *supra* note 83.

⁸⁷ See, e.g., Matthew Winden, Opinion, *Are Climate Disclosures Worth the Cost?*, THE HILL (June 21, 2023), <https://thehill.com/opinion/finance/4059135-are-climate-disclosures-worth-the-cost/>.

⁸⁸ This Part was last updated on March 31, 2024. Given the novelty of the final rule, additional developments in the legal challenges to the rule may occur by the time of publication.

⁸⁹ See Zoya Mirza & Lamar Johnson, *SEC Battles Climate Disclosure Rule Legal Challenges*, ESG DIVE (Mar. 27, 2024), <https://www.esgdive.com/news/SEC-climate-disclosure-rule-legal-challenges-tracker-roundup-analysis/711313/>; Lamar Johnson, *10 Republican-Led States File Lawsuit to Block SEC's Climate Disclosure Rule*, ESG DIVE (Mar. 8, 2024), <https://www.esgdive.com/news/10-republican-states-challenge-final-sec-climate-disclosure-rule/709763/>.

bolstered.⁹⁰ An SEC spokesperson stated that the agency “will vigorously defend the final climate risk disclosure rules in court.”⁹¹

On March 15, 2024, a three-judge panel on the Court of Appeals for the Fifth Circuit granted an administrative stay of the rule until the court has considered a lawsuit filed by two energy companies.⁹²

A. *The SEC’s Statutory Authority*

The seven petitions opposing the rule argue that, in promulgating the regulation, the SEC exceeded its statutory authority under the Securities Act of 1933 and the Securities Exchange Act of 1934.⁹³ Although the SEC has stated that the rule is intended to protect investors’ financial interests, opponents have claimed that the agency’s true motive is to influence climate policy.⁹⁴ These critics assert that “the clear purpose (and certain effect) of these disclosures is to give third parties information for use in their campaigns to reduce corporate emissions, regardless of the effect on investors.”⁹⁵ They insist that the rule “pressure[s] those companies to change their operations in ways not required by existing US environmental laws.”⁹⁶ House Republicans have asserted that the SEC is exceeding its mandate by attempting to set climate policy and direct business strategies, and cautioned that the Commission “is neither equipped nor authorized by Congress to engage in climate-related policymaking.”⁹⁷

⁹⁰ See Mirza & Johnson, *supra* note 89.

⁹¹ *Id.*

⁹² See Brian Croce, *Court Grants Stay in Lawsuit Challenging SEC Climate Disclosure Rule*, PENSIONS & INVS. (Mar. 18, 2024), <https://www.pionline.com/regulation/appeals-court-halts-sec-climate-disclosure-rule-until-lawsuit-considered>.

⁹³ See, e.g., *id.* See 5 U.S.C. § 706(2)(c).

⁹⁴ See Karp & Mahaffey, *supra* note 44.

⁹⁵ Stephen M. Bainbridge et al., *The SEC’s Misguided Climate Disclosure Rule Proposal*, 41 NO. 10 BANKING & FIN. SERVICES POL’Y REP. 1, 2 (2022).

⁹⁶ *Id.*

⁹⁷ Flook, *supra* note 57.

Others argue that the SEC lacks authority to require disclosures that are not materially relevant to the company's value.⁹⁸ These critics insist that climate-related disclosures are not material because "there is no substantial evidence suggesting causation between climate practices and superior economic performance, nor that ESG investing outperforms conventional investing."⁹⁹

Despite these criticisms, the SEC has strong grounds for asserting that its rule falls squarely within its statutory mandate. Section 7 of the Securities Act of 1933 grants the SEC the authority to require disclosures "as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors."¹⁰⁰ Thus, Congress granted the SEC a broad mandate to adapt disclosure requirements as needed to address evolving markets, regardless of whether the disclosures meet the materiality threshold.¹⁰¹ There are numerous examples of non-material disclosures that the SEC already mandates, including requirements to disclose related party transactions and stock buybacks regardless of their materiality.¹⁰² In the fall of 2022, Republicans introduced a bill that would have imposed a materiality requirement on the SEC's disclosure rules, further evidencing that such a requirement does not currently exist.¹⁰³ Commissioner Jaime Lizárraga, who cast the deciding vote to adopt the rule, stated that the requirements of the new rule are "no different from many of the commission's existing disclosure requirements" and are well within the SEC's authority to "[p]rotect investors and foster transparent capital markets."¹⁰⁴

Regardless, through the growing number of companies that are voluntarily disclosing climate-related information, along with the increasing shareholder push for such information, proponents argue that the market itself has signaled that climate-related disclosures

⁹⁸ See Jacob Robart, *Preparing for New SEC Climate-Related Disclosure Rules*, 41 REV. BANKING & FIN. L. 59, 67 (2021).

⁹⁹ Bainbridge et al., *supra* note 95, at 2.

¹⁰⁰ Securities Act of 1933, ch. 38 § 7, 48 Stat. 74, 79 (codified at 15 U.S.C. § 77g(a)(1)).

¹⁰¹ See Robart, *supra* note 98, at 65; Georgiev, *supra* note 2, at 115.

¹⁰² See Robart, *supra* note 98, at 65.

¹⁰³ See Georgiev, *supra* note 2, at 121.

¹⁰⁴ Johnson, *supra* note 89.

are material.¹⁰⁵ In a letter of support, a group of professors claimed that “climate-related matters impact the most important aspect of any securities transaction—the price at which investors buy or sell.”¹⁰⁶

When Congress passed the 1933 Securities Act, it included a detailed initial template of suggested disclosure requirements (Schedule A of the Securities Act).¹⁰⁷ Over the past century, the SEC has added new mandated disclosures and discarded others as the economy and the markets have evolved.¹⁰⁸ SEC Chair Gensler has emphasized that the proposed climate disclosure rule would “build on [the SEC’s] long tradition” of adapting disclosure requirements to encompass a broad range of modern risks.¹⁰⁹

Courts have consistently affirmed that the Securities Act of 1933 delegates broad rulemaking authority to the SEC.¹¹⁰ In a 1979 ruling, the D.C. Circuit Court of Appeals explained that “the Commission has been vested by Congress with broad discretionary powers to promulgate (or not to promulgate) rules requiring disclosure of information beyond that specifically required by statute.”¹¹¹ The court elaborated that “[r]ather than casting disclosure rules in stone, [the 1933] Congress opted to rely on the discretion and expertise of the SEC for a determination of what types of additional disclosure would be desirable.”¹¹² The court acknowledged that “[t]he Commission’s task [is] a peculiarly difficult one, requiring it to find a path between the views of the parties to the rulemaking polarized in support of the broadest disclosure or in opposition to any disclosure,

¹⁰⁵ See Robart, *supra* note 98, at 66.

¹⁰⁶ BRAD ROSEN ET AL., ESG UNDER ATTACK (2022), https://business.cch.com/srd/SP_ESG_UnderAttack_07142022_FINAL.pdf.

¹⁰⁷ See Securities Act of 1933, Schedule A, 48 Stat. 74, 88 (codified at 15 U.S.C. § 77aa).

¹⁰⁸ See Georgiev, *supra* note 2, at 115.

¹⁰⁹ John Filar Atwood, *California Court Strikes Down Quota for Racial, Ethnic, and LGBT Board Representation*, CORPORATE GOVERNANCE GUIDE NEWSLETTER (Apr. 13, 2022).

¹¹⁰ See Georgiev, *supra* note 2, at 116.

¹¹¹ *Id.* (quoting *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045 (1979)).

¹¹² *Id.* at 117 (quoting *Nat. Res. Def. Council*, 606 F.2d at 1045).

to interpret novel statutory commands, and to make decisions against the background of rapidly changing conditions”¹¹³

Congress appears to have endorsed the court’s interpretation of this broad mandate, because it has amended the Securities and the Exchange Act on multiple occasions but chose not to constrain the SEC’s broad authority.¹¹⁴ In fact, in the SEC’s nine decades of operation, no court has invalidated an SEC disclosure regulation as an overreach of authority despite persistent legal challenges by regulated entities.¹¹⁵

B. *The Major Questions Doctrine*

Opponents are also challenging the regulation under the major questions doctrine by asserting that the SEC lacks authority to undertake a regulation of such great economic significance without a clear mandate from Congress.¹¹⁶ In June 2022, the Supreme Court ruled in *West Virginia v. EPA* that EPA lacked the authority under section 111(d) of the Clean Air Act to limit power plant emissions by requiring power plants to shift from one form of energy generation to a different, lower-emission form.¹¹⁷ Under the major questions doctrine, administrative agencies need clear delegation of authority from Congress in order to promulgate regulations with major economic or political impacts.¹¹⁸ The Court suggested that because EPA had rarely invoked section 111(d) in the past, it could not now use this “ancillary provision” to “substantially restructure the American energy market.”¹¹⁹ The Court seemed particularly concerned that EPA had chosen to accomplish by regulation something that “Congress had conspicuously and repeatedly declined to enact itself.”¹²⁰

¹¹³ *Id.* (quoting *Nat. Res. Def. Council*, 606 F.2d at 1057).

¹¹⁴ *See id.* at 116.

¹¹⁵ *See id.*; ROSEN ET AL., *supra* note 106, at 7.

¹¹⁶ *See, e.g.*, Emergency Motion for Administrative Stay and Stay Pending Judicial Review at 7–21, *Liberty Energy Inc. v. SEC*, No. 24-60109 (5th Cir. Mar. 8, 2024).

¹¹⁷ *See West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).

¹¹⁸ *See id.* at 2608, 2616.

¹¹⁹ *Id.* at 2610.

¹²⁰ *Id.*

Opponents will likely cite *West Virginia* to support the proposition that the SEC lacks the authority to promulgate a climate disclosure rule because the regulation has major economic significance and Congress has not explicitly delegated such authority.¹²¹ The Chamber of Commerce, for example, suggested that the SEC's proposed climate disclosure rule exceeded the SEC's authority by "reorder[ing] the market."¹²² Opponents may argue that, as in *West Virginia*, bills that would have directed the SEC to issue climate-related disclosures have repeatedly stalled in Congress.¹²³

SEC Chair Gensler and SEC staff have acknowledged that the SEC is considering the implications of the *West Virginia* decision as it finalizes its climate disclosure rule.¹²⁴ However, the SEC's proposed climate disclosure rule can be distinguished from the regulation in question in *West Virginia* in a number of ways.

The *West Virginia* ruling suggested that the Court may be particularly critical where an agency is interpreting its mandate in a novel or creative way to make broad policy changes.¹²⁵ In that case, the Court found a major questions doctrine violation because EPA had "claim[ed] to discover in a long-extant statute an unheralded power . . . representing a transformative expansion in [its] regulatory authority."¹²⁶ Similarly, the Court struck down the Department of Education's student debt forgiveness program in June 2023, asserting that the agency had "never previously claimed powers of this magnitude."¹²⁷

¹²¹ See *id.* at 2608; Bill Flook, *Republicans Lean on Supreme Court's EPA Decision to Attack SEC Climate Disclosure Proposal*, THOMSON REUTERS (Aug. 10, 2022), <https://tax.thomsonreuters.com/news/republicans-lean-on-supreme-courts-epa-decision-to-attack-sec-climate-disclosure-proposal/>.

¹²² *Federal Securities Law Reports*, No. 3046, *supra* note 60.

¹²³ See Climate Risk Disclosure Act of 2018, S. 3481, 115th Cong. (2018); Climate Risk Disclosure Act of 2019, H.R. 3623, 116th Cong. (2019); Climate Risk Disclosure Act of 2021, H.R. 2570, 117th Cong. (2021). See also Jonathan D. Uslaner & Will Horowitz, *Will the SEC's Proposed Climate Risk Disclosure Rules Survive Supreme Court Scrutiny?*, REUTERS (Aug. 5, 2022), <https://www.reuters.com/legal/legalindustry/will-secs-proposed-climate-risk-disclosure-rules-survive-supreme-court-scrutiny-2022-08-05/>.

¹²⁴ See, Ho, *Supreme Court's EPA Ruling Is Significant*, *supra* note 67.

¹²⁵ See *West Virginia v. EPA*, 142 S. Ct. at 2610.

¹²⁶ *Id.*

¹²⁷ *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023).

Although opponents have framed the SEC's proposed rule as unprecedented, the SEC has a decades-long history of adapting disclosure requirements to address evolving risks about which investors are seeking information, including the 1999 risk of a Y2K-related computer crash, COVID-19, and cybersecurity.¹²⁸ More specifically, the SEC has mandated a variety of disclosures concerning environmental risks for over fifty years.¹²⁹ In 1971, the SEC issued a release emphasizing that the Securities Act required registrants to "disclos[e] legal proceedings and a description of the registrant's business as these requirements relate to material matters involving the environment and civil rights."¹³⁰ Two years later, the SEC mandated disclosure of a subset of environmental proceedings.¹³¹ In 1976, the SEC added a requirement that companies disclose any expenditures made in order to comply with environmental regulations.¹³² Around the same time, the SEC promulgated rules relating to the reporting of contingent environmental liabilities.¹³³ And, in 1993, the SEC issued a Staff Accounting Bulletin discussing disclosures of environmental loss contingencies.¹³⁴ Thus, in contrast to the Court's characterization of the EPA's Clean Power Plan and the Department of Education's student debt forgiveness program, the SEC's proposed rule arguably does not constitute an unprecedented use of the Commission's regulatory authority.¹³⁵

¹²⁸ See *SEC Year 2000 Actions Regarding Securities Industry and Agency Systems*, SEC (Sept. 15, 1999), <https://www.sec.gov/news/extra/y2k/y2kfact.htm>; *COVID-19 Related FAQs*, SEC (May 4, 2020), <https://www.sec.gov/corpfin/covid-19-related-faqs>; *SEC Proposes Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies*, SEC (Mar. 19, 2022), <https://www.sec.gov/news/press-release/2022-39>.

¹²⁹ See Benjamin, *supra* note 3, at 20.

¹³⁰ Georgiev, *supra* note 2, at 118.

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.* at 119; Richard Y. Roberts, Comm'r, SEC, Remarks at Critical Environmental Issues for Corporate Counsel Conference (May 5, 1995), <https://www.sec.gov/news/speech/speecharchive/1995/spch039.txt>.

¹³⁵ Cf. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022); *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023).

The statutory provision that the SEC has invoked is far from ancillary. Rather, section 7 of the Securities Act of 1933 is a core provision pursuant to which the SEC has consistently promulgated regulations since the 1930s.¹³⁶ Furthermore, the regulation in question may not constitute a question of major economic or political significance. Although the regulation may have significant effects on the market, it does not direct companies to take a specific set of actions beyond disclosing information.¹³⁷ Commentators have noted that the SEC's proposed rule does not "'regulate' the economy in the command-and-control sense" that the EPA regulation in *West Virginia* did.¹³⁸ However, given the judiciary's growing hostility towards administrative agencies,¹³⁹ the scope of the major questions doctrine is still uncertain.

C. First Amendment

Opponents are also challenging the rule as compelled commercial speech in violation of the First Amendment.¹⁴⁰ In a strikingly similar case, the D.C. Circuit struck down parts of the SEC's 2010 Conflict Minerals Rule on First Amendment grounds.¹⁴¹ The SEC had issued the regulation in order to comply with a congressional mandate under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, which mandated that the SEC require firms using "conflict minerals" to disclose the source of their minerals.¹⁴² Section 1502 of the Act was explicitly designed to reduce financing

¹³⁶ See Uslaner & Horowitz, *supra* note 123; Georgiev, *supra* note 2, at 117.

¹³⁷ See Proposed Rule, 87 Fed. Reg. 21,334 (Apr. 11, 2022).

¹³⁸ Georgiev, *supra* note 2, at 128.

¹³⁹ See Shay Dvoretzky & Emily J. Kennedy, *The Evolving Landscape of Administrative Law*, SKADDEN (Sept. 2023), <https://www.skadden.com/insights/publications/2023/09/quarterly-insights/the-evolving-landscape-of-administrative-law>.

¹⁴⁰ See Littenberg et al., *supra* note 40. See, e.g., Emergency Motion for Administrative Stay and Stay Pending Judicial Review at 24–27, *Liberty Energy Inc. v. SEC*, No. 24-60109 (5th Cir. Mar. 8, 2024).

¹⁴¹ See *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 373 (D.C. Cir. 2014).

¹⁴² See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010); *Nat'l Ass'n of Mfrs.*, 748 F.3d at 373; Benjamin, *supra* note 3, at 24.

of mining that Congress believed was contributing to “extreme levels of violence” in the eastern Democratic Republic of the Congo.¹⁴³

Although courts have traditionally applied a rational basis standard in assessing the constitutionality of compelled disclosures,¹⁴⁴ compelled disclosures beyond “purely factual and uncontroversial information” are subject to an enhanced level of scrutiny.¹⁴⁵ In the conflict minerals case, the D.C. Circuit court found that the SEC’s interest in addressing the Democratic Republic of the Congo’s humanitarian crisis was sufficient.¹⁴⁶ However, the court concluded that the rule was not adequately tailored to achieve this goal because the SEC had failed to explain why it could not let issuers describe the source of their minerals using their own language, or why the SEC could not simply compile its own list of products affiliated with the Congo war using the company disclosures.¹⁴⁷ The court expressed particular concern with the provision requiring companies to publicly announce that their products came from conflict zones, which the court described as requiring the company to confess that it had “blood on its hands.”¹⁴⁸ Ultimately, the court invalidated the provision of the regulation that required this statement and remanded the rule back to the SEC.¹⁴⁹

The SEC can likely distinguish the climate disclosure rule from the conflict minerals case. The Conflict Minerals Rule “require[d] an issuer to publicly tell consumers that its products are ethically tainted” by publishing a statement on their websites.¹⁵⁰ The climate disclosure rule requires no such targeted web announcement, and instead includes climate disclosure requirements as part of a company’s lengthy annual filings.¹⁵¹ Furthermore, the SEC has consistently framed the rule as intended to protect investors, rather than to

¹⁴³ Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502(a), 124 Stat. at 2213.

¹⁴⁴ See *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

¹⁴⁵ *Id.* See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

¹⁴⁶ See *Nat’l Ass’n of Mfrs.*, 748 F.3d at 359; Benjamin, *supra* note 3, at 26.

¹⁴⁷ See *Nat’l Ass’n of Mfrs.*, 748 F.3d at 372–73; Benjamin, *supra* note 3, at 26.

¹⁴⁸ *Nat’l Ass’n of Mfrs.*, 748 F.3d at 371; Benjamin, *supra* note 3, at 26.

¹⁴⁹ See *Nat’l Ass’n of Mfrs.*, 748 F.3d at 373.

¹⁵⁰ *Id.* at 371.

¹⁵¹ See Proposed Rule, 87 Fed. Reg. 21,334, 21,335 (Apr. 11, 2022).

achieve a particular level of emissions reductions.¹⁵² This is in sharp contrast to the preamble to the Conflict Minerals Rule, in which the SEC acknowledged that the rule diverged from normal SEC practice and was not primarily aimed to protect investors.¹⁵³

If the conflict minerals case is to serve as an example, the success of a First Amendment challenge may hinge in part on the adequacy of the SEC's cost-benefit analysis, as discussed below. However, the Supreme Court has signaled a growing hostility to corporate disclosure requirements.¹⁵⁴ Thus, despite its differences from the Conflict Minerals Rule, a court might strike down provisions of the SEC's climate disclosure rule as unconstitutional.

D. Cost-Benefit Analysis

Opponents are challenging the climate disclosure rule as arbitrary and capricious under the APA by asserting that the SEC failed to adequately consider the relevant costs of the regulation or overestimated its benefits.¹⁵⁵ The SEC is an independent agency and thus not required to fully comply with the Executive Order 12866 requirement that the Office of Information and Regulatory Affairs review the proposed rule.¹⁵⁶ However, the SEC must assess how the proposed rule will affect small businesses, in compliance with the Regulatory Flexibility Act and the Paperwork Reduction Act.¹⁵⁷ The SEC must also consider the rule's effect on "efficiency, competition and capital formation," which the D.C. Circuit has interpreted to require the SEC to do a cost-benefit analysis.¹⁵⁸

¹⁵² See *id.* at 21,335–36, 21,340, 21,399, 21,401, 21,437, 21,462.

¹⁵³ See Conflict Minerals, 77 Fed. Reg. 56,274, 56,336 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240 and 249b). See also Benjamin, *supra* note 3, at 25.

¹⁵⁴ See Benjamin, *supra* note 3, at 5.

¹⁵⁵ See, e.g., Emergency Motion for Administrative Stay and Stay Pending Judicial Review at 22–24, *Liberty Energy Inc. v. SEC*, No. 24-60109 (5th Cir. Mar. 8, 2024). See 5 U.S.C. § 706(2)(A).

¹⁵⁶ See Exec. Order No. 12,866 § (3)(b), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

¹⁵⁷ See *id.*; 5 U.S.C. § 601–12; 44 U.S.C. § 3501–21.

¹⁵⁸ 15 U.S.C. § 77b; *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49, 1151, 1153–54 (D.C. Cir. 2011); *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177–79 (D.C. Cir. 2010); *Chamber of Com. v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005).

Opponents have argued that the SEC's cost-benefit analysis is flawed because it underestimates the cost of compliance.¹⁵⁹ For example, the SEC initially projected in its proposed rule that initial compliance would cost \$640,000, but one company asserted that its initial cost would exceed \$100 million.¹⁶⁰ Meanwhile, the SEC projected its own annual internal costs at just \$150,000, which may be unrealistically low.¹⁶¹ Opponents also argue that the SEC has overlooked other costs entirely, including the "opportunity costs of reallocating budgets and priorities."¹⁶² The Chamber of Commerce has asserted that climate disclosures are unlikely to be material to investors, and therefore the benefits of the rule to investors may be limited.¹⁶³

The Chamber of Commerce and other business groups have successfully challenged the adequacy of the SEC's cost-benefit analysis for other regulations in the past.¹⁶⁴ In a 2011 case, the D.C. Circuit Court of Appeals found that the SEC had acted arbitrarily and capriciously for failing to adequately consider the economic consequences of a proposed rule and "failing to quantify certain costs" without explanation.¹⁶⁵ In 2009, the SEC created the Division of Economic and Risk Analysis in order to more rigorously analyze costs and benefits.¹⁶⁶ Ultimately, the outcome of an arbitrary and capricious APA challenge may depend on how rigorous a court finds the forty-page cost-benefit analysis that the SEC included in its final rule.¹⁶⁷

¹⁵⁹ See *Gensler Says Cost-Benefit Analysis is SEC's 'Bread and Butter' in Response to Criticism of Climate Disclosure Rule*, WGL-ACCTALERT VOL. 16, No. 104 (June 01, 2022).

¹⁶⁰ See *Federal Securities Law Reports*, No. 3046, *supra* note 60.

¹⁶¹ See *id.*

¹⁶² *Id.*

¹⁶³ See *id.*

¹⁶⁴ See Benjamin, *supra* note 3, at 47.

¹⁶⁵ *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149–50 (D.C. Cir. 2011); Benjamin, *supra* note 3, at 48.

¹⁶⁶ See *Economic and Risk Analysis*, SEC, <https://www.sec.gov/dera> (last modified Sept. 8, 2022); Benjamin, *supra* note 3, at 48.

¹⁶⁷ See Final Rule, 89 Fed. Reg. 21,668, 21,848–88 (Mar. 28, 2024).

E. Congressional Oversight

In addition to legal challenges, the SEC faces the prospect that Congress will exercise its oversight powers to hinder climate disclosure regulation. Republicans have been vocal critics of the proposed regulation: Senator Joe Manchin of West Virginia asked the SEC to reconsider the proposal given the burdens it would impose on the fossil fuel industry, while another group of Republican senators demanded that the SEC withdraw the proposal in its entirety.¹⁶⁸ These senators raised a number of concerns addressed above, including that the SEC had exceeded its statutory mandate.¹⁶⁹ Representative Patrick McHenry, a Republican chairman of the House Financial Services Committee, which oversees the SEC, echoed these concerns, asserting that the proposed rule advances “a far-left social agenda.”¹⁷⁰ Representative McHenry explained that “[t]he Biden Administration is pushing its climate agenda through financial regulators because they don’t have the votes to pass it in Congress.”¹⁷¹

House Republicans, many of whom were vocal critics of the proposed rule,¹⁷² are currently preparing a resolution under the Congressional Review Act (CRA), which allows Congress to overturn final agency rules.¹⁷³ During the Trump administration, Congress

¹⁶⁸ See Press Release, Senator Joe Manchin, Proposed Climate Disclosure Rule Hurts American All-Of-The-Above Energy Policy (Apr. 4, 2022), <https://www.manchin.senate.gov/newsroom/press-releases/manchin-to-sec-proposed-climate-disclosure-rule-hurts-american-all-of-the-above-energy-policy>; Press Release, Senator Kevin Cramer, Calling on SEC to Withdraw the Proposed Climate Disclosure Rule (Apr. 5, 2022), <https://www.cramer.senate.gov/news/press-releases/sen-cramer-leads-colleagues-in-calling-on-the-sec-to-withdraw-the-proposed-climate-disclosure-rule>.

¹⁶⁹ See John Filar Atwood, *Manchin, Republic Senators Voice Opposition to SEC’s Climate Disclosure Proposals*, CORP. GOVERNANCE GUIDE 1129929 (2022).

¹⁷⁰ Jim Tyson, *SEC Aims to Set Climate Risk, Cybersecurity Rules Before May*, UTILITY DIVE (Jan. 19, 2023), <https://www.utilitydive.com/news/sec-aims-set-climate-risk-cybersecurity-rules-before-may-ESG-buybacks-SPACs/640640/>.

¹⁷¹ Matthew Goldstein & Peter Eavis, *The S.E.C. Moves Closer to Enacting a Sweeping Climate Disclosure Rule*, N.Y. TIMES (Mar. 21, 2022), <https://www.nytimes.com/2022/03/21/business/sec-climate-disclosure-rule.html>.

¹⁷² See Flook, *supra* note 57.

¹⁷³ See David Hood, *Congressional Republicans Maneuver to Block SEC’s Climate Rules*, BLOOMBERG (Mar. 6, 2024), <https://news.bloomberglaw.com/esg/congressional-republicans-maneuver-to-stifle-secs-climate-rule>.

began using the CRA with increasing frequency to invalidate regulations.¹⁷⁴ If Congress were to invalidate the rule under the CRA within the sixty-day deadline, the SEC would be barred from issuing any regulation that is “substantially the same.”¹⁷⁵

A Democrat-controlled House, although a distant prospect, could shore up the regulation against a legal challenge by directing the SEC to promulgate regulations compelling climate disclosures. A number of Democratic senators and members of Congress have voiced strong support for the proposed rule.¹⁷⁶ Prior to the SEC’s proposal, Senator Elizabeth Warren and Representative Sean Casten introduced the Climate Risk Disclosure Act, which would have directed the SEC to promulgate climate disclosure regulations.¹⁷⁷ The bill was included in the text of the sweeping Climate Leadership and Environmental Action for our Nation’s (CLEAN) Future Act, which ultimately stalled in Congress.¹⁷⁸ Another bill, the Paris Climate Agreement Disclosure Act, which would have required companies to disclose greenhouse gas emissions, was introduced in the House in March 2021 but stalled in committee.¹⁷⁹

¹⁷⁴ See CONG. RSCH. SERV., IF10023, THE CONGRESSIONAL REVIEW ACT (CRA): A BRIEF OVERVIEW (2023).

¹⁷⁵ *Id.* at 1, 2.

¹⁷⁶ See Jacob Hupart, *Congressional Democrats Pressure the SEC to Maintain a Robust Climate Disclosure Rule, Including Scope 3 Emissions*, JD SUPRA (Sept 28, 2023), <https://www.jdsupra.com/legalnews/congressional-democrats-pressure-the-6283670/>.

¹⁷⁷ See S. 1217, 117th Cong. (1st Sess. 2021); H.R. 2570, 117th Cong. (1st Sess. 2021); Patrick J. Paul, *Climate Change Disclosures Regain National Attention*, 36-SUM NAT. RES. & ENV’T 53 (2021); *Climate Risk Disclosures Attached to Sweeping Carbon Emissions Bill*, WGL-ACCTALERT VOL. 15 No. 43 (Mar. 5, 2021).

¹⁷⁸ See Paul, *supra* note 177; *H.R. 1512 - CLEAN Future Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1512/all-actions> (last visited Feb. 18, 2024).

¹⁷⁹ See H.R. 1780, 117th Cong. (1st Sess. 2021); *H.R. 1780 - Paris Climate Agreement Disclosure Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1780/all-actions> (last visited Feb. 18, 2024).

IV. ADDITIONAL FEDERAL, STATE, AND PRIVATE ACTION ON CLIMATE DISCLOSURE

While awaiting a final rule, other federal agencies took steps to require climate disclosures. The Federal Reserve's Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation published a draft set of principles that would encourage major lenders to "assess and limit their exposure to climate impacts and the clean energy transition."¹⁸⁰ The Federal Reserve has followed the Central Bank's lead and is conducting a hypothetical "pilot climate scenario analysis" in order to predict how banks will perform in a variety of future scenarios.¹⁸¹ The Commodity Futures Trading Commission, which regulates U.S. derivatives markets, announced plans to target fraud and greenwashing in the voluntary carbon offset market.¹⁸² The Department of Labor finalized a rule rescinding Trump administration rules that prevented pension funds from considering allegedly "non-pecuniary" factors like climate change when making investments.¹⁸³ The new regulation explicitly notes that a fiduciary's duty of prudence may require them to consider the effects of climate change.¹⁸⁴ The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have jointly proposed the Federal Supplier Climate Risks and Resilience Rule, which would require major federal contractors to disclose Scope 1 and 2 greenhouse gas emissions and set emissions reduction targets.¹⁸⁵ These rules, although they affect a smaller subset of regulated entities, may face similar legal challenges, including a First Amendment challenge and claims that the implementing agency is overstepping its regulatory authority.

¹⁸⁰ Avery Ellfeldt, *Financial Firms May Have to Reveal Their Climate Risk*, SCI. AM. (Jan. 3, 2023), <https://www.scientificamerican.com/article/financial-firms-may-have-to-reveal-their-climate-risk/>.

¹⁸¹ See BD. OF GOVERNORS OF THE FED. RSRV. SYS., PILOT CLIMATE SCENARIO ANALYSIS EXERCISE (2023), <https://www.federalreserve.gov/publications/files/csa-instructions-20230117.pdf>.

¹⁸² See Ellfeldt, *supra* note 180.

¹⁸³ See *ESG Newsletter*, SULLIVAN & CROMWELL LLP (Nov. 30, 2022), <https://www.sullcrom.com/esg-newsletter-nov-2022#LegRegUnited%20States>.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

States have also taken actions to encourage disclosure of climate-related financial risks. In 2021, the New York State’s Department of Financial Services released guidance urging insurance companies to disclose climate risks.¹⁸⁶ In September 2023, the California legislature passed a bill that will require companies operating in California with annual revenues that exceed \$1 billion to disclose Scope 1, 2, and 3 emissions and have this data audited.¹⁸⁷ If federal regulations stall, progressive states may take increasingly proactive measures to require climate disclosures.¹⁸⁸

The private sector has also engaged in pro-climate activity in the absence of federal regulation. A number of lenders have committed to net-zero emissions by 2050, which will likely require shifting their loans and investments away from fossil-fuel intensive industries.¹⁸⁹ As investor concerns about climate change have escalated, some shareholders have successfully pressured companies in which they invest to provide climate information and take action to mitigate climate risks.¹⁹⁰ In 2022, shareholders introduced a record number of climate-related shareholder resolutions.¹⁹¹ Although most resolutions are non-binding, shareholders that year negotiated “110 climate-related commitments in exchange for withdraw[ing]” their resolutions, including companies’ commitments to

¹⁸⁶ See N.Y. DEPARTMENT OF FINANCIAL SERVICES, GUIDANCE FOR NEW YORK DOMESTIC INSURERS ON MANAGING THE FINANCIAL RISKS FROM CLIMATE CHANGE 4 (Nov. 15, 2021), https://www.dfs.ny.gov/system/files/documents/2021/11/dfs-insurance-climate-guidance-2021_1.pdf.

¹⁸⁷ See Jean-Philippe Brisson, *California Passes GHG Emissions Reporting and Climate-Related Financial Risk Legislation*, LATHAM & WATKINS (Sept. 21, 2023), <https://www.lw.com/en/offices/admin/upload/SiteAttachments/California-Passes-GHG-Emissions-Reporting-and-Climate-Related-Financial-Risk-Legislation.pdf>.

¹⁸⁸ See *id.*

¹⁸⁹ See Ellfeldt, *supra* note 10.

¹⁹⁰ See Michael Copley, *Businesses Face More and More Pressure from Investors to Act on Climate Change*, NPR (Apr. 9, 2023), <https://www.npr.org/2023/04/09/1168446621/businesses-face-more-and-more-pressure-from-investors-to-act-on-climate-change>.

¹⁹¹ See *Record Number of Negotiated Agreements Between Investors and Companies in 2022 Proxy Season*, CERES (Aug. 1, 2022), <https://www.ceres.org/news-center/press-releases/record-number-negotiated-agreements-between-investors-and-companies-2022>.

set targets for reducing greenhouse gas emissions and report their climate lobbying activity.¹⁹²

CONCLUSION

The SEC's rule on climate disclosures is critical to addressing the systemic financial risks that climate change poses. Yet the rule is facing a number of legal challenges, including under the major questions doctrine, the First Amendment, and the APA. These challenges, regardless of their merits, are sure to delay implementation of the SEC's final climate disclosure rule.¹⁹³ Already, the Fifth Circuit has granted a temporary stay of the rule.¹⁹⁴ Yet, even if these legal challenges are partially successful, a court might choose to strike down only part of the climate disclosure rule, while leaving the rest of the regulation in place. In the conflict minerals case, for example, the court struck down one of the disclosure requirements but the other provisions remain in effect today.¹⁹⁵ In the meantime, companies are already taking steps towards compliance in anticipation of a final rule going into effect.¹⁹⁶

Perhaps an even more salient threat is that a future Republican administration will roll back the rule. Given that Congress remains gridlocked with the legislative filibuster in place, future administrations will continue to face heightened pressure to rely on regulatory action to implement their agendas, including rollbacks of regulations that contravene their policy goals.¹⁹⁷ Both the Trump and Biden administrations have aggressively undone the prior

¹⁹² *Id.* See also Copley, *supra* note 190.

¹⁹³ See Ellfeldt, *supra* note 180.

¹⁹⁴ See Croce, *supra* note 92. This Note was last updated on March 31, 2024. Given the novelty of the final rule, additional developments in the legal challenges to the rule may occur by the time of publication.

¹⁹⁵ See Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 373 (D.C. Cir. 2014).

¹⁹⁶ See, e.g., VINSON & ELKINS, PROPOSED SEC CLIMATE DISCLOSURES: AN OVERVIEW OF THE PROPOSED RULE AND WHAT COMPANIES NEED TO DO NOW 16 (2022), https://media.velaw.com/wp-content/uploads/2023/09/14151831/SEC-Climate-Related-Disclosures-Proposed-Rule-White-Paper-04.11.2022_revised-as-of-9.13.23.pdf.

¹⁹⁷ See Bethany Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 13–47 (2019).

administrations' regulations using a variety of tools.¹⁹⁸ In addition to encouraging Congress to reject the SEC's climate disclosure rule using the CRA, as discussed above, a Republican administration might also use abeyances, suspensions, or notice-and-comment rulemaking to roll back the rule, regardless of whether Republicans control Congress.¹⁹⁹

If the SEC's climate disclosure rule is still tied up in litigation at the time of a change in administration, a Republican president might seek an abeyance order in pending litigation, by requesting that the court place a hold on a legal challenge to a pending rule while the administration reconsiders the rule.²⁰⁰ This rollback method extends the duration of any stay a court has placed on a rule, and can avoid a legal decision upholding the challenged rule, even if it does not ultimately prevent a regulation from going into effect.²⁰¹ Alternatively, if the litigation has concluded and courts have upheld the rule, a Republican administration might choose to postpone the regulation's effective date or compliance deadline while working to repeal the regulation.²⁰² This makes it easier for an agency to later repeal the rule and win a challenge to that repeal in court, as the benefits have not yet accrued and the cost saving of the repeal will be greater.²⁰³ Finally, an administration could use traditional notice-and-comment rulemaking to repeal the rule at any point in the future, although this process would be more resource-intensive for the SEC and subject to arbitrary and capricious judicial review under the APA.²⁰⁴

Ultimately, in addition to the many legal challenges that SEC's final climate disclosure rule is facing, in defending the rule, the SEC

¹⁹⁸ See *id.*; Mark Febrizio, *Biden is Using Multiple Mechanisms to Reverse Trump's Regulatory Agenda*, GEORGE WASH. REGUL. STUD. CTR. (Apr. 22, 2021), <https://regulatorystudies.columbian.gwu.edu/biden-using-multiple-mechanisms-reverse-trumps-regulatory-agenda>. See also Christopher Hickey et al., *Here Are the Executive Actions Biden Signed in His First 100 Days*, CNN, <https://www.cnn.com/interactive/2021/politics/biden-executive-orders/> (last updated Apr. 30, 2021).

¹⁹⁹ See Noll & Revesz, *supra* note 197.

²⁰⁰ See *id.*

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See *id.*

must also grapple with congressional opposition and the increasingly salient threat of rollback by a future Republican presidential administration.