ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) MATTERS: *CAN* THE SEC MANDATE DISCLOSURE? *SHOULD* THE SEC MANDATE DISCLOSURE?

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INTRODUCTION

An increasingly trendy topic in the world of finance, environmental, social, and governance (ESG) matters are nonfinancial factors that affect the financial value of firms. These matters include risks and opportunities related to climate change, company hiring practices, and ethical supply chain sourcing, among others, and investors are increasingly using ESG information to influence their investment decisions. More and more companies have been releasing voluntary "sustainability reports" in an attempt to match this investor demand. However, investors are growing dissatisfied with both the reliability and the comparability of the information that individual firms are choosing for inclusion in these voluntary disclosures. These investors are advocating for ESG information to be consistently defined and disclosed in a firm's financial statements. Investors do not want voluntary disclosure anymore; they want *mandatory* disclosure.

In response, the United States House of Representatives has introduced and passed a bill to require the United States Securities and Exchange Commission (SEC) to regulate the disclosure of these ESG matters. Perhaps prematurely, bearing in mind the considerable amount of doubt that the bill will become law, the SEC has passed a Proposed Rule to make these disclosures mandatory. Thus, there are several questions as to whether, in the absence of congressional authorization, the mandatory disclosure requirements under the SEC's proposed regulations would be illegal. Mainly, (1) did the SEC exceed its statutory authorization, and (2) are the mandatory disclosure requirements considered "compelled speech" under the First Amendment. After analyzing the ability of the SEC to mandate these disclosures, it is important to consider the costs and benefits of requiring disclosure in order to reach a conclusion as to whether the SEC *should* mandate disclosure of ESG matters.

In Part I, this Note gives a brief overview of the history of ESG and how it materialized as a result of a change in the prevalent theory of the purpose of business from the shareholder theory to the stakeholder theory. In Part II, this Note moves into analyzing the coming switch from voluntary to mandatory disclosure. First, the Note analyzes the current, voluntary approach to disclosure by looking at the most popular reporting frameworks utilized by firms. Second, the Note analyzes the bill recently passed by the House, which would require ESG disclosure, and looks at the partisan responses to the bill in

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order to gauge the likelihood of it becoming law. In Part III, this Note gives a brief overview of the SEC's previous attempts to meet investor demand for ESG information before analyzing the SEC's recently released Proposed Rule. This Part then analyzes the potential illegality of the Proposed Rule through the lens of, first, statutory agency authorization and, second, compelled speech in violation of the freedom of speech. Finally, assuming that the SEC is *allowed* to mandate ESG disclosure, in Part IV, this Note presents a cost-benefit analysis to answer the question as to whether the SEC *should* mandate ESG disclosure.

I. THE HISTORY AND EMERGENCE OF ESG: THE EVOLVING PURPOSE OF BUSINESS AND THE ENSUING ADOPTION OF ESG

Traditionally, the role of business has been singular: make profit for shareholders.[1] This notion of business is commonly referred to as the shareholder theory of business. However, over time, the conception of business has changed, and the prevailing view of business has become the stakeholder theory of business. Under this theory, a business must "place a concern with ethics, responsibility, and sustainability on a par with profits."[2] While the idea that a business has additional "social responsibilities" has been around since 1953, the stakeholder theory was the first attempt to place these responsibilities on a level of equal importance with a company's bottom line.[3] Now, a business places equal priority on a shareholder's need for profit as it does on the needs of other interested parties, such as employees, customers, and governments. Under this theory of business, a firm that ignores the interests of the broader community in which it operates is destined to fail.[4] To succeed, a business must understand how its decisions and actions impact its surrounding environment.

Around the advent of stakeholder theory, and the related increase in support for the adoption of social responsibilities by businesses, the SEC, for the first time, considered making the disclosure of environmental and "socially-significant" matters mandatory.[5] Although the SEC ultimately declined to make these disclosures mandatory, the interest in, and support for, ESG reporting only continued to grow over time. For example, in the 1980s, United States President

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1. *See generally* Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970 (discussing the role of business as simply generating profits, with any social goals being best left to politics, as opposed to having a greater "social responsibility").

2. R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH iv (1984).

3. HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 6 (1953) ("[Social responsibility] refers to the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society.").

4. Business Roundtable Institute for Corporate Ethics, *What is Stakeholder Theory? - R. Edward Freeman*, YOUTUBE (Oct. 1, 2009), https://www.youtube.com/watch?v=bIRUaLcvPe8 ("[A business that] doesn't pay attention to the quality of life in the community, doesn't pay attention to issues of corporate responsibility, of sustainability, of its effects on civil society . . . [is] a business that's soon to be regulated into decline.").

5. Securities Act Release No. 5569, Exchange Act Release No. 11,236 (Feb. 11, 1975).

Ronald Reagan called upon the private sector to act responsibly and expand their inclusion of social responsibilities, and he created a special Presidential Task Force to "promote private sector leadership and responsibility for solving public needs."[6] Subsequently, in the 1990s, President Bill Clinton developed a Presidential Award, the Ron Brown Award for Corporate Leadership, to acknowledge and reward excellent corporate citizenship.[7]

The first major move towards formalizing the intersection of business and social responsibility occurred on the global scale during a speech given by Kofi Annan, then Secretary-General of the United Nations (UN), at the World Economic Forum in Davos, Switzerland on January 31, 1999:

> I propose that you, the business leaders gathered in Davos, and we, the United Nations, initiate a global compact of shared values and principles . . . .
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> . . . .
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> . . . Specifically, I call on you—individually through your firms, and collectively through your business associations—to embrace, support and enact a set of core values in the areas of *human rights, labour standards, and environmental practices*.[8]

The solidification of corporate social responsibility as a global goal furthered the adoption of ESG reporting, and, throughout the 2000s and 2010s, the UN continued to be a staunch leader in the promotion of ESG reporting and corporate social responsibility. While the UN's directives and policies are not mandatory, many corporations have voluntarily adopted the UN's goals in their own corporate policies to demonstrate their commitment to being socially responsible. For example, the UN adopted seventeen different Sustainable Development Goals in 2015, and, by 2017, 43% of the Global Fortune 250 list tied their own reported corporate social responsibility activities to the UN's goals.[9] Overall, by 2017, 93% of companies on the Global Fortune 250 list participated in issuing nonfinancial reports.[10]

II. THE FUTURE OF ESG: MAKING THE SWITCH FROM VOLUNTARY DISCLOSURE TO MANDATORY REPORTING IN THE UNITED STATES

"Sustainable investing" is when an investment strategy specifically targets both financial *and* nonfinancial objectives.[11] There are several categories of

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6. Renée A. Berger, *Private-Sector Initiatives in the Reagan Administration*, 36 PROC. ACAD. POL. SCI. 14, 14 (1986).

7. Mauricio Andrés Latapí Agudelo et al., *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INT'L J. CORP. SOC. RESP. 1, 9 (2019).

8. Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb. 1, 1999) (emphasis added).

9. JOSÉ LUIS BLASCO & ADRIAN KING, THE ROAD AHEAD: THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2017 4 (2017).

10. *Id.* at 9.

11. *The Rise of Sustainable Investing*, UBS, https://www.ubs.com/global/en/assetmanagement/insights/investment-

sustainable investing, including ESG integration,[12] restriction screening,[13] thematic investing,[14] shareholder engagement,[15] and impact investing.[16] Sustainable investors, which can be either individual or institutional investors, care about the disclosure of ESG information because they look to invest in companies that participate and engage in meaningful ESG activities.[17] Among the 110 asset owners surveyed by investment bank Morgan Chase in 2019,[18] 80% said that they actively incorporate ESG factors in their investment strategy; this is a 10% increase from Morgan Stanley's last survey from 2017.[19] Additionally, eight in every ten survey respondents believe that companies with strong ESG practices are better long-term investments, and the majority envision a future where they allocate solely to investment managers with a formal ESG approach.[20]

This trend towards investors relying on ESG information to make investment decisions has exposed several problems with the current system of ESG reporting, which is done exclusively on a *voluntary* basis using guidelines that are not legally endorsed or standardized. Investors are mainly concerned with (1) the adequacy of the ESG information being reported and (2) the comparability of information across both company and sector lines. Generally, investors do not consider current ESG disclosures to be providing adequate

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outlook/panorama/panorama-end-year-2020/articles/rise-of-sustainable-investing.html (last visited May 15, 2022). Within Europe's Mutual Funds landscape, sustainable investing assets are expected to "skyrocket" from €1.1 trillion in 2017 to between €5.4 trillion and €7.6 trillion by 2025 to make up 41-57% of the total European Union-domiciled Mutual Fund Assets Under Management. *Id.* (citing PwC LUXEMBOURG, THE GROWTH OPPORTUNITY OF A CENTURY (2020)).

12. *See 7 Insights from Asset Owners on the Rise of Sustainable Investing*, MORGAN STANLEY (May 28, 2020), https://www.morganstanley.com/ideas/sustainability-investing-institutional-asset-owners (defining "ESG Integration" as "[p]roactively considering ESG criteria alongside financial analysis").

13. *Id.* (defining "Restriction Screening" as "[e]xclusionary, negative or values-based screening of investments").

14. *Id.* (defining "Thematic Investing" as "[p]ursuing strategies that address sustainability trends such as clean energy, water, agriculture or community development").

15. *Id.* (defining "Shareholder Engagement" as "[d]irect company engagement or activist approaches").

16. *Id.* (defining "Impact Investing" as "[s]eeking to make investments that intentionally generate measurable positive social and/or environmental outcomes").

17. *Id*

18. These asset owners included "public and corporate pensions, endowments, foundations, sovereign wealth entities, insurance companies, and other large asset owners worldwide, 92% of which had total assets over $1 billion." *Morgan Stanley Sustainable Signals: Asset Owners See Sustainability as Core to Future of Investing*, BUSINESS WIRE (May 27, 2020), https://www.businesswire.com/news/home/20200527005551/en/Morgan-Stanley-Sustainable-Signals-Asset-Owners-See-Sustainability-as-Core-to-Future-of-Investing.

19. MORGAN STANLEY, *supra* note 12.

20. *Id.* The other 43% of respondents cite barriers to sustainable investing, such as access to adequate tools to measure sustainability goals and quality data, as the reason why they do not currently foresee a future exclusively investing with managers with a formal ESG approach, suggesting that mandatory ESG disclosures would encourage more sustainable investing.

information because the disclosures are "episodic [and] incomplete"; as the disclosures are completely voluntary, companies get to choose when to make disclosures and what information to report in the disclosures.[21] Frequently, instead of providing "relevant, reliable, and decision-useful" information about the company's ESG activities,[22] companies choose to use "boilerplate language of minimal utility to investors, providing few material details about climate risks and opportunities facing them," and refuse to actually "quantify[] risks or past impacts."[23]

Additionally, investors complain about the lack of comparability between different companies' disclosures. Currently, the SEC does not require companies to disclose information related to ESG matters and, therefore, does not require adherence to any specific form or standard of disclosure. However, many companies voluntarily report these metrics using various standards published by different nonprofit organizations.[24] Due to a lack of uniformity amongst these various frameworks, investors are unable to meaningfully evaluate and compare different companies' ESG practices, risks, and opportunities.[25] This problem persists even when the companies being compared are in the same industry.[26]

Ultimately, both of these problems stem from the lack of a promulgated, standardized ESG disclosure framework. As a result, investors, particularly sustainable investors, have been advocating for a switch from the current system of voluntary ESG reporting to *mandatory* ESG reporting. There has been a significant push forward in recent years, including a bill passed by the House,[27] to have the SEC develop and promulgate regulations on the topic of ESG disclosures, specifically to define ESG metrics and formulate and require a standardized reporting framework.[28]

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21. Letter from Cynthia A. Williams, Osler Chair in Bus. L., & Jill E. Fisch, Saul A. Fox Distinguished Professor of Bus. L., to Brent J. Fields, Sec'y, SEC (Oct. 1, 2018).

22. *Id.*

23. JIM COBURN & JACKIE COOK, COOL RESPONSE: THE SEC & CORPORATE CLIMATE CHANGE REPORTING—SEC CLIMATE & S&P 500 REPORTING—2010 TO 2013 5 (2014).

24. *See infra* Part II.A.

25. Catherine M. Clarkin et al., *The Rise of Standardized ESG Disclosure Frameworks in the United States*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 22, 2020), https://corpgov.law.harvard.edu/2020/06/22/the-rise-of-standardized-esg-disclosure-frameworks-in-the-united-states.

26. Letter from Jean Rogers, CEO & Founder, SASB, to Brent J. Fields, Sec'y, SEC (July 1, 2016) (on file with author) ("79 percent of the investors polled said they are dissatisfied with the comparability of sustainability reporting between companies in the same industry.").

27. *See infra* Part II.B.

28. In response to the SEC's 2016 Concept Release on Business and Financial Disclosure Required by Regulation S-K, which asked, among other topics, whether the SEC should require disclosure of matters characterized broadly as ESG concerns, the SEC received over 26,500 comments. TYLER GELLASCH, TOWARDS A SUSTAINABLE ECONOMY: A REVIEW OF COMMENTS TO THE SEC'S DISCLOSURE EFFECTIVENESS CONCEPT RELEASE 9 (2016). Since 2008, less than 4% of the SEC's proposals have received more than 25,000 comments. *Id.* Over 10,000 of the submitted comments discussed disclosures relating to climate change and environmental matters. *Id.* at 10.

A. Voluntary Reporting: Currently Used Disclosure Frameworks

There are currently four main frameworks, published by nonprofit organizations, that companies use as starting points for their voluntary reports. These reporting frameworks differ in two main ways: (1) which matters are deemed important enough to disclose[29] and (2) how the guides frame the matters themselves.[30] For example, prominent frameworks from the Sustainability Accounting Standards Board (SASB) and the Task Force on Climate-Related Financial Disclosures (TCFD) determine whether an ESG matter is material enough to report based on its financial materiality.[31] However, other frameworks, such as the framework from the Global Reporting Initiative (GRI), deem a matter to be material based on the impact the company makes on the economy, environment, and society.[32] Additionally, the Greenhouse Gas Protocol ("GHG Protocol") focuses specifically on providing a framework to "measure and manage greenhouse gas (GHG) emissions from private and public sector operations, value chains and mitigation actions."[33]

Beginning with the SASB framework, SASB created a set of seventy-seven different industry-specific disclosure standards called the SASB Standards.[34] Since these standards are tailored to each industry, SASB had to formulate a method to define each industry. Instead of using any of the traditional industry classification systems based on common financial profiles and market profiles, SASB defines each industry by its sustainability risks and opportunities.[35] These standards are designed to "help companies disclose

29. The SASB and TCFD Frameworks focus on financial materiality, while the GRI Framework focuses on both financial and nonfinancial materiality.

30. The SASB and TCFD Frameworks incorporate these matters directly into the financial statements, while the GRI Framework is specifically for reports separate from the financial statements.

31. Clarkin et al., *supra* note 25. Matters that are deemed "material" are significant and should be reported because it is probable that the omission or misstatement of such an item in a financial report would change or alter the judgment of a reasonable person, such as an investor relying on the report. FINANCIAL ACCOUNTING STANDARDS BOARD, CONCEPTS STATEMENT NO. 8—CONCEPTUAL FRAMEWORK FOR FINANCIAL REPORTING—CHAPTER 3, QUALITATIVE CHARACTERISTICS OF USEFUL FINANCIAL INFORMATION (AS AMENDED) 2–3 (Aug. 2018). While this formulation is based on the accounting standards, it is essentially identical to the formulation used by the courts in interpreting federal securities law. TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) (defining a matter as 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").

32. Clarkin et al., *supra* note 25.

33. *About Us*, WORLD RES. INST., https://ghgprotocol.org/about-us (last visited May 15, 2022).

34. *Standards Overview*, SUSTAINABILITY ACCT. STANDARDS BD., https://www.sasb.org/standards (last visited May 15, 2022).

35. SASB's trademarked Sustainable Industry Classification System identified 11 major "thematic sectors" (Consumer Goods, Extractives & Minerals Processing, Financials, Food & Beverage, Health Care, Infrastructure, Renewable Resources & Alternative Energy, Resource Transformation, Services, Technology & Communications, and Transportation) which are further

financially-material sustainability information to investors" by identifying the environmental, social, and governance issues most relevant to the industry at hand.[36] Therefore, while the guidance is specific to each industry, the SASB Framework covers a broad base of ESG matters from energy and water management to data security and employee health.[37]

In contrast, the TCFD Framework focuses on the environmental prong of ESG and giving general guidance on climate-related topics.[38] The purpose of the TCFD is to provide disclosure of "clear, comparable and consistent information about the risks and opportunities presented by climate change."[39] Unlike the SASB Framework, which exclusively gives industry-specific guidance, the TCFD Framework gives both general guidance as well as supplemental guidance to those sectors most likely to be affected by climate change.[40] This framework is more widely adopted on the global scale because its framework is frequently incorporated into mandatory reporting regimes; for example, regulators in the European Union, United Kingdom, and Hong Kong all base their ESG regulations on the TCFD Framework.[41]

The GRI Framework shares similarities with both the SASB Framework and the TCFD Framework. Similar to the SASB Framework, the GRI Framework covers a wide range of ESG topics, as opposed to only focusing on environmental matters.[42] But, similar to the TCFD Framework, the GRI Framework provides both broad "Universal Standards" as well as industry-specific "Sector Standards."[43] However, in taking an opposite approach to both the SASB and TCFD Frameworks, the GRI Framework does not attempt to integrate ESG reporting into a company's financial statements. Instead, the GRI Framework focuses on providing guidance exclusively for use within sustainability reports.[44] These sustainability reports are published at the whim of the company, although most choose to publish one annually, and focus exclusively on their corporate social responsibility and ESG initiatives. The separation of these reports from the financial statements themselves can be seen in two different lights. Optimistic investors will see the separation as the company signaling that the firm's ESG activities are important enough to garner a separate report of their own. Pessimistic investors will see the separation as the company signaling that the firm's ESG activities are not as important as their financial metrics. By demonstrating that the company does not place equal

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broken up into "sub-sectors" and finally "industries." *Find Your Industry*, SUSTAINABILITY ACCT. STANDARDS BD., https://www.sasb.org/find-your-industry (last visited May 15, 2022).

36. *Id.*

37. Clarkin et al., *supra* note 25.

38. *Id.*

39. MICHAEL R. BLOOMBERG, RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES i (2017).

40. *Id.*

41. Clarkin et al., *supra* note 25.

42. *The Global Standards for Sustainability Reporting*, GLOB. REPORTING INITIATIVE, https://www.globalreporting.org/standards (last visited May 15, 2022).

43. *Id.*

44. Clarkin et al., *supra* note 25.

importance on both financial and nonfinancial matters, the company risks alienating sustainable investors, which are quickly becoming the majority of investors.

Finally, the GHG Protocol, similarly to the TCFD Framework, is a more tailored framework that focuses exclusively on the environmental prong of ESG. The GHG Protocol is endorsed by the United States Environmental Protection Agency (EPA),[45] as it provides accounting and reporting guidance for the seven greenhouse gases covered by the Kyoto Protocol.[46] The EPA recognizes Scope 1, Scope 2, and Scope 3 emissions.[47] Scope 1 emissions are "direct emissions" that are from sources controlled and owned by the company, such as facilities and vehicles.[48] Scope 2 and Scope 3 emissions are "indirect emissions."[49] Scope 2 emissions are emissions from purchased or acquired electricity, steam, heat, and cooling and are considered "indirect" because, while they are a result of the company's energy use, the emissions physically occur at the facility where they are generated and purchased from, not at the company's own facility.[50] Scope 3 emissions are indirect emissions that result from activities that are neither owned nor controlled by the reporting company.[51] These emissions are often called "value chain emissions" and include emissions from both upstream and downstream activities in the company's value chain; one company's Scope 3 emissions are another organization's Scope 1 and Scope 2 emissions.[52]

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45. *GHG Inventory Development Process and Guidance*, U.S. EPA, https://www.epa.gov/climateleadership/ghg-inventory-development-process-and-guidance (Sept. 29, 2021) ("Organizations are encouraged to consult the GHG Protocol Corporate Standard for foundational guidance . . . .").

46. *Corporate Standard*, WORLD RES. INST., https://ghgprotocol.org/corporate-standard (last visited May 15, 2022) (defining the seven greenhouse gases as "carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFCs), perfluorocarbons (PCFs), sulphur hexafluoride (SF6), and nitrogen trifluoride (NF3)"). The Kyoto Protocol was adopted on December 11, 1997, and while it originally expired in 2012, the Doha Amendment extended the Kyoto Protocol through 2020. *See What is the Kyoto Protocol?.*, U.N., https://unfccc.int/kyoto_protocol (last visited May 15, 2022). The Kyoto Protocol operationalized the United Nations Framework Convention on Climate Change "by committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets." *Id.* In addition to giving targets and metrics, the Kyoto Protocol established monitoring, verification, and compliance systems to ensure transparency and hold parties accountable. *Id. See generally* YVO DE BOER, KYOTO PROTOCOL REFERENCE MANUAL: ON ACCOUNTING OF EMISSIONS AND ASSIGNED AMOUNT (2008).

47. *Scope 1 and Scope 2 Inventory Guidance*, U.S. EPA, https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance (Sept. 9, 2022).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Scope 3 Inventory Guidance*, U.S. EPA, https://www.epa.gov/climateleadership/scope-3-inventory-guidance (May 12, 2022).

52. *Id.*

B. The Move Towards Mandatory Reporting: The House Passes the ESG Disclosure Simplification Act of 2021

In response to the increasing pressure from investors for mandatory ESG disclosure requirements, the House passed the ESG Disclosure Simplification Act of 2021 ("the Bill") on June 16, 2021.[53] The Bill is included in the Corporate Governance Improvement and Investor Protection Act as Title I and has three main components.[54]

First, should the Bill become a law, the SEC would have to define "ESG metrics" in its regulations.[55] This is an important step forward and aims to counteract the comparability problem, as there has previously been no commonly accepted definition of ESG and so each company has had its own method to define and describe ESG. These differing opinions of ESG have resulted in each company choosing to either report clearly distinct metrics or, supposedly, the same metrics, but calculated in a different manner. In an effort to potentially ease the way to mandatory reporting, the Bill allows for the SEC, at its discretion, to incorporate any "internationally recognized, independent, multi-stakeholder environmental, social, and governance disclosure standards."[56] This would be convenient for the SEC, since the European Union and the United Kingdom have already successfully implemented ESG disclosure requirements which the SEC can use as a starting point.[57] Additionally, many companies have already invested time and money to reach compliance with selected voluntary reporting frameworks, so, depending on the framework(s) selected to be incorporated, the SEC could reduce the potential burden of implementation on various United States companies.[58]

Second, all issuers of audited financial statements would be *required* to disclose ESG metrics.[59] This is the crux of the Bill, and the most important part

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53. 167 CONG. REC. H2863 (daily ed. June 16, 2021) (Roll no. 169) (passing the Bill 215-214).

54. H.R. 1187, 117th Cong. (2021).

55. H.R. 1187, 117th Cong. § 103(b)(1)(B) (2021). The definition of "ESG metrics" will be codified in part 210 of title 17 of the Code of Federal Regulations. H.R. 1187, 117th Cong. § 103(a) (2021).

56. H.R. 1187, 117th Cong. § 103(b)(4) (2021).

57. The European Union Technical Expert Group on Sustainable Finance "provides performance thresholds for identifying environmentally sustainable economic activities" and sets out disclosure requirements, such as "[l]arge companies must disclose the percentage of turnover (revenue), capital expenditure and operating expenses qualifying as environmentally sustainable." David M. Silk et al., *U.K. and EU Regulators Move Ahead on ESG Disclosures and Benchmarks*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 26, 2020), https://corpgov.law.harvard.edu/2020/04/26/u-k-and-eu-regulators-move-ahead-on-esg-disclosures-and-benchmarks. The United Kingdom's Financial Conduct Authority (FCA) rule focuses on the TCFD framework and requires all commercial U.K. companies with a premium listing (roughly 480 companies) to make climate change disclosures consistent with the recommendations promulgated by TCFD or explain why they have not. *Id.*

58. For more information regarding the most commonly utilized frameworks, see *supra* Part II.A.

59. H.R. 1187, 117th Cong. § 103(b)(1)(A) (2021).

from the perspective of investors, as it finally would regulate, and mandate, the ESG information that companies disclose. For investors, this is the ideal solution to both the adequacy problem and the comparability problem. However, this could potentially be a double-edged sword. It is likely that, with regulation and inclusion within audited financial statements, this ESG information will also need to be audited. Thus, while it is one problem to try to simply *define* ESG metrics, it is another problem entirely to then figure out how to properly *audit* them.[60] The lack of applicable auditing standards has been a common concern among detractors of the Bill.[61]

Third, the SEC would need to establish a permanent Sustainable Finance Advisory Committee.[62] This committee would be required to issue a report, within 180 days of its first meeting, giving recommendations on which ESG metrics should be required disclosures.[63] This report would "identif[y] the challenges and opportunities for investors associated with sustainable finance" as well as "recommend[] policy changes to facilitate the flow of capital towards sustainable investments."[64] The committee's focus on sustainable finance reflects the recent trend underlying this push for mandatory reporting: sustainable investing.[65]

1. Party-Line Voting and the Associated Pushback from Legislators

While the Bill being passed by the House can, and should, be seen as an example of mandatory ESG disclosure gaining momentum in the United States,

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60. The Public Company Accounting Oversight Board (PCAOB) oversees the audits of *public* companies in order to ensure that audits remain informative and accurate. *Mission, Vision, and Values*, PCAOB, https://pcaobus.org/about/mission-vision-values (last visited May 15, 2022). The international equivalent is the International Auditing and Assurance Standards Board (IAASB). While the IAASB has recently undertaken a project to create guidance surrounding ESG reporting, the PCAOB has remained silent. *Assurance on Sustainability Reporting*, IAASB, https://www.iaasb.org/consultations-projects/assurance-sustainability/environmental-social-and-governance-esg-reporting (last visited May 15, 2022). In fact, the limited assurance of ESG reporting undertaken thus far by public company auditors has used American Institute of Certified Public Accountants (AICPA) attestation standards. Maria L. Murphy, *Study: Auditor Assurance over ESG Reporting Still in Early Stages*, COMPLIANCE WK. (Sept. 3, 2021), https://www.complianceweek.com/accounting-and-auditing/study-auditor-assurance-over-esg-reporting-still-in-early-stages/30760.article. This is important to note because AICPA standards are generally less stringent as compared to PCAOB standards, since AICPA standards are used for *private* as opposed to public companies. *About the AICPA*, AICPA, https://us.aicpa.org/about.html (last visited May 15, 2022).

61. Several House Representatives, who voted nay on the Bill, have argued that it is important to first "examine the inconsistencies and methodologies related to *measuring* [ESG metrics]" because without proper metrics "we're putting the cart before the horse." Press Release, French Hill et al., Rep. Hill, Rep. Barr, and Rep. Huizenga Comment on SEC Chairman Gensler's Mandatory Climate Risk Directive (July 28, 2021) (emphasis added).

62. H.R. 1187, 117th Cong. § 103(b)(2) (2021).

63. *Id.*

64. H.R. 1187, 117th Cong. § 104 (2021).

65. The Bill defines sustainable finance as "finance with respect to investments taking into account environmental, social, and governance considerations." *Id.*

it is important to consider the current political climate in judging its future as to whether the Bill is likely to become a law. For example, the Bill very narrowly passed the House by a yea-and-nay vote of 215 yeas to 214 nays, and voting was almost entirely along party lines; all 215 yeas were attributable to Democrats, and 210 of the 214 nays were Republicans.[66] Many legislators released statements clarifying their positions on the Bill, which can be used to elucidate the sharp partisan stance on the Bill.

For the supporters of the Bill, which are all of the Democrats except for four of them, the most frequently cited reason for supporting the Bill is the benefit of increased transparency to the public.[67] Interestingly, however, many of these press releases actually disregard investor information as being the main reason for passing the Bill. Instead, the legislators voted for the Bill in an effort to hold companies responsible for their actions and potentially influence the corporations to be more socially conscious. For example, after the Bill's passing, one legislator stated that he was "hopeful that increasing transparency will encourage companies to be more mindful of climate concerns and other important social responsibilities."[68] It is this position that most of the opponents of the Bill take issue with. For example, one legislator described the Bill as "a partisan, left-wing bill aimed at naming and shaming public companies,"[69] and another legislator went so far as to call the Bill a "wokeness" report card for businesses.[70] It is a problem, according to these detractors, that the Bill oversteps by "forcing disclosure of immaterial information."[71] While opponents of the Bill believe companies should be given the choice to *voluntarily* include ESG information in their financial statements,[72] they believe it is foolish to *mandate* its inclusion and disagree with the Bill on the grounds that the SEC should not require any disclosure beyond information that is material to the company's financial information.[73]

This sharp divide does not bode well for the Bill's future as it moves on to the Senate as it is likely that the party-line voting will persist. In the current,

66. 167 CONG. REC. H2863 (daily ed. June 16, 2021) (Roll no. 169).

67. *See* Press Release, A. Donald McEachin, McEachin Votes in Support of Legislation to Increase Corporate Transparency and Accountability (June 16, 2021).

68. *Id.*

69. Press Release, French Hill, Rep. Hill Offers Practical, Good Governance Amendment to Replace House Democrats' Partisan, Left-Wing Legislation (June 16, 2021).

70. Press Release, Doug LaMalfa, LaMalfa Opposes the "Wokeness Report Card" for Businesses (June 17, 2021).

71. Press Release, Michael C. Burgess, Burgess Works for More Transparency (June 16, 2021).

72. *See* Press Release, Hill et al., *supra* note 61.

73. *See* Press Release, LaMalfa, *supra* note 70 ("Reports through the Securities and Exchange Commission should be designed to better inform investors about a company's financial health and relative risk, not to promote cancel culture.")

117th, Congress, both the House[74] and the Senate[75] are controlled by the Democrats. The Bill was able to pass the House, in part, due to the Democrats' control; even with several of the Democrats flipping to vote with the Republicans against the Bill, it had enough support to win a simple majority and pass in the House. However, with the current fifty-fifty split in the Senate, the future of the Bill is uncertain at best. It is expected that the Republican minority will stage a filibuster, and, under the Senate cloture rule, the Bill would then need sixty votes for passage or, put another way, ten Republican votes in addition to every Democratic vote.[76] Most likely, this will be unattainable for the Bill because, as seen in the House, the Bill did not get any Republican support nor did it have unanimous Democratic support. Additionally, several Senate Republicans have already spoken out against mandatory disclosure of ESG information.[77]

Despite the current lack of support for ESG-related legislation in the Senate, the passage of the Bill through the House demonstrates the increasing attention to corporate transparency and sustainability in the United States.[78] Even current President Joe Biden has come out as a staunch supporter of ESG and anticipates championing reporting requirements during his tenure in office. For example, in a 2021 Executive Order, President Biden announced that it is "the policy of [his] Administration to advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk."[79] Additionally, despite the pushback facing legislation in Congress, momentum to respond to investor demand for transparent ESG reporting is gaining in other executive branch agencies,[80] particularly the SEC.[81]

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74. *See* Office of the Historian & Clerk of the House's Office of Art & Archives, *Party Divisions of the House of Representatives, 1789 to Present*, U.S. H.R., https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited May 15, 2022) (222 Democrats to 212 Republicans).

75. The Democrats currently hold the majority in the Senate due to the tie-breaking vote of Vice President Kamala Harris, since the breakdown of the Senate is currently fifty Republicans, forty-eight Democrats, and two Independents (who caucus with the Democrats). Senate Historical Office, *Party Division*, U.S. S., https://www.senate.gov/history/partydiv.htm (last visited May 15, 2022).

76. S. Doc. No. 113-18, at 16 (2013) ("three-fifths of the Senators duly chosen and sworn").

77. Laura Weiss, *House Passes ESG, Climate Disclosure Rules for Public Companies*, ROLL CALL (June 16, 2021), https://rollcall.com/2021/06/16/house-passes-esg-climate-disclosure-rules-for-public-companies ("[Mandating ESG reporting by public companies] will ultimately harm investors both by discouraging companies from going public and by undermining the quality and reliability of the SEC's disclosure framework.").

78. Tara Giunta et al., *ESG Disclosure Gaining Momentum as Bill Passes the House of Representatives*, PAUL HASTINGS (June 21, 2021), https://www.paulhastings.com/insights/international-regulatory-enforcement/esg-disclosure-gaining-momentum-as-bill-passes-the-house-of-representatives.

79. Exec. Order No. 14,030, 87 Fed. Reg. 27,967 (May 25, 2021).

80. Giunta et al., *supra* note 78.

81. *See infra* Part III.

III. SEC ACTION ON ESG-RELATED DISCLOSURES: A JUSTIFIED RESPONSE TO INVESTOR DEMAND OR SIGNIFICANT REGULATORY OVERREACH?

The SEC has broad authority to require the disclosure of information "if such information is in the interest of, or is material to[,] investors."[82] Whether or not the disclosure of ESG information "is in the interest of investors," and therefore within the purview of the SEC, has become a recent topic of debate.[83] Nevertheless, the SEC is aware of this investor demand for adequate ESG reporting,[84] and, in the recent years, the agency has taken several steps to attempt to meet this demand, including releasing a proposed rule in March 2022 that would mandate ESG disclosures.[85]

A. *A History of Recent SEC Efforts to Regulate ESG-Related Disclosures*

Until March 2020, when the Investor Advisory Committee[86] approved recommendations that would encourage the SEC to update its reporting requirements to include "material, decision-useful environmental, social, and governance, or ESG factors," the SEC had not re-evaluated its regulation of climate change-related disclosures since 2010.[87] In response, the Chairman of the SEC announced the agency's intent to develop a rule proposal for consideration by the end of 2021 on the topic of mandatory climate risk disclosure.[88]

In pursuit of this goal, the ESG Subcommittee of the Asset Management Advisory Committee[89] released preliminary recommendations, which would have required the adoption of a standardized disclosure framework for material ESG risks, in December 2020.[90] The SEC requested that the public submit

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82. H.R. 1187, 117th Cong. § 102 (2021). *See also* Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021) ("Proactively addressing emerging disclosure gaps that threaten investors and the market has always been core to the SEC's mission.").

83. H.R. 1187, 117th Cong. § 102 (2021). *See infra* Part III.B.1.a.

84. Investors no longer believe the SEC's regulations adequately inform them about "known material risks, uncertainties, impacts, and opportunities," and the investors want the SEC to provide "greater consistency." Statement, SEC, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021).

85. *See infra* Part III.B.

86. The Investor Advisory Committee advises the SEC on "regulatory priorities" to protect investor interests and promote investor confidence. *Spotlight on Investor Advisory Committee*, SEC, https://www.sec.gov/spotlight/investor-advisory-committee.shtml (Feb. 14, 2017).

87. SEC, *supra* note 84.

88. Gary Gensler, Chairman, SEC, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (July 28, 2021).

89. The Asset Management Advisory Committee advises the SEC on "trends and developments affecting investors and market participants." *Spotlight on Asset Management Advisory Committee (AMAC)*, SEC, https://www.sec.gov/page/asset-management-advisory-committee (Mar. 25, 2022).

90. SEC, *supra* note 84.

comments on these potential disclosure rules in March 2021.[91] The SEC was specifically interested in hearing the public's opinion on whether the potential disclosure rules facilitated "consistent, comparable, and reliable information."[92] During the comment period, 550 unique comment letters were submitted, and 75% of the letters supported mandatory climate disclosure rules.[93] The SEC then reviewed its disclosure recommendations and announced its ultimate proposed rule amendments on March 21, 2022.[94] This proposed rule has since drawn both praise and backlash, with many calling it "significant regulatory overreach."[95]

In addition to crafting new regulation, the SEC has responded to the ESG trend by, in 2021, creating an enforcement task force focused exclusively on climate and ESG issues.[96] The "Climate and ESG Task Force" is a part of the SEC's Division of Enforcement, and its mission is to develop initiatives to "proactively identify ESG-related misconduct."[97] The members of the task force are expected to work closely with the Senior Policy Advisor for Climate and ESG.[98] This role was also created in 2021 in response to the increasing interest in ESG, and this appointee will both advise the SEC on ESG matters and advance related initiatives.[99]

B. The SEC's Recently Proposed Rule on ESG-Related Disclosures

Under the SEC's March 2022 proposed rule, registrants would be *required* to include, in both their registration statements and periodic reports,[100] climate-related information, including:

> (1) the registrant's governance of climate-related risks and relevant risk management processes; (2) how any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term; (3) how any

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91. *Id.*

92. *Id.*

93. Gensler, *supra* note 88.

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

95. Paul Barker et al., *SEC Proposes New Climate Disclosure Requirements*, KIRKLAND & ELLIS (Mar. 24, 2022), https://www.kirkland.com/-/media/publications/alert/2022/03/sec-proposes-new-climate-disclosure-requirements.pdf. *See infra* Part III.B.1.

96. SEC, *supra* note 82.

97. *Id.* This misconduct will be identified by locating "any material gaps or misstatements in issuers' disclosure of climate risks under existing rules." *Id.*

98. *See id.*

99. Press Release, SEC, Satyam Khanna Named Senior Policy Advisor for Climate and ESG (Feb. 1, 2021).

100. The registrant must "*file* rather than *furnish* the climate-related disclosure." Barker et al., *supra* note 95 (emphasis added). This is an important shift since it substantially increases the company's liability exposure. *Id.*

> identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook; and (4) the impact of climate-related events (severe weather events and other natural conditions) and transition activities on the line items of a registrant's consolidated financial statements, as well as on the financial estimates and assumptions used in the financial statements.[101]

Additionally, registrants would be required to disclose information about all of their Scope 1 and Scope 2 emissions.[102] In contrast, a registrant would only be required to disclose information about their Scope 3 emissions if the emissions are material or if the registrant set a GHG emissions target that includes a Scope 3 emissions goal.[103] All accelerated filers[104] and large accelerated filers[105] will be required to provide attestation reports from an independent attestation service provider regarding their Scope 1 and Scope 2 emissions, but the requirement does not necessitate attestation reports regarding their Scope 3 emissions.[106]

Determining whether Scope 3 emissions, and ESG information in general, are "material" is a complicated question because it is nonfinancial information. Thus, companies need to keep in mind the concept of "double materiality."[107] Under double materiality, a company should report ESG information if it is either (1) financially material or (2) socially material. An ESG matter is financially material if it impacts the company's financial performance or ability to create long-term value, and a matter is socially material if it impacts "people and the earth."[108] In addition to disclosing financially material information, it is in the best interest of the company to disclose socially material information

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101. Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022).

102. *Id.*

103. *Id.*

104. *See* 17 C.F.R. § 240.12b-2(1) (2013) (defining "accelerated filer" as an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $75 million or more, but less than $700 million, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and (iv) the issuer is not eligible to use the requirements for SRCs under the SRC revenue test).

105. *See* 17 C.F.R. § 240.12b-2(2) (2013) (defining "large accelerated filer" as an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and (iv) the issuer is not eligible to use the requirements for SRCs under the SRC revenue test).

106. SEC, *supra* note 101.

107. Maria Castañón Moats & Paul DeNicola, *The Corporate Director's Guide to ESG*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 15, 2021).

108. *Id.*

because many stakeholders, such as sustainable investors, are interested in this information; thus, withholding this information can damage a company's reputation and long-term value.[109]

If the SEC adopts this proposed rule, the requirements contained therein would take effect, at the earliest, in fiscal year 2023 and begin to apply to SEC filings in 2024.[110] Prior to finalizing any major regulatory changes, however, the agency is required to solicit feedback from the public.[111] The original deadline to submit a comment was May 20, 2022, as per usual SEC protocol,[112] but the deadline was extended to June 17, 2022 after the agency received complaints that the original deadline did not allow enough time to analyze the minutiae of the approximately 500-page proposal.[113]

1. A Critical Response: Evaluating the Legality of the Proposed Rule

The proposed rule is expected to face two main legal challenges, which would preclude its adoption by reason of illegality: (1) the SEC overstepped its statutory authorization and did not have authority to enact climate disclosure regulations "in the absence of explicit Congressional authorization"[114] and (2) mandating ESG-related disclosures is equivalent to compelling speech in contravention of the First Amendment.[115] Importantly, even if these legal challenges prove unsuccessful, they can still delay the actual implementation of the proposed rule.[116]

i. The SEC Exceeded its Statutory Authority

The SEC is an independent federal agency that was established pursuant to the Securities Exchange Act of 1934, by which Congress gave the SEC a

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109. *Id.*

110. Barker et al., *supra* note 95.

111. Paul Kiernan, *SEC Extends Comment Periods on Three Major Rule Proposals*, WALL ST. J. (May 9, 2022, 1:19 PM), https://www.wsj.com/articles/sec-extends-comment-period-on-three-major-rule-proposals-until-june-17-11652109343.

112. *Id.* The SEC typically chooses to solicit comments until either (1) sixty days after the date the proposed rule was published in the Federal Register or (2) thirty days after publication, which is the minimum allowed under federal law. *Id.*

113. *Id.* ("The current comment deadline, May 20, 2022, is woefully inadequate to provide the necessary opportunity for meaningful public comment." (quoting Letter from Tawny A. Bridgeford, Deputy Gen. Couns. & Vice President, Regul. Affs., Nat'l Mining Ass'n, to Vanessa A. Countryman, Sec'y, SEC (Apr. 19, 2022) (on file with author))).

114. This is the reason that any potential legislation on the topic of ESG-related disclosure is important for companies to follow closely; for example, if the Bill mentioned above, see *supra* Part II.B, were to pass the Senate and eventually become law, it would render this argument against the proposed rule ineffective, since it would authorize the SEC to regulate on the topic and make the ESG-related disclosures mandatory.

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

116. Barker et al., *supra* note 95.

tripartite mission to "protect[] investors, facilitat[e] capital formation, and foster[] fair, orderly, and efficient markets."[117] Unless the topic of climate-related disclosure falls within these "subject-matter boundaries" imposed on the SEC by Congress, the SEC would lack a statutory basis to issue this proposed rule and, therefore, would need a "specific congressional mandate" to justify regulation.[118] Here, there are three main arguments to suggest that the SEC exceeded their statutory authority: (1) the SEC overstepped its boundaries by regulating a public policy concern, (2) the SEC overstepped its boundaries in violation of the Supreme Court's major questions doctrine by regulating matters that it had previously only regulated after congressional authorization, and (3) the SEC is mandating the disclosure of too much, and potentially immaterial, information.[119]

First, Congress itself has previously limited the SEC's ability to adopt regulations related to mandating climate-related disclosures because ESG disclosures relate to public policy goals, not the federal securities laws which created and authorized the SEC.[120] Essentially then, when the topic of the SEC's proposed regulation is a "public policy" concern, the SEC is only allowed to adopt the regulation after Congress gives its express permission; for example, Congress has previously authorized and required the SEC to mandate new disclosures on specific public policy concerns such as conflict minerals and payments by resource extraction companies.[121]

Second, the SEC itself has previously concluded that it is generally unauthorized to mandate disclosures relating to environmental, sustainability, or other social goals except in the case of a congressional mandate. Precedent within the SEC is to rely on statutory authorization when it wants to expand mandatory disclosures beyond topics directly covered by the Securities Act of 1933 and the Securities Exchange Act of 1934. For example, the SEC previously did not regulate disclosure of ESG matters such as corporate governance and executive compensation until after Congress authorized it.[122] In issuing this proposed rule, however, the SEC shirks its precedent to assert that the agency has "broad authority" to promulgate disclosure requirements

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117. Statement, SEC, We are Not the Securities and Environmental Commission—At Least Not Yet (Mar. 21, 2022). *See* Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq. (establishing the SEC).

118. Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?*, MERCATUS CTR. GEORGE MASON UNIV. (Aug. 19, 2021), https://www.mercatus.org/research/policy-briefs/does-sec-have-legal-authority-adopt-climate-change-disclosure-rules.

119. The "major questions doctrine" applies when an agency asserts "highly consequential power beyond what Congress could reasonably be understood to have granted." West Virginia. v. EPA, 142 S. Ct. 2587, 2609 (2022).

120. *See* Vollmer, *supra* note 118 ("A new set of disclosure obligations for climate-change issues adopted by the SEC would have climate issues as a common subject and would seek to use the securities disclosure system to advance a public policy goal extraneous to the federal securities laws without congressional approval.").

121. *Id.*

122. *Id.*

that are "necessary or appropriate in the public interest or for the protection of investors."[123] Suddenly concluding that regulating climate-related disclosures is within the bounds of the SEC's authority is a marked change from the SEC's previous stance, and the Supreme Court has explicitly warned agencies against attempting to broaden their statutory authority:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[124]

This skepticism has been refined to become the core of the Supreme Court's major questions doctrine and was the basis of the Court's recent decision in *West Virginia v. EPA*.[125] In the *EPA* ruling, the Supreme Court struck down a regulation that gave the EPA power to regulate power plant carbon emissions contributing to climate change.[126] The EPA argued that the power to issue the regulation was granted by the Clean Air Act, which gave the EPA power to regulate sources of any substance that "causes, or contributes significantly, air pollution."[127] However, the Court concluded that the EPA's reliance on the Clean Air Act constituted a "fundamental revision" of the statute as, prior to this attempt at regulation, the EPA used the power embedded in the Act to attempt to reduce pollution by simply setting measures to encourage power plants to operate more cleanly, not to attempt to reduce pollution by requiring power plants to shift their activity from "dirtier to cleaner sources."[128] The Court ultimately determined this broader conception of the Clean Air Act, in the absence of congressional authorization, was inappropriate and declared the regulation invalid as beyond the authority of the EPA.[129]

Essentially, the Court made it such that an agency's regulation is presumed invalid if it results in the agency doing something "new and big," unless the agency can point to clear congressional authorization.[130] Thus, if the Court determined that the EPA, an agency focused on protecting the environment, regulating the carbon emissions of power plants in a certain way was "new and big" enough to be invalid, it is likely that the Court would find

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123. SEC Proposed Rule, 87 Fed. Reg. at 21,335.

124. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 159–60 (2000)).

125. 142 S. Ct. 2587, 2609 (2022).

126. *Id.*

127. *Id.* at 2627 (citing 42 U.S.C. § 7411(b)(1)(A)).

128. *Id.* at 2610 (citing 80 Fed. Reg. 64,726).

129. *Id.*

130. Nina Totenberg, *Supreme Court Restricts the EPA's Authority to Mandate Carbon Emissions Reductions*, NPR, https://www.npr.org/2022/06/30/1103595898/supreme-court-epa-climate-change (June 30, 2022). The Supreme Court defines "something new and big" as an agency claiming to discover an "unheralded power" representing a "transformative expansion in [an agency's] regulatory authority." *EPA*, 142 S. Ct. at 2610 (quoting *Util. Air*, 573 U. S. at 324).

the SEC, an agency that focuses on financial matters, regulating ESG- and climate-related matters to be invalid as well.

Third, the Supreme Court has also made it clear that agencies need to avoid overly sweeping disclosure requirements that would bury investors in trivial information.[131] Consequently, the SEC needs to find a balance between mandating enough, but not too much, information.[132] Generally, this is achieved by mandating only the disclosure of *material* information; essentially, the SEC needs to determine what information is material to an "objectively reasonable investor in her capacity as an investor . . . seeking a financial return on her investment."[133] It is important to note that the standard is an "objectively reasonable investor," not a "sustainable investor." This distinction is important because, while the SEC can rely on "significant investor demand" as a justification for issuing a new disclosure requirement, the "demand" can only come from investors that are seeking the information to "help them assess the financial value of companies in which they are considering investing" and not investors that are seeking the information out of concern for the climate.[134] Thus, in addition to checking the subject matter of its regulation, the SEC needs to check the *motivation* behind its regulation and ensure that both are proper. Otherwise, the regulation will be invalid.

Here, there is an argument to be made that neither the subject matter of the proposed rule, since the SEC exceeded its subject-matter boundaries in the absence of congressional approval and in violation of the major questions doctrine, nor the motivation underlying the proposed rule, since the regulation was founded mainly in investor concern for the climate, were appropriate.

ii. The Mandated ESG-Related Disclosures Constitute Compelled Speech

There is also an argument to be made that, by mandating climate-related disclosures, the SEC violated the First Amendment.[135] The right to freedom of speech, which extends to corporations,[136] includes both "the right to speak freely and the *right to refrain from speaking at all*."[137] This so-called "negative free

131. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448 (1976).

132. *See infra* Part IV.A.2 (expanding on the problem of information overload).

133. SEC, *supra* note 117.

134. *Id. See also* Letter from Paul G. Mahoney & Julia D. Mahoney, Law Professors, Univ. Va. Sch. L., to Gary Gensler, Chairman, SEC (June 1, 2021) ("[I]nstitutional investors' enthusiasm for ESG investing is not just a question of risk and return, [so] mandated ESG disclosures are not merely outside the core concerns of the SEC, but in active conflict with them.").

135. The First Amendment prohibits Congress from making a law that "abridg[es] the freedom of speech." U.S. CONST. amend. I.

136. One of the first cases to grant corporations the same rights under the Constitution as those afforded to individuals was *Santa Clara County v. Southern Pacific Railroad Co.*, in which the Chief Justice stated that the Supreme Court "does not wish to hear argument on the question whether the provision in . . . the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does." 118 U.S. 394, 396 (1886). *See also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (extending free speech protections under the First Amendment to corporations).

137. Wooley v. Maynard, 430 U.S. 705, 714 (1977) (emphasis added).

speech right[]," which prohibits compelled speech,[138] is well-established in religious[139] and political[140] contexts, but it has a more complicated application in the commercial context,[141] especially as applied to mandating disclosure requirements.[142] Outside of the commercial sphere, courts apply a strict scrutiny standard.[143] However, within the commercial sphere, if a disclosure only requires "purely factual and uncontroversial information," courts apply a less stringent standard.[144] Under this more deferential standard, a disclosure will be allowed so long as (1) it is not "unjustified or unjustly burdensome,"[145] (2) it remedies a harm that is "potentially real, [and] not purely hypothetical,"[146] and (3) it is "no broader than reasonably necessary."[147] Applying this three-prong test to the SEC's proposed rule, it is likely that the rule will face compelled speech litigation.

First, there are concerns about the proposed rule's "specific *cost*, feasibility, [and] liability."[148] The SEC based its proposed rule on two commonly used voluntary reporting frameworks, the TCFD Framework and the GHG Protocol, in an effort to achieve a balance between mandating "better disclosure and limiting compliance costs."[149] However, this rule imposes two substantial costs on companies: an implementation cost and an attestation cost. Basing the disclosure requirements on already utilized frameworks partially lowers the implementation cost, but these savings are only captured by the small

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138. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 U.S. 2448, 2464 (2018) (explaining that compelled speech imposes "damage").

139. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (prohibiting children from being forced to salute the flag and recite the Pledge of Allegiance).

140. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (prohibiting a newspaper from being forced to provide free space for political candidates to reply to the newspaper's criticisms).

141. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) ("[T]he extension of First Amendment protection to commercial speech is justified principally by the *value to consumers of the information* such speech provides . . . ." (emphasis added)).

142. "Disclosure requirements are seen as one of the less restrictive commercial speech regulations because they add to the flow of commercial information." Nicole B. Cásarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 931 (1998) (citing *id.* at 651 n.14).

143. "[F]or the Free Speech Clause, the Court's strict scrutiny rules are essentially per se invalidations." Spencer G. Livingstone, Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359, 2367 (2020). There have only been five cases that have survived strict scrutiny. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015); Holder v. Humanitarian Law Project, 561 U.S. 1 (2010); Burson v. Freeman, 504 U.S. 191 (1992); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990); Buckley v. Valeo, 424 U.S. 1 (1976).

144. *Zauderer*, 471 U.S. at 651.

145. *Id.*

146. Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct., 512 U.S. 136, 146 (1994).

147. *In re* R. M. J., 455 U.S. 191, 203 (1982).

148. Barker et al., *supra* note 95 (emphasis added).

149. *See* SEC Proposed Rule, 87 Fed. Reg. at 21,343–45. *See generally supra* Part II.A (describing commonly used reporting frameworks, including the TCFD Framework and GHG Protocol).

percentage of companies that use these frameworks;[150] a survey cited by the SEC itself shows that firms, at best, pick and choose which elements from the TCFD to report, with the average rate of disclosure of each element being around 20%.[151] In addition to overestimating the cost savings to companies by utilizing an already "widely" adopted framework, the SEC fails to distinguish between the costs of *voluntarily* following a reporting framework and having *mandatory* SEC disclosures that must be audited. Currently, most companies that voluntarily report ESG matters either do not subject the information to assurance by independent auditors at all or only obtain assurance for part of it.[152] Thus, the "biggest winners" with regard to the proposed rule are audit firms, as companies will be required to employ audit firms to obtain necessary assurance for a variety of metrics, including "subject-specific metrics within the financial statements" and Scope 1 and Scope 2 emissions.[153] Another "big winner" will likely be consulting firms, as even the SEC admits that companies will probably need to employ consulting firms specializing in ESG- and climate-related risk just to compile their required information.[154] Thus, this disclosure requirement, even if justified, is potentially unjustly burdensome, as the cost to each company to both implement the disclosure framework and audit the disclosures is likely to be large and onerous.

Second, the harm that the proposed rule is attempting to remedy is "greenwashing,"[155] in which a company manipulates the information available in their sustainability reports with the "goal of attaining higher ESG ratings."[156] This is troubling because unsophisticated investors, particularly unsophisticated

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150. For example, while 92% of the S&P 500 companies published sustainability reports in 2020, only 17% of the reporting companies aligned with the TCFD Framework. *92% of S&P 500® Companies and 70% of Russell 1000® Companies Published Sustainability Reports in 2020, G&A Institute Research Shows*, GLOBENEWSWIRE (Nov. 16, 2021), https://www.globenewswire.com/news-release/2021/11/16/2335435/0/en/92-of-S-P-500-Companies-and-70-of-Russell-1000-Companies-Published-Sustainability-Reports-in-2020-G-A-Institute-Research-Shows.html.

151. SEC Proposed Rule, 87 Fed. Reg. at 21,423 (Table 4).

152. "35% of Russell 1000 index firms, which are virtually all large accelerated filers, obtained third-party assurance for their sustainability reports in 2020," but only 3% of these companies received assurance for their entire report. *Id.* at 21,424.

153. Statement, SEC, *supra* note 117.

154. SEC Proposed Rule, 87 Fed. Reg. at 21,352 ("[C]limate consulting firms are available to assist registrants . . . ."). However, there is currently an ESG consultant shortage that is emerging as a major stumbling block for corporations. *See* Amanda Iacone & Stephen Lee, *ESG Consultant Shortage Looms as Corporate Reporting Race Begins*, BLOOMBERG (June 28, 2022), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/financial-accounting/BNA%2000000181-6dda-dcde-a1d9-7dff18e10001. This shortage is likely to further increase corporate costs of compliance to annual amounts far exceeding the SEC's current estimates. *Id.*

155. There is no universally accepted definition of "greenwashing," but it is "typically described as the set of activities conducted by firms or funds to falsely convey to investors that their investment products or practices are aligned with environmental or other ESG principles." SEC Proposed Rule, 87 Fed. Reg. at 21,429 n.844.

156. *Id.* at 21,429.

sustainable investors, often rely on these ratings to inform their investment decisions.[157] The harm stems from a lack of standardization and transparency in the methodologies used by companies, which creates a higher level of divergence in ESG ratings across ESG raters than there is in credit ratings across credit raters.[158] The proposed rule attempts to remedy this harm by creating a standardized framework; however, there are questions as to whether the proposed rule will be successful in this regard. Notably, Commissioner Hester M. Peirce of the SEC refused to support the proposed rule and released a dissenting statement in which she outlined many concerns,[159] chief among them the fact that the proposal will "*not* bring consistency, comparability, and reliability to company climate disclosures."[160] The Commissioner notes that this attempt to solve greenwashing will actually aggravate the problem by requiring companies to put into quantitative terms highly speculative data on the "habits of their suppliers, customers, and employees[,] changing climate policies, regulations, and legislation[,] technological innovations and adaptations[,] and changing weather patterns."[161] In fact, this "solution" might actually be more harmful to investors, as requiring companies to include this information in official SEC documents lends credence to the data and makes investors more likely to wrongfully rely on unreliable data.[162] All in all, the disclosure requirement might be attempting to solve a real harm, but there are questions as to whether the requirement will, actually, remedy the harm. In fact, there is evidence that the proposed regulation will instead "undermine the existing regulatory framework that for many decades has undergirded consistent, comparable, and reliable company disclosures."[163]

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157. *Id.*

158. *Id.* at 21,429 n.846. The correlation between ESG ratings is on average 0.61 (but range from 0.42 to 0.73), whereas the correlation between credit ratings is 0.99. Florian Berg et al., *Aggregate Confusion: The Divergence of ESG Ratings* 2 (MIT Sloan Sch. of Mgmt., Working Paper No. 5822-19, 2019).

159. Commissioner Peirce included a succinct list of what she believed to be elements missing from the proposed rule:

- A credible rationale for such a prescriptive framework when our existing disclosure requirements already capture material risks relating to climate change;
- A materiality limitation;
- A compelling explanation of how the proposal will generate comparable, consistent, and reliable disclosures;
- An adequate statutory basis for the proposal;
- A reasonable estimate of costs to companies; and
- An honest reckoning with the consequences to investors, the economy, and this agency.

SEC, *supra* note 117.

160. *Id.* (emphasis added).

161. *Id.*

162. *Id.*

163. *Id.*

Third, to determine whether a disclosure requirement is "broader than reasonably necessary," it is necessary to analyze whether there is a clear and logical connection between the disclosure and the objective of the federal securities laws.[164] Thus, an SEC disclosure mandate is at its most impenetrable the closer the disclosure relates to *financial* materiality, as "the quest for financial returns is the common goal that unites *all* investors"; it is not the role of the SEC to accommodate and provide information that relates to individualized goals, such as alleviating climate change.[165] Under the proposed rule, the SEC is attempting to accommodate stakeholders and sustainable investors and not "objectively reasonable investors" concerned about their financial return, which is the population the SEC is supposed to be focused on protecting.[166] Additionally, if the climate-related disclosures mandated in the proposed rule were truly motivated by material *financial* concerns, these matters would already be subject to mandatory disclosure under other SEC disclosure requirements. Thus, lacking a potential clear and logical connection, the disclosure requirement is likely to come under attack for being too broad. Taken in sum, since the proposed rule needs to not be unjustly burdensome, needs to remedy a real harm, *and* not be broader than reasonably necessary, there is an argument to be made that the climate-related disclosure requirements in the SEC's proposed rule constitute compelled speech that would not pass even the less stringent commercial test for disclosures.

IV. A COST-BENEFIT ANALYSIS OF MANDATING ESG-RELATED DISCLOSURES

Assuming that the SEC has the authority to mandate the disclosure of ESG information, it is important to analyze all of the associated costs and benefits, to both the public and the companies, in order to answer the question as to whether the SEC *should* mandate disclosure. Generally, when ESG activities become institutionalized within a sector, the benefits to the public are tangible.[167] However, does disclosure of ESG information also benefit the company supplying the information? If so, do these combined benefits outweigh the burdens placed on the public and the complying companies?

A. The Public Perspective

As mentioned previously, the increasing support for mandatory disclosure of ESG information can be attributed to the rise of sustainable investing.[168] Considering the public's interest in utilizing ESG information to determine investment strategies, the chief benefit of mandatory disclosure is the

164. *Id.*

165. *Id.* (emphasis added).

166. *Id.*

167. *See generally* SIMON ZADEK, THE CIVIL CORPORATION: THE NEW ECONOMY OF CORPORATE CITIZENSHIP (2001).

168. *See supra* Part II.

guaranteed receipt of decision-useful information.[169] ESG metrics are considered decision-useful information, as 74% of companies acknowledge climate change as a material risk.[170]

Despite the materiality of this information, however, not all companies currently choose to disclose this information, and, for the companies that do provide this information to the public, 82% of investors are dissatisfied with how these ESG risks and opportunities are currently identified and quantified in financial terms.[171] A major cause of this discontentment is greenwashing, where companies engage in obfuscation and other misleading efforts to boost their ESG ratings.[172] Greenwashing is so prevalent, in part, because of the emergence of sustainable funds. Thus, another benefit to having a standardized framework is a reduction in a company's ability to manipulate their disclosures in such a way so as to be lumped into these specialized funds and attract more capital and investments from sustainable investors. Relatedly, mandating disclosure would alleviate the public's dissatisfaction with available information because academic studies have found that firms engaged in and reporting on their corporate social responsibility, including ESG, activities present more reliable and transparent financial information.[173] All end users, including both investors and creditors, are therefore able to put more trust in a company's reported information if ESG-related disclosures are included.

An additional benefit to regulation of ESG information is the creation of a common location for the disclosures in regulatory filings. Under the proposed rule, a registrant would be required to disclose ESG-related information in several places: climate-related disclosures must be present in its registration statements and periodic reports, and climate-related financial statement metrics, along with their related disclosures, must be included in a note to the company's audited financial statements and be subject to audit.[174]

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169. Decision-useful information is information that is material to a company's operations and financial health. SEC Proposed Rule, 87 Fed. Reg. at 21,340.

170. *Practicing Responsible Policy Engagement*, CERES, https://www.ceres.org/practicingRPE (last visited May 15, 2022).

171. Letter from Jean Rogers to Brent J. Fields, *supra* note 26.

172. *See supra* Part III.B.1.ii.

173. *See* Yongtae Kim et al., *Is Earnings Quality Associated with Corporate Social Responsibility?*, 87 ACCT. REV. 761 (2012). There are two conflicting theories related to firms engaging in corporate social responsibility. The first is the "transparent financial reporting hypothesis," which suggests that firms engage in socially responsible activities as a part of a moral imperative because engaging in honest, trustworthy, and ethical behavior is beneficial to the firm. *Id.* at 765. The alternative theory is the "opportunistic financial reporting hypothesis," which suggests that engaging in socially responsible activities is just "reputation insurance" and is used to cover up the impact of corporate misconduct. *Id.* at 766. The results of this study are consistent with the transparent financial reporting hypothesis, as firms engaged in corporate social responsibility activities are less likely to manage earnings through discretionary accruals, manipulate real operating activities, and be subject to SEC investigations. *Id.*at 768.

174. SEC Proposed Rule, 87 Fed. Reg. at 21,346. The company would also be required to "electronically tag both narrative and quantitative climate-related disclosures in Inline XBRL." *Id.* Inline eXtensible Business Reporting Language (XBRL) is a "structured data language" that filers must use to create a single document that is both human- and machine-readable. *Inline XBRL*, SEC,

Mandating reporting, and explicitly detailing where the information must be reported, will have the added benefit of reducing investors' search costs and therefore improving investors' information-processing efficiency.[175]

On the other hand, should ESG-related disclosures become mandatory, the most worrisome burden that would be placed on the public is the problem of information overload. The Supreme Court has a traceable history of being concerned about the amount of information a company is required to report; specifically, the Court is troubled by a standard of materiality that is so low that a corporation would be liable for insignificant omissions.[176] As a result of management's rational fear of substantial liability, the Court foresees corporations overcompensating and burying the public in a veritable "avalanche of trivial information,"[177] and, just as having too little information on which to base a decision is unfavorable, investors being exposed to too much information is a serious impediment to informed decision making.[178]

Interestingly, another cost to mandating ESG-related disclosures is seemingly counterintuitive, as corporate social responsibility activities and taxes are substitutes, not complements.[179] Basically, companies with higher corporate social responsibility scores actually pay less in corporate taxes.[180] Thus, mandating disclosure of ESG matters, and therefore encouraging participation in ESG matters due to the potential backlash for reporting no positive ESG activity, actually has the societal cost of depriving the United States' government, and its associated welfare programs, of additional money,

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https://www.sec.gov/structureddata/osd-inline-xbrl.html (Apr. 9, 2020). The SEC requires filers to use Inline XBRL to file their operating company financial statement information and risk/return summary information, and, for users of the information, Inline XBRL "provides an easier way to view, access, and explore the contextual information of the underlying data." *Id.*

175. SEC Proposed Rule, 87 Fed. Reg. at 21,429.

176. *See* TSC Indus. v. Northway, Inc., 426 U.S. 438, 448 (1976).

177. *Id.*

178. *Id.* at 449.

179. Angela K. Davis et al., *Do Socially Responsible Firms Pay More Taxes?*, 91 ACCT. REV. 47 (2016). Additionally, the more socially responsible firms also engage in more tax lobbying activities, which is also counterintuitive. *Id.* Combined, the evidence suggests that the more socially responsible firms are actually the firms that are engaging in the most tax avoidance. *Id.*

180. The theory that corporate social responsibility activities and tax payments are complements is based on the idea that socially responsible firms will be willing to dedicate resources to socially responsible activities that will *not* maximize financial performance, such as paying taxes. *See* Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. MGMT. REV. 497 (1979); Elisabet Garriga & Domènec Melé, *Corporate Social Responsibility Theories: Mapping the Territory*, 53 J. BUS. ETHICS 51 (2004); Alison Mackey et al., *Corporate Social Responsibility and Firm Performance: Investor Preferences and Corporate Strategies*, 32 ACAD. MGMT. REV. 817 (2007). However, the results of this study instead support traditional economic theory, which suggests that firms will only engage in socially responsible activities insofar as the incentives are aligned with the goal of maximizing shareholder wealth. *See* Davis et al., *supra* note 179.

which is, arguably, the opposite of what proponents of ESG want the effect of mandating disclosure to be.[181]

B. The Corporate Perspective

At the highest level of analysis, participating in ESG activities confers several benefits on a corporation, including reducing costs and risk, creating a competitive advantage, developing reputation and legitimacy, and creating win-win situations through synergistic value creation.[182] For example, firms with higher measures of corporate social responsibility have lower cost of capital,[183] since disclosure improves risk-sharing, higher revenue growth,[184] and are less likely to be subject to SEC investigations.[185] Additionally, the market responds to involvement in ESG activities, as firms that have adopted extensive ESG policies have outperformed other comparable firms, both in stock market and accounting performance.[186] There is also evidence that firms issuing corporate social responsibility, or sustainability, attract dedicated institutional investors and analyst coverage.[187] As a result, these analysts are able to achieve lower forecast error and dispersion.[188] This suggests that ESG-related disclosures allow for more accurate valuations of a firm's performance.

Generally, a policy of mandating ESG-related disclosures is seen as a regulation that would benefit the public and investors more so than individual companies; just as there are more benefits conferred to the public, there are more costs incurred by the companies. As mentioned above, the largest costs imposed on the companies are the unduly burdensome implementation and attestation costs.[189]

Further, at a higher level of simply analyzing the rationale behind ESG-related disclosures, there is a tension that exists as to whether corporate social

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181. Øyvind Ihlen et al., *Corporate Social Responsibility and Communication*, *in* THE HANDBOOK OF COMMUNICATION AND CORPORATE SOCIAL RESPONSIBILITY 3, 8–9 (2011).

182. Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L J. MGMT. REVS. 85, 92 (2010).

183. *See* Dan S. Dhaliwal et al., *Voluntary Nonfinancial Disclosure and the Cost of Equity Capital: The Initiation of Corporate Social Responsibility Reporting*, 86 ACCT. REV. 59 (2011). Since the decrease in the company's cost of capital occurs in the first year after issuing their initial corporate social responsibility report, it is unclear whether mandating reporting for all corporations would actually confer a long-term benefit onto the corporations. *Id.*

184. *See* Baruch Lev et al., *Is Doing Good Good for You? How Corporate Charitable Contributions Enhance Revenue Growth*, 31 STRATEGIC MGMT. J. 182 (2010).

185. *See* Kim et al., *supra* note 173.

186. *See* Mozaffar Khan et al., *Corporate Sustainability: First Evidence on Materiality*, 91 ACCT. REV. 1697 (2016).

187. *See* Dhaliwal et al., *supra* note 183.

188. *Id.* This relationship between disclosure and forecast accuracy is even stronger in countries such as the United States, which are more stakeholder-oriented. *See* Dan S. Dhaliwal et al., *Nonfinancial Disclosure and Analyst Forecast Accuracy: International Evidence on Corporate Social Responsibility Disclosure*, 87 ACCT. REV. 723 (2012).

189. *See supra* Part III.B.1.ii.

responsibility, including ESG, is something that a business should be "encouraged" to focus on. This argument mainly depends on the prevalent view of business. Many critics of ESG subscribe to the shareholder theory of business, which demands the only concern of management to be maximizing shareholder wealth. These detractors argue that ESG undermines the goal of profit maximization and, therefore, expands the scope of business too far, by having corporations attempt to solve societal problems better served to be addressed by government.[190]

CONCLUSION

This Note strove to answer two main questions: (1) whether the SEC was acting within its authority to regulate ESG reporting without a congressional mandate and (2) whether the SEC should mandate these ESG disclosures. As discussed in Part II, the House recently passed a Bill which, if passed into law, would serve as an adequate congressional mandate to empower the SEC to regulate ESG disclosures. However, as discussed, the Bill is unlikely to pass into law due to the current political climate and trend towards party-line voting. Thus, the SEC is left without a congressional mandate and so their premature regulation is likely to be subject to litigation based on the SEC exceeding their statutory authority. As discussed in Part III, the regulation is also likely to be challenged in court under a theory of compelled speech. Due to the recent Supreme Court ruling declaring that the EPA exceeded their statutory authority in regulating certain carbon emissions, it is likely that, should the SEC regulation be challenged in court, it will be deemed an overstep of agency power and the question of compelled speech will likely not even need to be answered. However, even if this regulation gets struck down, corporations should anticipate ESG matters to be of continued legislative interest due to the investor demand for ESG-related information. As seen in Part IV, while there are more benefits conferred onto investors than corporate entities, the scales seem to be tipping in favor of disclosure, as these public benefits outweigh the corporate costs. As a result, the government is likely to remain captivated by this topic for the foreseeable future, and it would be prudent for companies to, as soon as possible, begin preparing for the inevitable switch to mandatory reporting.

190. *See* Deborah Doane, *Good Intentions – Bad Outcomes? The Broken Promise of CSR Reporting*, *in* THE TRIPLE BOTTOM LINE: DOES IT ALL ADD UP? 81 (2004). Critics argue that because corporations did not create systemic societal problems, such as human trafficking, corporations should not be forced to overstep into a government's territory and address these problems or pay for solutions. *Id.*