

The Divergence of Mandatory Climate Disclosure in the U.S. and the EU

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Abstract

In this article, we ask why mandatory disclosure of climate risk differs between the U.S. and the EU. We identify a fundamentally different legal basis for securities regulation on the two sides of the Atlantic. While the EU treaty provides EU institutions with legislative authority to introduce far-reaching climate disclosure obligations, the SEC faces significant hurdles to do so under U.S. administrative and constitutional law. We focus on the SEC because it has acted on climate. Congress could pass a comprehensive climate disclosure statute, but the subject is controversial in the United States, and so the legislature is unlikely to act. Moreover, we discuss pros and cons of climate disclosure from an economic perspective. Finally, we discuss the recent developments in climate disclosure regulation, both in the EU and in California, and their potential to set voluntary disclosure standards for companies not subject to these jurisdictions.

Keywords: climate risk, mandatory disclosure, materiality, major question doctrine, first amendment, Omnibus, positive and negative externalities, sustainable finance

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JEL classification: K22, K23, G38, Q54.

The Divergence of Mandatory Climate Disclosure in the U.S. and the EU

Alessio M. Paces

David Zaring^(*)

1. Introduction

There is an increasing divergence between European Union (EU) and U.S. securities regulation, particularly on matters of Environmental, Social & Governance performance (known as ESG). While EU securities regulation has evolved towards mandating disclosure on several ESG performance indicators, the U.S. has maintained the focus of securities regulation on financial performance.¹ In this essay, we discuss this divergence focusing on climate change and the risk factors affecting it.

We focus on climate disclosure as both an advanced and tractable example of the incorporation of ESG values into corporate disclosure obligations. As Jeffrey Gordon has argued,² climate change risk should be unbundled from ESG for two reasons. First, ESG reflects the arbitrary weighting of different social goals leading to inconsistent measurement.³ Second, ESG is extremely contentious politically, which makes it unworkable as a criterion to evaluate corporate performance from the perspective of a typical investor.⁴ To be sure, climate risk is controversial too. However, differently from ESG, there is a single goal – reducing global warming – on which many governments worldwide (including, until recently, the U.S.) have agreed by signing the 2015 Paris agreement and one measure – CO₂ and other Greenhouse Gas (GHG) emissions – that has an impact, however debated, on this goal.⁵

The EU treaty framework provides an institutional foundation for the integration of environmental protection and market governance. Under the Treaty on the Functioning of the European Union (TFEU), environmental protection is recognized as a cross-cutting objective that must be

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¹ Not entirely reluctant, but so far unsuccessful. The SEC's first effort to promulgate a climate disclosure rule was immediately stayed in *State of Iowa v. Securities and Exchange Commission*, No. 24-1522 (8th Cir. 2024). The SEC has since withdrawn its defense of the rule. Press Release, U.S. Sec. & Exch. Comm'n, *SEC Votes to End Defense of Climate Disclosure Rules* (Mar. 27, 2025), <https://www.sec.gov/news/press-release/2025-58>.

² Jeffrey N. Gordon, *Unbundling Climate Change Risk from ESG*, CLS Blue Sky Blog (July 26, 2023), <https://clsbluesky.law.columbia.edu/2023/07/26/unbundling-climate-change-risk-from-esg/>

³ Florian Berg, Julian F. Kölbl & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, 26 REV. FIN. 1315 (2022).

⁴ See Robert P. Bartlett III & Ryan Bubb, *Corporate Social Responsibility Through Shareholder Governance*, 97 S. CAL. L. REV. 417 (2024). See also Isla Binnie, *BlackRock's Fink says he's stopped using 'weaponised' term ESG*, <https://www.reuters.com/business/environment/blackrocks-fink-says-hes-stopped-using-weaponised-term-esg-2023-06-26/> (reporting that BlackRock has stopped using the term ESG to avoid investment backlash while maintaining its stance toward climate risk management).

⁵ Alessio M. Paces, *Controlling Shareholders and Sustainable Corporate Governance: The Role of Dual-Class Shares*, 25 THEORETICAL INQUIRIES IN L. 43 (2024).

integrated into the definition and implementation of Union policies, including the regulation of the internal market.⁶ As a result, climate-related financial disclosures can be justified as furthering not only environmental goals but also – if not mainly – the establishment of the internal market, making sustainability a concern of financial regulation.⁷

In contrast, the United States constitutional and statutory framework has separated environmental regulation from financial regulation. Agencies such as the Securities and Exchange Commission (SEC) are limited to mandates focused on investor protection, market efficiency, and capital formation, and lack any general authority to pursue environmental objectives.⁸ That job instead belongs to the Environmental Protection Administration (EPA), among other agencies. This separation of regulatory authority, especially when paired with searching judicial review to make sure that regulators do not expand their remit beyond their statutory borders, makes it institutionally difficult to integrate climate concerns into financial regulation without express congressional authorization.⁹ In the U.S., the constitutional constraints are imposed by the Major Questions Doctrine, meant to ensure that a clear legislative delegation extends to any important new regulatory initiative, and the First Amendment’s concerns about compelled speech, which limit the ability of the agency to create certain new expansive disclosure obligations. The political branches could get around major questions issues by expressly delegating the authority to do climate disclosures to the SEC; freedom of speech means that some compelled speech cannot be solved with legislation, although the First Amendment does not protect anyone’s ability to commit fraud, including securities fraud.¹⁰ More ordinary canons of statutory interpretation and judicial review of agency action pose administrative law limitations on what the SEC can do on climate.

We do not want to overstate these differences. Any EU regulator’s power to act in this domain is ultimately constrained by its political structure. Not long ago, if anyone told you that the EU is organized and harmonized, while the U.S. is unable to coordinate its balkanized regulators, they would have been viewed as naïve. The United States has a number of mechanisms to pursue regulatory coordination, from the President’s Working Groups to the Financial Stability Oversight Council to, increasingly, the White House’s Office of Information and Regulatory Affairs. In Europe, even where legal authority is clear, legislation requires approval by both the Council of the European Union (EU Council) —where large Member States such as Germany and France exert substantial influence—and the European Parliament.¹¹ Without consensus among key

⁶ Treaty on the Functioning of the European Union art. 11, Oct. 26, 2012, 2012 O.J. (C 326) 47.

⁷ See generally, R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION 43–45 (2011) (describing the ways that European regulators craft environmental regulation).

⁸ “[F]ederal securities regulation is primarily oriented toward investor protection in the sense of remedying information asymmetries and rooting out fraud.” Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The Sec’s Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975, 1005 (2006).

⁹ See, e.g., Robert B. Ahdich, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Administrative Law*, 57 EMORY L.J. 1, 18–22 (2007) (thinking about the interaction between local and international governance initiatives).

¹⁰ See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (“the First Amendment does not shield fraud.”). As Amanda Shanor has put it, we “might all agree that commercial or securities fraud, perjury, extortion, and conspiracy involve speech, for instance, but the First Amendment would not pop to mind if we were defending someone charged with those offenses.” Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 344 (2018).

¹¹ Consolidated Version of the Treaty on European Union arts. 16–17, Oct. 26, 2012, 2012 O.J. (C 326) 13

Member States, proposals in line with the Treaties may nonetheless be politically unachievable. Still, the mode of policymaking is bureaucratic and political, rather than driven by litigation.¹²

In the United States, litigation is an essential component of disclosure regulation, because the disclosure requirements must survive judicial review, but also because litigation is a large part of how disclosure is enforced. Not only was the SEC's first effort at a climate rule stayed by the courts before it could go into effect, but the possibility of a securities fraud class action over a materially misleading climate disclosure has given public companies a compelling reason to resist additional disclosure obligations – and the securities class action is a uniquely American institution.¹³

In this article, we ask why mandatory disclosure of climate risk differs between the U.S. and the EU. We identify a fundamentally different legal basis for securities regulation on the two sides of the Atlantic. While the EU treaty provides EU institutions with legislative authority to introduce far-reaching climate disclosure obligations, the SEC faces significant hurdles to do so under U.S. administrative and constitutional law. We focus on the SEC because it has acted on climate; Congress could pass a comprehensive climate disclosure statute, but the subject is controversial in the United States, and so the legislature is unlikely to act. Moreover, we discuss pros and cons of climate disclosure from an economic perspective. Finally, we discuss the recent developments in climate disclosure regulation, both in the EU and in California, and their potential to set voluntary disclosure standards for companies not subject to these jurisdictions.

We proceed by comparing how the U.S. and EU define materiality in securities disclosure – they differ in this critical element of securities regulation – and then examine the legal authority of the SEC to mandate climate disclosures under U.S. constitutional, statutory, and administrative law. We contrast that with the EU's legal framework, which supports broader disclosure mandates rooted in the Treaties. We assess the economic justifications for climate disclosure, including its potential benefits and costs. We then turn to the EU's recent efforts to scale back its disclosure regime through the Omnibus proposal, consider U.S. legislative resistance to international climate standards, and conclude by evaluating whether the EU, or a novel would-be regulator like the state of California, is best positioned to set the global baseline for climate reporting.

2. *Materiality*

The treatment of materiality is one of the critical differences between U.S. and EU law. American law requires the disclosure only of information that would be material to an investor deciding where to allocate her money,¹⁴ European law enshrines double materiality – material information for financial decision-making, as well as information that would be material to other stakeholders.

¹² ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 4–7 (2001).

¹³ See n.1 *supra*.

¹⁴ And even then, silence is generally golden – a publicly traded company is not required to discuss any important innovation the moment the innovation is discovered, for example, and it can keep its merger negotiations secret, but it must disclose all material information relevant to its quarterly and annual reporting.

a. *Single materiality in the US*

As an initial matter, capital markets regulation in the United States proceeds on a single materiality standard, meaning that climate disclosures would have to be made under existing law if they would be material to investors. If they would not be material, it could be argued that an SEC that required these disclosures is not engaged in its mission – investor protection. The standard for materiality in America is low—it must be that the information misrepresented or omitted by the public company would have affected the “total mix” of information that an investor would have relied upon before making a purchase or sale decision.¹⁵ Still, materiality is a fact-dependent inquiry, and an objective standard based on a “reasonable investor.”¹⁶ Plenty of American companies have won dismissals of securities class action lawsuits on the basis that the information sought by the class was not material to investors.¹⁷ There are many publicly traded companies that might make climate-related disclosures to investors on the basis of an American materiality standard – a forestry company might discuss the risks to its ability to rely on certain habitats for certain kinds of trees; a chain of ski resorts might want investors to understand its plans for warmer winters, and so on.

But this would not necessarily be the case for every American public company. Climate-related risks are often speculative, long-term, and contingent on uncertain future developments—such as regulatory changes or evolving market preferences. As such, required climate disclosures could be immaterial, or even misleading, to investors on the cusp of an investment decision. For many companies, particularly those outside of carbon-intensive industries, climate risks are unlikely to have a significant or demonstrable financial impact in the near term. Therefore, mandating broad-based disclosure across all sectors risks imposing burdens without yielding information that is relevant or decision-useful to investors.

Mandatory climate disclosure may reflect broader policy or social objectives rather than the SEC’s core investor-protection mission. If the disclosures are intended more to influence corporate behavior than to inform investment decisions, they may fall outside the bounds of what securities law deems material.

For what it is worth, these kinds of bounds of authority questions force courts into the sorts of inquiries they often might not wish to make. Discerning the “real” reason an agency made a decision – was this to protect investors or change corporate behavior? – is no easy task. It is not even clear that an agency – a collective body filled with decisionmakers who may support a regulatory decision for a variety of reasons – has that kind of intent. Moreover, discerning such intent seems like the sort of fact-dependent inquiry that would warrant the sort of discovery and civil procedure that is ordinarily eschewed in American administrative law.

¹⁵ TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

¹⁶ As the Supreme Court has put it, to fulfill the materiality requirement “there must be 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.” Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988).

¹⁷ The motion to dismiss in American courts is ordinarily the first opportunity for defendants to get a case dismissed – and it occurs before the costly discovery process begins. See Alexander I. Platt, *Beyond “Market Transparency”: Investor Disclosure and Corporate Governance*, 74 STAN. L. REV. 1393, 1469 (2022) (“securities class actions that survive a motion to dismiss invariably settle”).

b. *Double materiality in the EU*

The EU has taken a different approach to climate disclosure, based on the innovative concept of double materiality.¹⁸ Double materiality means that climate-related information must be disclosed if it is material in at least one of the following senses. The first is financial materiality, meaning that information is necessary to understand the company's development, performance and position. The second is impact materiality, meaning that the information is necessary to understand the impact of the company's activities on the environment and society, considering a broad range of stakeholders. Although EU securities law does not define the notion of 'reasonable investor',¹⁹ financial materiality is comparable to the U.S. notion of single materiality to the extent that the information is relevant for investors to understand a company's value. In contrast, impact materiality, which concerns the external effect of a company's activities, is relevant not only for investors (to the extent that they have non-financial preferences) but also for other stakeholders such as customers, employees, and government.²⁰ This marks an important difference from the U.S. securities law, for which impact materiality is irrelevant.

The double materiality approach to climate disclosure must be understood in the broader context of the EU regulatory stance towards fighting climate change.²¹ First, the EU has put the alignment with the Paris agreement goals into legislation which is binding on Member States: the so-called EU Climate Law.²² The EU Climate Law includes the stated goal to reduce CO₂ emissions by 55% by 2030 and to reach CO₂-neutrality (so-called Net Zero) by 2050. Consequently, one key item of EU mandatory climate disclosure is a transition plan in which companies illustrate their plan to align with the above mentioned goals, or explain why they do not have one.²³ Secondly, the core of EU mandatory climate disclosure – the Corporate Sustainability Reporting Directive, CSRD²⁴ – is part of a system including an EU Taxonomy of environment-friendly and climate-

¹⁸ Carol A. Adams et al., *The Double-Materiality Concept: Application and Issues* (Global Reporting Initiative, White Paper, 2021), available at <https://www.globalreporting.org> (last visited Apr. 19, 2025).

¹⁹ Niamh Moloney, EU SECURITIES AND FINANCIAL MARKETS REGULATION 704 (4TH ED. 2023).

²⁰ Niamh Moloney, EU SECURITIES AND FINANCIAL MARKETS REGULATION 156 (4TH ED. 2023). See also European Commission, *Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information*, 2019 O.J. (C 209) 1 (EU), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC0620\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC0620(01)) (last visited Apr. 19, 2025), p. 5.

²¹ Jukka Mähönen & Vera Palea, *Analyzing Double Materiality Through the Lens of the European Political Constitution: Implications for Interoperability and Standards-Setting* (Univ. of Oslo, Faculty of L., Legal Studies Research Paper Series No. 2024-05, 2024), available at <https://ssrn.com/abstract=4731089> (last visited Apr. 19, 2025).

²² Regulation 2021/1119 of the European Parliament and of the Council of 30 June 2021 Establishing the Framework for Achieving Climate Neutrality and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law"), 2021 O.J. (L 243) 1.

²³ The Corporate Sustainability Reporting Directive (CSRD, *infra* note __) introduces a "comply or explain" requirement regarding the disclosure of climate transition plans, by amending Directive 2013/34/EU (the Accounting Directive). The new Article 19a(2)(a)(ii) of Directive 2013/34/EU reads as follows:

"The undertaking shall disclose its plans... including, where relevant, its climate transition plan, in line with the limiting of global warming to 1.5 °C in accordance with the Paris Agreement. Where the undertaking has not adopted such a plan, it shall provide a clear explanation of why it has not done so."

²⁴ Directive 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, 2022 O.J. (L 322) 15 (CSRD).

friendly activities,²⁵ a Sustainable Finance Disclosure Regulation (SFDR) classification of financial products into ‘brown’, ‘green’, and ‘dark green,’²⁶ and the obligation for securities market intermediaries to ask retail investors about their “sustainability preferences” expressed in terms of the above taxonomy and classification system, in order to recommend suitable investments.²⁷ As it explicitly appeals to investors’ non-financial preferences, this system aims to influence corporate behavior and reduce their CO2 emissions.

In addition, one of the priorities of EU climate legislation is to fight greenwashing.²⁸ The goals of EU mandatory climate disclosure are broader than informing investors about climate risks. From this perspective, the disclosure of CO2 emissions and the climate transition plan would be relevant only to the extent that they reflect the specific company’s physical and transition (both regulatory and technological) risks from climate change.²⁹ But because also impact materiality matters, EU regulation is concerned that limiting disclosure to climate risk could give investors and other stakeholders a misleading impression about the company’s contribution to climate change. For instance, to reduce their CO2 emissions disclosure, listed companies could strategically outsource high-emission activities to privately held suppliers.³⁰

The concern about greenwashing leads to another important difference with U.S. securities regulation: EU mandatory disclosure rules apply to privately held companies, if they are large enough, and extend reporting obligations to the supply and value chains of the companies in scope. Companies subject to the CSRD must report their Scope 3 emissions – namely the CO2 emissions in their value chain – and more in general, disclose their business partners’ actual and potential principal adverse impacts on climate.³¹

²⁵ Regulation 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088, 2020 O.J. (L 198) 13 (EU Taxonomy Regulation).

²⁶ Regulation 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector, 2019 O.J. (L 317) 1 (SFDR).

²⁷ Commission Delegated Regulation 2021/1253 of 21 April 2021 Amending Delegated Regulation (EU) 2017/565 as Regards the Integration of Sustainability Factors, Risks and Preferences into Certain Organisational Requirements and Operating Conditions for Investment Firms, 2021 O.J. (L 277) 1.

²⁸ María J. Nieto & Chryssa Papathanassiou, *Different Shades of Green: EU Corporate Disclosure Rules and Their Effectiveness in Limiting “Greenwashing”*, ECB Occasional Paper Series No. 370 (Mar. 2025), available at <https://www.ecb.europa.eu> (last visited Apr. 19, 2025). See also Recital 11 of the EU Taxonomy Regulation, *supra* note ____.

²⁹ Thea Kolasa & Zacharias Sautner, *Institutional Investors and the Fight Against Climate Change*, 32 CORP. GOVERNANCE: INT’L REV. 1 (2024), p. 2-3. (explaining the breakdown of climate change risk into its components).

³⁰ Hans B. Christensen, Luzi Hail & Christian Leuz, *Mandatory Corporate Social Responsibility and Sustainability Reporting: Economic Analysis and Literature Review*, 26 REV. ACCT. STUD. 1176, 1232 (2021).

³¹ Art 19a of Directive 2013/34/EU as modified by CSRD. The requirement to report on CO2 emissions, including Scope 3, stems from Disclosure Requirement E1-6 in the Commission Delegated Regulation 2023/2772 of 31 July 2023 Supplementing Directive 2013/34/EU of the European Parliament and of the Council as Regards Sustainability Reporting Standards, 2023 O.J. (L 2772) 1, 88 (European Sustainability Reporting Standards, ESRS). ESRS definitions, *id.* at 327, define Scope 3 GHG emissions “[a]ll indirect GHG emissions (not included in scope 2 GHG emissions) that occur in the value chain [...] both upstream and downstream [...]” and refer to the GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard (available at <https://ghgprotocol.org/corporate-value-chain-scope-3-standard>, last accessed April 30, 2025) for measurement.

In conclusion, climate disclosure obligations in the EU are more far-reaching and burdensome than anything conceivable under current US securities law.³² Drafting transition plans is expensive and so is collecting information about the CO2 emissions of business partners (Scope 3), particularly for smaller companies which are at a competitive disadvantage in large-scale compliance. For this and other geopolitical reasons, which we are going to discuss in Section 6, the European Commission is reconsidering the scope and the extent of mandatory climate disclosure. But there is a more fundamental reason for the divergence between the US and the EU on climate disclosure rules, to which we turn next: the legal basis of mandatory disclosure differs in the two jurisdictions.

3. SEC Constraints

This part of the essay begins with the constitutional constraints and then turns to the statutory constraints on climate regulation by the SEC, other than those posed by materiality. It assesses how the Major Questions Doctrine could pose a constitutional barrier, requiring a clear congressional delegation for the SEC to engage in climate regulation of significant economic or political consequence. Congress could of course give the SEC that clear delegation, as the European governing bodies have done in the European context; but as climate disclosures have grown controversial in the U.S., it is unlikely to do so, leaving the SEC as the only potential source of climate disclosure obligations.³³

This part also analyzes the First Amendment implications of compelled climate disclosures, especially where such disclosures might be construed as forcing companies to confess environmental culpability. We then explore how the SEC's statutory authority under Section 13(a) of the Exchange Act limits disclosure mandates to those that protect investors or ensure fair dealing, a scope that climate-related disclosures may not clearly fall within. Finally, we outline how "hard look" review and de novo analysis of statutory authority further heightens the legal risks for the SEC.

a) The Major Questions Doctrine

The increasingly important and always controversial Major Question Doctrine is based on the separation of powers, and canons of statutory interpretation.³⁴ It precludes agencies like the SEC from interpreting ambiguous grants of authority from Congress in ways that would allow them to

³² See e.g. Cynthia A. Williams, *Does Climate Disclosure Work to Reduce Greenhouse Gas Emissions? Emerging Evidence Suggests Cautious Optimism*, 48 SEATTLE U. L. REV. 571 (2025).

³³ Blanca Begert, *States Can't Save Us Now*, POLITICO (Jan. 28, 2025), <https://www.politico.com/newsletters/california-climate/2025/01/28/states-cant-save-us-now-00201129> (reporting that the "broader corporate climate disclosure push is all but dead at the federal level," with little prospect of congressional action to bolster the SEC's authority).

³⁴ Supreme Court justices have expressed differing views. See *Biden v. Nebraska*, 143 S.Ct. 2355, 2380 (2023) (J. BARRETT, concurring) ("[T]he major questions doctrine grows out of these same commonsense principles of communication. Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"); *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2617 (2022) (J. GORSUCH, concurring) ("The major questions doctrine works in much the same way to protect the Constitution's separation of powers."). See also Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023); *The Major Questions Doctrine*, CONG. RSCH. SERV. (Nov. 2, 2022).

take on new responsibilities of great economic or political significance.³⁵ To regulate so substantially, the “agency instead must point to clear congressional authorization for the power it claims.”³⁶ The idea is that “in certain extraordinary cases . . . something more than a merely plausible textual basis for the agency action is necessary” to permit a new agency initiative to go forward.³⁷

The Supreme Court has rooted the doctrine in “both separation of powers principles and a practical understanding of legislative intent.”³⁸ It is a real constraint on the adoption of new responsibilities by agencies interpreting old statutes.³⁹ It has been used in recent years to reverse a rental eviction moratorium issued by the Center for Disease Control during the coronavirus pandemic⁴⁰ and a wide-ranging anti-climate change initiative issued by the EPA.⁴¹

Requiring publicly traded companies to disclose detailed climate-related risks, emissions data, and transition plans would mark a significant expansion of the SEC’s regulatory authority into the realm of environmental policy—a domain traditionally handled by Congress and specialized environmental agencies like the EPA. Climate change is undoubtedly a major national issue, but the securities laws contain no clear statement authorizing the SEC to act as a climate regulator – or so stakeholders impacted by a climate rule would argue, and did argue in the litigation over the SEC’s first attempt to promulgate a climate rule.⁴²

A thought experiment here is helpful: if EPA asserted authority to regulate the capital markets, as a corollary to its responsibilities for ensuring, *inter alia*, clean air and clean water, it would face difficult questions as to whether Congress wanted the agency to regulate in the area. So, too, if the roles were reversed.

While the last administration emphasized that climate change is a “whole-of-government” issue—that is a policy orientation, not a delegation of legal authority. A court applying the major questions doctrine might see the “whole-of-government” approach as a red flag, suggesting that agencies are asserting new powers beyond their traditional domains in service of a broader executive agenda.

b) The First Amendment

If the SEC obligated public companies to make disclosures about climate, in ways that suggested that the disclosing firm was environmentally unfriendly, the agency could be seen to be requiring

³⁵ Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 449 (2016).

³⁶ *Id.* (quotation marks omitted).

³⁷ *Id.* at 2609.

³⁸ *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2595 (2022).

³⁹ *West Virginia*, 142 S. Ct. at 2610 (“[T]his is a major questions case. . . . [The EPA] located [a] newfound power in the vague language of an ancillary provision of the Act, one that was designed to function as a gap filler) (quotation omitted).

⁴⁰ *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021)

⁴¹ *West Virginia*, 142 S. Ct. at 2595.

⁴² Litigation challenging the SEC’s final climate disclosure rule was swiftly filed by multiple parties and consolidated in the Eighth Circuit, which stayed the rule; the SEC later dropped its defense of it. *See supra* note 1.

a publicly traded company to “confess blood on its hands,” a form of compelled speech that industry has used to defeat financial regulations in other contexts.⁴³

The particular protections afforded speech in recent years mark a change in judicial policy away from a laissez faire approach to disclosure requirements. Disclosure regulation, which does, after all, amount to compelled speech, albeit speech compelled after the voluntary decision by a company to go public, did not typically raise First Amendment concerns.⁴⁴ The agency’s mandate that publicly traded companies disclose their quarterly and annual results – and that they do so in a manner consistent with Generally Accepted Accounting Principles (GAAP) – have never been the source of much controversy.⁴⁵ More generally, commercial speech restrictions – restrictions on advertising, as well as disclosure requirements like safety warnings or reporting requirements – are subject to intermediate scrutiny under the First Amendment, meaning that they must promote a reasonable government objective and be narrowly tailored to meet that objective.⁴⁶

The problem arises when the government forces businesses to disclose information that makes the business look bad. Consider when the SEC required publicly traded firms to assess whether they used “conflict minerals” in their manufactured products. The D.C. Circuit ruled that “[b]y compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.”⁴⁷ This sort of libertarian approach to commercial speech has plenty of critics, but it has proven to be popular at both the Supreme Court and D.C. Circuit.⁴⁸

Similarly, mandating climate-related disclosures may violate the First Amendment by compelling speech that forces companies to adopt and publicize a contested moral or political stance—namely, that they are responsible for contributing to climate change and its harms. For many issuers, particularly those in fossil fuels, heavy industry, or transportation, such disclosures function less as neutral facts and more as compelled confessions of environmental wrongdoing. Requiring a company to publish emissions data or climate transition risks can implicitly frame it as a climate offender, obliging it to “confess” to having blood on its hands, regardless of whether the company agrees with that characterization.

The speech constraint is a limited one; the SEC’s authority to regulate greenwashing—misleading environmental claims by public companies—rests on the principle that the First Amendment does

⁴³ See *Nat’l Ass’n of Mfrs. v. Sec. Exch. Comm.*, 748 F.3d 359, 371 (D.C. Cir. 2014) (“By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.”)

⁴⁴ Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 619–20 (2006).

⁴⁵ *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

⁴⁶ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980); *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989).

⁴⁷ *Nat’l Ass’n of Mfrs. v. Sec. Exch. Comm.*, 748 F.3d 359, 371 (D.C. Cir. 2014).

⁴⁸ See Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 426 (2015) (noting that the doctrine “raise[s] grave questions about compulsory disclosure, which is an increasingly popular (and minimally intrusive) regulatory tool”). See also Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 171 (2016) 171 (“the modern state regulates in ways that appear, or are more prone to appear, speech-regulating than earlier forms of administration”).

not shield fraudulent speech.⁴⁹ As the Supreme Court has held, "[t]here is no constitutional value in false statements of fact."⁵⁰ The agency regulates a lot of speech; it cannot, however, compel companies to make statements of guilt.

c) *Statutory Limits*

The SEC's rulemaking powers are constrained by the express terms of Section 13(a) of the Exchange Act, its enabling statute. The section provides that the SEC's authority is limited to mandating public reporting that is "necessary or appropriate for the proper protection of investors and to ensure fair dealing in the security."⁵¹ Based on this congressional guidance, and on a 1994 statute outlining some goals for its rulemakings,⁵² the SEC has accordingly formulated its mission as "protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation."⁵³ As the agency has put it, "[c]ompanies offering securities for sale to the public must tell the truth about their business, the securities they are selling, and the investment risks. And those who sell and trade securities and offer advice to investors – such as brokers-dealers, investment advisers, and exchanges – must treat investors fairly and honestly."⁵⁴

As the en banc Fifth Circuit has recently explained, Section 13(a) of the Exchange Act "exists primarily to protect investors and the macroeconomy from speculative, manipulative, and fraudulent practices, and to promote competition in the market for securities transactions. A disclosure rule is related to the purposes of the Act if it has some connection with those purposes, but not otherwise."⁵⁵

One of the principal critiques of the SEC's power to promulgate a climate disclosure rule is that it does not protect investors or ensure fair dealing. Sixteen state attorneys general wrote a letter to former SEC Chair Gary Gensler arguing that "legitimate mandatory disclosures under Section 13(a) are those required to protect investors from inflated prices and fraud, not [those that are] merely helpful for investors interested in companies with corporate practices consistent with federally encouraged social views."⁵⁶ Such critics argue that such disclosures may reflect policy preferences rather than the investor-focused concerns that the statute authorizes the agency to address.

d) *APA Review*

⁴⁹ Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Advisory Firm WisdomTree with Failing to Adhere to Its Own Investment Criteria for ESG-Marketed Funds* (Oct. 21, 2024), <https://www.sec.gov/news/press-release/2024-173>.

⁵⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

⁵¹ 15 U.S.C. § 78m(a).

⁵² National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424 (1996).

⁵³ SEC, *Mission*, <https://www.sec.gov/about/mission> (last visited Mar. 4, 2025).

⁵⁴ See *id.*

⁵⁵ *All. for Fair Bd. Recruitment v. Sec. & Exch. Comm'n*, 125 F.4th 159, 168 (5th Cir. 2024).

⁵⁶ Letter from Patrick Morrissey, Attorney General of West Virginia, to Gary Gensler, Chair of the U.S. Securities and Exchange Commission (June 14, 2021), <https://www.sec.gov/comments/climate-disclosure/cll12-8915606-244835.pdf>. For a discussion, see <https://www.dlapiper.com/en-us/insights/publications/2024/04/sec-stays-climate-rules-an-overview-of-ongoing-legal-challenges>.

The informal notice and comment rulemaking provisions of Section 553 of the Administrative Procedure Act (APA) apply to most cases where an agency acts legislatively and prospectively. They require that, when an agency wishes to act with force of law, it should propose the legal action as a rule that would be published in the Federal Register and opened for comment from the public, and that the agency should consider public comments before amending the rule and promulgating a final version of it.⁵⁷ The legislative history of the APA suggests that “[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures”—a position that suggests somewhat searching review of broad new initiatives.⁵⁸

Once comments have been received and considered, and a rulemaking record made, the final rule issued is subject to judicial review. Under Section 706 of the APA, courts are instructed to set aside final agency action that is “arbitrary, capricious, or otherwise not in accordance with law.”⁵⁹

The way that courts review agency action is evolving, but in the current approach involves two separate inquiries. First, a court would decide whether the agency is legally empowered to promulgate the rule.⁶⁰ In doing so, courts may consider an agency’s assessment that it did have that power to the extent it has the “power to persuade,” based on the agency’s “thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.”⁶¹

Second, a court would take a “hard look” at the proposed agency action, the meaning of which was set out in the Supreme Court’s decision in *Motor Vehicle Manufacturers Association v. State Farm Insurance Co.*⁶² *State Farm* review turns on whether, in doing whatever the agency did—be it finding facts, interpreting statutes, or doing some of both—the agency has considered the relevant factors or has based its decision on factors it is not supposed to consider, and “whether there has been a clear error of judgment.”⁶³ As the Court held in *State Farm*, the agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” to meet this test.⁶⁴

Hard look review has been with us for some time, and it is often charged with a degree of vagueness. However, the Supreme Court has recently made hard look review harder to survive. While agencies must offer reasoned explanations for their policymaking choices, in *EPA v. Ohio*—a case involving air pollution regulations not unrelated to climate change—the Court’s insistence on exhaustive justification and consideration of every possible alternative amounted to a genuinely searching inquiry.⁶⁵

The D.C. Circuit has also applied a demanding version of hard look review to SEC rulemakings in its *Business Roundtable* decision, where it faulted the agency for failing to consider a pair of

⁵⁷ 5 U.S.C. § 553.

⁵⁸ ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, at 259 (1946).

⁵⁹ *Loper Bright Enters. v. Raimondo*, 603 U.S. ____ (2024).

⁶⁰ *Loper Bright Enters. v. Raimondo*, 603 U.S. ____ (2024).

⁶¹ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁶² 463 U.S. 29, 42–44 (1983).

⁶³ *Id.* at 43 (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)).

⁶⁴ *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁶⁵ [Ohio v. Environmental Protection Agency](#), 603 U.S. ____ (2024).

expert reports that had been submitted to the record. This was despite what was otherwise a voluminous record on the costs and benefits of expanding proxy access.⁶⁶

e) Conclusion

The agency faces a number of hurdles when it comes to climate disclosures – hurdles not shared by the EU capital markets regulators. These legal constraints are a part of the story why American and European climate reporting requirements are likely to differ, although we will discuss later the possibility of future convergence.

4. EU Legal Basis

In the EU, the legal basis of mandatory climate disclosure is ultimately the treaties binding the Member States of the Union, particularly the Treaty on the Functioning of the European Union (TFEU).⁶⁷ From that perspective, the EU climate disclosure rules are formally impeccable as they tick all the boxes of legitimate EU legislation: they were adopted following the Ordinary Legislative Procedure; they implement the relevant EU Treaty provisions to promote the internal market; they document the subsidiarity and proportionality of EU action in the context of the required impact assessment. In this section, we illustrate how with a CSRD case study – although the same arguments apply to the related EU sustainability disclosure legislation. In section 6, we will discuss the more recent overhaul of EU climate disclosure regulation, which have the same legal basis and follow the same procedures, but is motivated by new geopolitical evolutions and the realization that complex regulations hamper EU competitiveness and the Union’s ability to pursue its goals.⁶⁸

The EU climate disclosure legislation has been adopted following the Ordinary Legislative Procedure.⁶⁹ According to this procedure, legislation must be proposed by the European Commission and approved by the EU co-legislators: the EU Council, which comprises the representatives of the governments of 27 EU Member States; and the European Parliament, which includes the representatives of EU citizens. The Council, with a qualified majority (55% of countries and 65% of the population), and the Parliament, with absolute majority, must approve the same text, which might differ from the text initially proposed by the European Commission. The co-legislators are often engaged in negotiations to reach a compromise: this is called “trialogue” as it involves all three EU institutions. The CSRD, the SFDR and the EU Taxonomy were all adopted following this procedure. Their implementation measures, subsequently adopted by the European Commission, reflect specific statutory mandates so, differently from the U.S., there is no question about their legitimacy under administrative law. One important difference between the CSRD and the related legislation is that the former is a Directive. Differently from a Regulation, such as the EU Taxonomy and the SFDR, which are immediately applicable, a

⁶⁶ *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

⁶⁷ Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 (TFEU).

⁶⁸ Mario Draghi, *The Future of European Competitiveness: A Competitiveness Strategy for Europe* (European Comm’n, Sept. 2024), available at https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en (last visited Apr. 19, 2025).

⁶⁹ Art 289 TFEU.

Directive must be transposed into national law by Member States. The implementation of CSRD has been suspended pending the ‘Omnibus’ overhaul, which we discuss in section 6.

The legitimacy of CSRD, as of any other EU legislation, depends on the implementation of the primary source of EU law: the treaties. As often in the case of EU securities law, the CSRD pursues the realization of the internal market, particularly supporting the freedom of establishment and the approximation of national laws affecting the functioning of the internal market.⁷⁰ These two provisions confer upon EU institutions the competence to enact legislation, which otherwise would remain with the individual Member States. According to the principle of conferral governing EU law,⁷¹ the Union can only act within the limit of the powers explicitly given to it by the Treaties and for the purposes set out therein. Therefore, EU climate disclosure rules are based on the argument that fragmented national laws on this matter would undermine the establishment and the functioning of the internal market, which is a major goal of the EU Treaties, limiting firms’ and investors’ ability to access finance – including climate finance – across the Member States borders. The EU goals also include environmental protection and, specifically, combating climate change,⁷² which results in the competence to adopt legislation on this matter.⁷³ Although environmental protection is not formally the basis of EU mandatory climate disclosure, it influences its far-reaching contents.

The CSRD and the rest of EU sustainability disclosure legislation are part of a bigger enterprise: the European Green Deal.⁷⁴ The European Green Deal lines up several policies for the EU to achieve climate neutrality by 2050, a goal that – as we have seen – has been subsequently made binding on Member States through the European Climate Law of 2021.⁷⁵ These policies include regulations and public investments, but because both the EU and the Member States’ budgets are limited, the Green Deal specifically aims to stimulate massive private investment in climate change mitigation and adaptation. On this perspective, the goal of EU mandatory climate disclosures is threefold: a) to reduce systemic climate risk in the European economy; b) to improve the allocation of financial resources towards decarbonization; c) to make companies more accountable for their impact on the environment and the society, i.e. for their negative externalities.

Therefore, in the EU, mandatory climate disclosure clearly aims to changing the behavior of companies. If the goal of climate disclosure is to “drive change”, rather than merely inform investors about climate risks, the criterion to discern the information to disclose is double materiality,⁷⁶ which includes negative externalities such as CO2 emissions if only their impact on society is significant.

Because double materiality results in more burdensome disclosure obligations than single materiality, it is important to assess its legitimacy. This assessment is performed based on the criteria of subsidiarity and proportionality of EU legislation. When the EU has shared competence

⁷⁰ See, respectively, Art 55 TFEU (freedom of establishment) and Art 114 TFEU (approximation of laws).

⁷¹ Art 5(2) Consolidated Version of the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) 13 (TEU).

⁷² Art 191 TFEU.

⁷³ Art 192 TFEU.

⁷⁴ European Commission, *The European Green Deal*, COM (2019) 640 final (Dec. 11, 2019), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0640> (last visited Apr. 19, 2025).

⁷⁵ Regulation (EU) 2021/1119, *supra* note ____.

⁷⁶ Christensen & Leuz, *supra* note ____, p. 1178.

with Member States, such as on fostering the internal market, EU legislation must be able to achieve a result that Member States cannot achieve individually (subsidiarity, Art 5(3) TEU) and must not exceed what is necessary to achieve the objective (proportionality, Art 5(4) TEU). The European Commission's impact assessment of the CSRD proposal explained that the legislation, notably including double materiality, met these criteria.⁷⁷ This assessment has not been challenged.

The European Commission argued that double materiality was already embedded in the CSRD predecessor, the Non-Financial Reporting Directive of 2014 (NFRD),⁷⁸ which inter alia required companies in scope to disclose the “impact” of their activities. A 2019 Communication by the European Commission explained that the NFRD disclosure implied double materiality – namely, both economically relevant and socially/environmentally impactful information was to be disclosed.⁷⁹ However, the Communication was not binding. The CSRD makes double materiality binding across the Union, achieving several advantages over action by individual Member States, hence fulfilling the subsidiarity principle. First, by standardizing climate disclosure, the CSRD ensures comparability in climate risk assessment and in the accountability of companies to stakeholders. Second, the CSRD reduces the cost of compliance with related EU sustainable finance regulations, such as SFDR and Taxonomy Regulation, which require comparable climate information from portfolio companies established in different parts of the Union. Third, by establishing uniform reporting criteria, the CSRD allows retail investors with climate preferences to identify suitable investments from anywhere in the EU.

The discussion of proportionality is less straightforward. The European Commission estimated the incremental cost of CSRD compliance, compared to the NFRD, to be EUR 1,200 – 3,700 million one-off and EUR 600 – 1,500 million annually.⁸⁰ Although the European Commission argued that the benefits are not quantifiable, it determined these benefits to exceed the cost particularly because of the above-mentioned argument of information comparability, reduced compliance cost, and because the burden on the Small Medium Enterprises (SMEs) is reduced, albeit not significantly. As we will see in Section 6, the European Commission has proposed more recently to further reduce the CSRD scope and the burden on SMEs. On the one hand, this move defies the initial proportionality assessment. On the other, however, the CSRD overhaul proposal aims to improve on the proportionality principle by reducing considerably the regulatory burden on SMEs and less significant CO2 emitters.

In conclusion, the EU climate disclosure rules stem from a different constitutional architecture than in the U.S., which explains why they can be more far-reaching. Moreover, the stated goals of the EU are different from the U.S. in that the EU is normatively committed to achieving climate neutrality by 2050 and explicitly relies also on private investment to realize that goal. Therefore, European climate rules aim not only to inform investors about climate risk, but also to provide

⁷⁷ European Commission, *Impact Assessment Accompanying the Proposal for a Directive Amending Directive 2013/34/EU as Regards Corporate Sustainability Reporting*, SWD (2021) 150 final (Apr. 21, 2021), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2021:150:FIN> (last visited Apr. 19, 2025).

⁷⁸ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1.

⁷⁹ European Commission, *Guidelines*, *supra* note ___, p. 4.

⁸⁰ European Commission, *Impact Assessment*, *supra* note ___, p. 80.

investors and other stakeholders with broadly climate-relevant information to change the behavior of companies toward decarbonization by way of sustainable finance.

5. *Disclosure Economics*

There are two sets of economic arguments for mandatory climate disclosure. The first is that information relevant to assess climate (physical and transition) risks improves the liquidity and efficiency of financial markets, leading to better capital allocation. From the perspective of investors as information users, this argument is consistent with single materiality. The second argument is that, having to disclose information about their contribution to climate change, companies may, under pressure from investors and other stakeholders, change their behavior and internalize more of this negative externality. Because the users of information include not only investors, but also society at large, this approach corresponds with double materiality. We discuss these arguments in turns.

The general case for mandatory disclosure is based on positive externalities.⁸¹ If disclosure is voluntary, companies disclose less information than socially desirable because there are spillovers to other companies. Moreover, lack of standardization leads to duplication and other social costs. The same arguments apply to climate risks.⁸² Companies are inclined to disclose less because competitors may free ride, particularly on strategies to address transition risks. When information is suboptimal, capital markets allocate resources less efficiently, for instance underpricing climate risks and making climate innovation comparatively costlier to finance.

The traditional counterargument to the rationale for mandatory disclosure is the unraveling of financial markets.⁸³ Failure to disclose may lead investors to assume the worst and lower a company's price more than (climate) risk warrants. Companies will find ways, such as costly signaling, to disclose information credibly and access capital markets. However, it has been argued that the unraveling result is less likely to occur with respect to climate information because: a) climate risk is harder for investors to understand and process than financial information; b) climate transition strategies include proprietary information that companies avoid disclosing to protect their competitive advantage; c) there is uncertainty as to whether company managers even know climate information, leaving investors with no grounds to assume the worst.⁸⁴ These arguments suggest that companies voluntarily disclose less climate information than financial information. This, in turn, may lead to underpricing of climate risk until climate information is mainstreamed in capital markets.⁸⁵

⁸¹ John Armour et al., *PRINCIPLES OF FINANCIAL REGULATION* 164–67 (Oxford Univ. Press 2016).

⁸² John Armour, Luca Enriques & Thom Wetzer, *Mandatory Corporate Climate Disclosures: Now, But How?*, 2021 Colum. Bus. L. Rev. 1085, 1117—22 (2022).

⁸³ See e.g. Ronald A. Dye, *Optimal Disclosure Decisions When There Are Penalties for Nondisclosure*, 48 RAND J. ECON. 704, 704—07 (2017) (summarizing the economic literature on unraveling).

⁸⁴ Hans B. Christensen, Luzi Hail & Christian Leuz, *Mandatory Corporate Social Responsibility and Sustainability Reporting: Economic Analysis and Literature Review*, 26 REV. ACCT. STUD. 1176, 1217 (2021).

⁸⁵ See e.g. Madison Condon, *Market Myopia's Climate Bubble*, 63 UTAH L. REV. 63 (2022).

Whether mandatory climate disclosure is desirable depends on how the benefits of potentially more efficient pricing compare with the costs. Mandatory disclosure is expensive in many ways.⁸⁶ There are substantial direct costs of compliance. The indirect costs could be even higher. Competition may suffer as mandatory disclosure places a comparatively higher burden on SMEs, and the latter may be discouraged from going public. Moreover, paradoxically, mandatory climate disclosure may undermine innovation as it reduces a company's ability to protect proprietary information. Finally, the cost of mandatory disclosure increases with reputation and litigation risk stemming from imperfect reporting standards. Particularly in litigation-friendly environments, such as the U.S., companies subject to mandatory disclosure may overreact in reporting climate risks, lest they be accused of making a material misstatement or omission. Moreover, the additional disclosures required might subject American companies to more opportunities to make a misstatement, which could result in more litigation.⁸⁷

Because of these and other unintended consequences, U.S. legal commentators have argued that climate disclosure may be too much of a good thing, and the SEC should refrain from mandating it.⁸⁸ Similarly, economists remind us that – apart from the benefits of standardization – mandatory climate disclosure can only improve financial market efficiency if there is a failure of voluntary disclosure.⁸⁹ There is some evidence that mandating disclosure of CO₂ emissions results in more information than previously available;⁹⁰ but this is preliminary, and more research is needed for a conclusive case.

The second argument for mandatory climate disclosure is to reduce the negative externalities of climate change.⁹¹ Whereas internalizing negative externalities undoubtedly increases social welfare, this is not obviously a matter for financial regulation. However, when the traditional approaches to negative externalities – such as taxes and environmental regulation – are undermined by political and international coordination failure, as appears to be the case on climate change, sustainable finance is a second-best approach.⁹² Even in the absence of environmental policy failure, economic theory reveals that mandatory climate disclosure is welfare-enhancing in the presence of financial constraints to climate transition.⁹³ In the EU, these are the economic rationales underlying double materiality. As explained earlier, double materiality supports the goal of climate finance to make companies reduce CO₂ emissions through investor pressure.

⁸⁶ Christensen & Leuz, *supra* note _____, 1216–18.

⁸⁷ *When Stock Exchanges Met Esg Disclosure: A Story Of Opportunities And Challenges Ahead*, 2024 NO. 2 FNREL-INST 5, 5-15 (“It is obvious that there are litigation risks associated with more disclosures: the more disclosures, the more risk for litigation, particularly around hard to define issues like social license, to which ESG issues are linked.”).

⁸⁸ Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 COLUM. BUS. L. REV. 840, 871–2.

⁸⁹ Christensen & Leuz, *supra* note _____, 1230.

⁹⁰ Patrick Bolton & Marcin Kacperczyk, *Carbon Disclosure and the Cost of Capital* (Nov. 13, 2021) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3755613 (last visited Apr. 29, 2025).

⁹¹ Armour, Enriques & Wetzler, *supra* note _____, 1122–1124.

⁹² Markus Kitzmueller & Jay Shimshack, *Economic Perspectives on Corporate Social Responsibility*, 50 J. ECON. LIT. 51 (2012). *See also*, more recently, Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L. FIN. & ACC. 247 (2017).

⁹³ Roman Inderst & Marcus M. Opp, *Sustainable Finance versus Environmental Policy: Does Greenwashing Justify a Taxonomy for Sustainable Investments?*, 163 J. FIN. ECON. 103954 (2024).

While single materiality does not normally include a concern for negative externalities, which increase financial return, this approach to mandatory disclosure converges with double materiality if investors care not only about financial return, but also about the overall impact of climate change.⁹⁴ In this case, information relevant for the non-monetary preferences of investors is material for decision-making. In financial economics, there is increasing evidence that retail investors have non-financial preferences. In a survey of Vanguard investors, 46% of retail investors appear to care also about climate change and other ethical ‘values’, as opposed to exclusively maximizing ‘value.’⁹⁵ The issue, however, is complicated – a study of British firms found that investors reacted negatively to climate disclosures,⁹⁶ and American energy stocks have continued to outperform their benchmarks.⁹⁷ Moreover, most retail investors participate in financial markets through intermediaries, which engage with portfolio companies on behalf of both value- and values-driven investors with often conflicting preferences.⁹⁸ Finally, retail investors may not understand climate information and the tradeoff with financial return. Experimental evidence reveals that investor sustainability preferences do not vary with impact as individuals are content with a ‘warm glow.’⁹⁹ Although EU securities regulation, with its emphasis on eliciting the sustainability preferences of retail investors, aims precisely to overcome these problems,¹⁰⁰ more research is needed to evaluate the effectiveness of these policies.

One final point about double materiality is that disclosure of climate information supports a learning process about climate risks, not only by investors, but also by issuers and all company stakeholders.¹⁰¹ This is an additional benefit to factor into the cost-benefit analysis. While climate reporting may sound unnecessarily burdensome, and even increase reputational and legal risks *today*, the balance from a company’s standpoint might become different if, for example, consumers and investors will have higher valuations for low-carbon products *tomorrow*. The recent economic literature on values transition reveals that whereas values, namely consumer preferences, slowly evolve with demographics and politics, making climate innovation financially more affordable can accelerate this evolution.¹⁰² On this perspective, mandatory climate disclosure can enable the

⁹⁴ Christensen & Leuz, *supra* note ____, 1232.

⁹⁵ Stefano Giglio et al., *Four Facts About ESG Beliefs and Investor Portfolios*, 164 J. FIN. ECON. 103984 (2025) (documenting that 22% of respondents invest in ESG stocks as a hedge against climate risk while 24% are motivated by ethical arguments). See also Laura T. Starks, *Presidential Address: Sustainable Finance and ESG Issues—Value versus Values*, 78 J. FIN. 1837 (2023) (discussing the importance of distinguishing between values- and value-investing in sustainable finance).

⁹⁶ Khaled Alsaifi et al., *Market Responses to Firms’ Voluntary Carbon Disclosure: Empirical Evidence from the United Kingdom*, 262 J. CLEANER PROD. 121377 (2020), <https://doi.org/10.1016/j.jclepro.2020.121377>.

⁹⁷ *The Energy Select Sector SPDR Fund (XLE) Performance*, Yahoo! Fin., <https://finance.yahoo.com/quote/XLE/performance> (last visited Apr. 30, 2025). This trend could reflect investor taste, but it could also reflect macroeconomic or geopolitical factors.

⁹⁸ Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1 (2023).

⁹⁹ See Florian Heeb et al., *Do Investors Care About Impact?*, 36 REV. FIN. STUD. 1737, 1738–39 (2023). At the same time, economic theory reveals that even a weak sustainability preference is sufficient to change corporate behavior so long as a majority of shareholders vote according to it. Eleonora Broccardo, Oliver Hart, & Luigi Zingales, *Exit versus Voice*, 130 J. POL. ECON. 3101 (2022).

¹⁰⁰ Alessio M. Paccès, *Will the EU Taxonomy Regulation Foster Sustainable Corporate Governance?*, 13 SUSTAINABILITY 12316 (2021).

¹⁰¹ Armour, Enriques & Wetzter, *supra* note ____, 1123.

¹⁰² Timothy Besley & Torsten Persson, *The Political Economics of Green Transitions*, 138 Q.J. ECON. 1863 (2023).

transition of values into value as it allows climate-conscious investors to subsidize climate innovation.

6. Recent Developments

a) EU

In February 2025, the European Commission published a proposal to drastically simplify sustainability reporting.¹⁰³ The proposal is twofold. The first part, which was immediately approved by the co-legislators, aims to “stop the clock” and postpone the application of the CSRD for all companies not already subject to its predecessor, the NFRD, until 2027.¹⁰⁴ The second part contains the substantive overhaul of mandatory climate disclosure, and, as of this writing, is still under discussion by both Member States (represented in the EU Council) and the European Parliament.¹⁰⁵ This significant reform proposal is known as the “Omnibus” because it concerns several aspects of sustainability reporting and due diligence obligations. In this article, we focus on climate disclosure.

The Omnibus proposal was motivated by the EU Competitiveness Report commissioned to former European Central Bank President and former Italian Prime Minister, Mario Draghi.¹⁰⁶ The report included a strong call for the simplification of EU regulatory burdens, which, it argued, undermine—rather than facilitate—firms’ ability to pursue the Union’s priorities, including combating climate change. As repeatedly emphasized by Draghi,¹⁰⁷ the extent and fragmentation of EU regulation undermines the competitiveness of SMEs in the global market. The European Commission responded with a comprehensive EU Competitiveness Compass, including the Omnibus as a first measure, with a target to reduce the reporting burden by at least 25% in general, and by 35% for SMEs.¹⁰⁸

Yet, it is impossible to ignore a second, unofficial motivation behind the Omnibus: the new geopolitical context. The EU climate disclosure rules have been designed with broad extraterritorial reach. On the one hand, they apply to multinational corporations that conduct

¹⁰³ European Commission, *Commission Simplifies Rules on Sustainability and EU Investments, Delivering Over €6 Billion in Administrative Relief*, Feb. 26, 2025, available at https://finance.ec.europa.eu/publications/commission-simplifies-rules-sustainability-and-eu-investments-delivering-over-eu6-billion_en (last visited Apr. 25, 2025).

¹⁰⁴ Directive (EU) 2025/794 of the European Parliament and of the Council of 14 April 2025 Amending Directives (EU) 2022/2464 and (EU) 2024/1760 as Regards the Dates from Which Member States Are to Apply Certain Corporate Sustainability Reporting and Due Diligence Requirements, 2025 O.J. (L 794) 1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202500794&qid=1744877402314 (last visited Apr. 25, 2025).

¹⁰⁵ European Commission, *Proposal for a Directive of the European Parliament and of the Council Amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464, and (EU) 2024/1760 as Regards Certain Corporate Sustainability Reporting and Due Diligence Requirements*, COM (2025) 81 final (Feb. 26, 2025), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52025DC0081> (last visited Apr. 25, 2025) (Omnibus proposal).

¹⁰⁶ Draghi Report, *supra* note ____.

¹⁰⁷ See Mario Draghi, *Forget the US — Europe Has Successfully Put Tariffs on Itself*, *Fin. Times*, Feb. 14, 2025, available at <https://www.ft.com/content/13a830ce-071a-477f-864c-e499ce9e6065> (last visited Apr. 25, 2025).

¹⁰⁸ European Commission, *A Competitiveness Compass for the EU*, COM (2025) 30 final (Jan. 29, 2025), available at https://commission.europa.eu/document/download/10017eb1-4722-4333-add2-e0ed18105a34_en (last visited Apr. 25, 2025).

significant business in the EU, whether directly or via subsidiaries.¹⁰⁹ On the other hand, EU-based companies are required to report on the CO2 emissions and principal adverse impacts of their business partners, regardless of where these partners are located.¹¹⁰ This could not go unnoticed, particularly in the US, where, as we have explained, there is a different approach to mandatory disclosure and a different political sensitivity to ESG and climate-related issues. Consequently, both commentators and policymakers have criticized the EU climate rules as non-tariff barriers to international trade and urged the US government to respond.¹¹¹

The Omnibus proposal only partially addresses this concern. In an overarching reduction of scope, the proposal also tempers extraterritoriality. According to initial estimates, the number of US companies subject to the CSRD would decrease from approximately 3,000 to 900.¹¹² This reduction stems from several changes. First, the threshold for a company to fall under the CSRD has been significantly raised. Under the Omnibus, only companies with more than 1,000 employees (and that also meet certain balance sheet or turnover thresholds) are in scope.¹¹³ Second, for non-EU parent companies, the consolidated EU turnover threshold has been raised from €150 million to €450 million, EU branches must do business for more than €50 million, and EU subsidiaries must qualify as “large undertakings” (reflecting the proposed exclusion of all SMEs from CSRD scope).¹¹⁴ Third, value chain reporting obligations have been substantially scaled back: business partners not subject to CSRD are now only required to report information based on a simplified voluntary standard applicable to SMEs.¹¹⁵

These lowered reporting requirements are worth briefly elaborating upon. Notably, unlike in U.S. securities law, the CSRD applies not only to publicly held companies, but also to private companies that exceed the relevant size thresholds. Lowering these thresholds thus helps bring the two jurisdictions somewhat closer in scope. Another important change concerns the reporting of Scope 3 emissions. Whereas the current CSRD version requires companies to report emissions

¹⁰⁹ Art 40a of Directive 2013/34/EU as modified by CSRD.

¹¹⁰ Art 19a of Directive 2013/34/EU as modified by CSRD.

¹¹¹ Michael R. Littenberg & Marc Rotter, *Stop the Omnibus and Let Us Off—Members of U.S. Congress and State Officials Call for Action Against the EU CSDDD and CSRD*, Ropes & Gray LLP (Feb. 28, 2025), available at <https://www.ropesgray.com/en/insights/viewpoints/102k2ce/stop-the-omnibus-and-let-us-off-members-of-u-s-congress-and-state-officials-ca> (last visited Apr. 25, 2025) (referring, among others, to the letter from 26 state officials to President Trump calling for the US to object to the CSRD: <https://sfof.com/wp-content/uploads/2025/02/USTR-European-Letter.pdf>). For an academic commentary, see Bernard S. Sharfman, *The EU's New Corporate Sustainability Directive Is a Tariff on U.S. Companies*, *Nat'l Rev.*, Dec. 27, 2024, available at <https://www.nationalreview.com/2024/12/the-eus-new-corporate-sustainability-directive-is-a-tariff-on-u-s-companies/> (last visited Apr. 25, 2025).

¹¹² Sodali & Co., *Breaking Down the Omnibus: Implications for the CSRD*, Feb. 27, 2025, available at <https://sodali.com/resources/insights/breaking-down-the-omnibus-implications-for-the-csrd> (last visited Apr. 25, 2025). Cf. Dieter Holger, *At Least 10,000 Foreign Companies to Be Hit by EU Sustainability Rules*, *Wall St. J.*, Apr. 5, 2023, available at <https://www.wsj.com/articles/at-least-10-000-foreign-companies-to-be-hit-by-eu-sustainability-rules-307a1406> (last visited Apr. 25, 2025).

¹¹³ Art 2(1) Omnibus proposal (amending art 1 of Directive 2013/34/EU as modified by CSRD).

¹¹⁴ Art 2(12) Omnibus proposal (amending art 40a of Directive 2013/34/EU as modified by CSRD).

¹¹⁵ Art 2(6) and 2(8) Omnibus proposal (amending art 29b and introducing art 29ca into Directive 2013/34/EU as modified by CSRD). The proposed Voluntary Reporting Standards for SMEs (so-called VSME) are intended as a reporting cap for companies with less than 1,000 employees (Omnibus proposal, p. 9).

along their entire value chains, except for a grace period of three years,¹¹⁶ the Omnibus proposal's reference to the SME reporting standard effectively exempts companies from reporting Scope 3 emissions related to smaller business partners.¹¹⁷ Finally, the Omnibus proposal significantly reduces the requirement for companies to report on their alignment with the EU Taxonomy. Such reporting is mandatory only for EU companies with turnover above €450 million. For the others, it becomes optional: companies—including non-EU multinationals—can choose whether to report taxonomy alignment and may even opt to report partial alignment, thereby softening the binary nature of this classification system.¹¹⁸

Even if adopted, the Omnibus proposal is unlikely to appease ESG opponents in the US.¹¹⁹ This is because it scales back reporting obligations—including limiting their extraterritorial reach—but does not roll back the underlying principles.¹²⁰ Notably, the concept of double materiality remains intact, as does the requirement to align company transition plans with the EU Climate Law. The Omnibus merely clarifies that transition plans are primarily a matter of disclosure, replacing the current obligation to “put them into effect” with a softer requirement to describe “implementing actions.”¹²¹ Moreover, while the EU is reconsidering its 2040 climate targets—which would affect corporate transition plans—it remains firmly committed to achieving Net Zero by 2050.¹²² This is consistent with the Draghi Report, which presents the reduction of regulatory burdens on EU firms as a tool for asserting EU's global leadership in the climate transition, not as a retreat from climate goals.¹²³

As of this writing, it remains unclear whether the Omnibus proposal will be adopted or substantially amended by the co-legislators. The rollback of reporting obligations is politically controversial.¹²⁴ In particular, the significant reduction of Scope 3 emissions reporting obligations

¹¹⁶ Art 19a of Directive 2013/34/EU as modified by CSRD. *See also* European Sustainability Reporting Standards (ESRS), *supra* note __, p. 327.

¹¹⁷ European Financial Reporting Advisory Group (EFRAG), *Voluntary Standard for Non-Listed Micro-, Small-, and Medium-Sized Undertakings (VSME)* (2024), available at <https://www.efrag.org> (last visited Apr. 25, 2025) (Scope 3 emissions reporting is voluntary under both the basic and the comprehensive module).

¹¹⁸ Art 2(3) Omnibus proposal (introducing art 19b into Directive 2013/34/EU as modified by CSRD). In the same vein, in the proposed amendment of the Climate Delegated Acts, the European Commission has introduced a 10% financial materiality threshold to report on taxonomy alignment. European Commission, *Questions and Answers on Simplification Omnibus I and II* (Feb. 26, 2025), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52025DC0081> (last visited Apr. 25, 2025).

¹¹⁹ *See* Luca Enriques, Matteo Gatti, and Roy Shapira, *How the EU Sustainability Due Diligence Directive Could Reshape Corporate America*, 78 STAN. L. REV. (forthcoming), available at SSRN: <https://ssrn.com/abstract=5083571> (noting that, despite the Omnibus watering down disclosure and compliance obligations, U.S. companies still face liability risk based on *In re* Caremark Intern Inc. Deriv. Litig., 698 A.2d 959 (Del. Ch. 1996)).

¹²⁰ *See e.g.*, Littenberg & Rotter, *supra* note __.

¹²¹ Art 4 (10) Omnibus proposal (amending art 22 of Directive (EU) 2024/1760). Note that this provision concerns the Corporate Sustainability Due Diligence Directive (so-called CS3D), not the CSRD.

¹²² Karl Mathiesen, *EU Delays 2040 Climate Target Release Until 'Before Summer'*, *Politico*, Apr. 3, 2025, available at <https://www.politico.eu/news/energy-and-climate/eu-delays-2040-climate-target-release-until-before-summer> (last visited Apr. 25, 2025).

¹²³ Draghi Report, *supra* note __, p. __.

¹²⁴ *See e.g.* Laurent Beuselinck, Johann Weicht & Jacco Kroon, *EU Omnibus Update: European Parliament Agrees to 'Stop-the-Clock,' but the EU Omnibus Debate Continues*, ERM (Apr. 3, 2025), available at <https://www.erm.com/insights/eu-omnibus-update-european-parliament-agrees-to-stop-the-clock-but-the-eu-omnibus-debate-continues/> (last visited Apr. 25, 2025).

may incentivize companies to strategically outsource emissions to less transparent parts of their value chains. Furthermore, introducing optionality in Taxonomy alignment reporting may undermine the very purpose of having such a classification system, namely, to reduce greenwashing.¹²⁵ A counterargument is that the current EU sustainability reporting rules need streamlining to fit the goals of the European Green Deal. The complexity stemming from the rapid and sequential introduction of duplicative and occasionally inconsistent regulations defies the purpose of encouraging sustainable finance.¹²⁶

More fundamentally, these policy considerations become secondary in the context of the current geopolitical tensions. As we have endeavored to explain, EU climate disclosure rules and US securities regulation have a completely different legal basis and reflect fundamentally different policy goals. Because of that, the extraterritorial reach of EU climate rules—however justified by double materiality and the EU Treaty provisions supporting it—risks imposing standards that do not reflect political preferences in other jurisdictions.

b) US

As revealed by the EU example, one notable factor of climate regulation is that a number of cross-border standards have been devised to implement it. Perhaps most prominently, the International Sustainability Standards Board has issued a pair of accounting standards – International Financial Reporting Standards (IFRS) 1 and 2 – that establish the baseline framework for reporting on sustainability risks and opportunities that could reasonably affect a firm’s cash-flows or cost of capital, and applies that framework for climate disclosures.¹²⁷ International regulatory cooperation is often supported by American businesses and groups like the U.S. Chamber of Commerce as a pragmatic way to level the global playing field.¹²⁸ The international engagement is often done for selfish reasons – American firms conclude that an international standard will induce less compliance costs than would a variety of domestic standards. By aligning standards and reducing compliance friction across borders, cooperation can help prevent foreign jurisdictions from imposing duplicative or overly burdensome rules on U.S. firms, and in some cases may even limit the reach of more aggressive regulators abroad.

Yet in Washington, regulatory cooperation frequently triggers political backlash, particularly in Congress, where it is often framed as a threat to American sovereignty. That tension was on full display in the PROTECT USA Act, introduced by Senator Bill Hagerty, which aims to prohibit U.S. regulatory agencies from participating in international financial regulatory organizations, particularly including those with climate reporting requirements, without explicit congressional approval—an effort that reflects ongoing skepticism toward transnational standard-setting, even when it is supported by the private sector.¹²⁹

¹²⁵ See Paces, *supra* note ____ [Taxonomy piece].

¹²⁶ European Cent. Bank, *Investing in Europe’s green future* (Occasional Paper Series No. 367, 2025), 70, available at <https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op367~16f0cba571.en.pdf> (last visited June 6, 2025).

¹²⁷ Int’l Sustainability Standards Bd., IFRS S1—General Requirements for Disclosure of Sustainability-related Financial Information (2023); Int’l Sustainability Standards Bd., IFRS S2—Climate-related Disclosures (2023).

¹²⁸ DAVID ZARING, *THE GLOBALIZED GOVERNANCE OF FINANCE*, 1-10 (2020).

¹²⁹ Protecting U.S. Sovereignty in Financial Reporting Act, S. 3247, 118th Cong. (2023).

The Act warns that “restrictions adopted unilaterally by foreign countries... can have serious adverse effects on employment, economic stability, scientific progress, and international trade,” revealing how sustainability regulations are seen as a risk to core national interests, and then outlines a number of procedures that both agencies and courts would have to follow if the foreign restrictions would adversely affect a variety of American interests, including climate interests.¹³⁰

It is easy to propose legislation in America, and hard to get it enacted into law, but the Protect USA Act reflects a degree of hostility by many congressmen to what they see as the extraterritorial application of the law of a foreign sovereign to the United States. The bill does not go after every variant of climate reporting and enforcement; it specifically targets the EU’s Corporate Sustainability Due Diligence Directive (CS3D), which includes some compliance obligations for companies, rather than the Corporate Sustainability Reporting Directive (CSRD), which focuses on disclosure.¹³¹

c) *California’s Disclosure Regime*

Regardless of the next steps taken by the SEC with regard to climate disclosures, companies will face other efforts in America, most notably from California. Effective in 2024, California has introduced comprehensive climate disclosure regulations for corporations operating within the state. Similarly, unless significantly scaled back by the Omnibus reform, the EU’s CSRD will mandate climate-related disclosures for American companies operating in the Union, including Scope 3 emissions and impact assessments based on the double materiality standard. California’s laws are aligned with the international standards that animated the EU’s framework.¹³² While the EU regime is broader and rooted in the EU Treaties,¹³³ California’s laws have expansive reach too.¹³⁴

California’s rules, aimed at enhancing transparency in corporate environmental practices, require companies to report on their GHG emissions, climate risks, and sustainability efforts. This legislation targets both public and private corporations that meet specific revenue thresholds, with an emphasis on providing standardized information that investors, regulators, and the public can use to assess a company’s environmental impact.

¹³⁰ Prevent Regulatory Overreach from Turning Essential Companies into Targets Act of 2025 (“PROTECT USA Act”), S. 985, 119th Cong. (2025).

¹³¹ See *id.* However, 26 state officials wrote a letter calling upon the Trump administration to retaliate against the CSRD: <https://sfof.com/wp-content/uploads/2025/02/USTR-European-Letter.pdf>. See *supra*, note ____.

¹³² Cal. S.B. 253, 2023–2024 Reg. Sess. (Cal. 2023); Cal. S.B. 261, 2023–2024 Reg. Sess. (Cal. 2023).

¹³³ See *supra*, text accompanying notes _____. In particular, EU climate regulation uniquely adopts a double materiality standard, which departs from international accounting standards such as the IFRS S1 and the IFRS S2 issued by the International Sustainability Standards Board (ISSB). See e.g. ESRS–ISSB Standards Interoperability Guidance, <https://www.ifrs.org/content/dam/ifrs/supporting-implementation/issb-standards/esrs-issb-standards-interopability-guidance.pdf>. In April, 2025, the ISSB adopted a narrow set of optional changes designed to simplify climate disclosures, but not dilute them. Int’l Sustainability Standards Bd., *Exposure Draft — Amendments to Greenhouse Gas Emissions Disclosures* (Apr. 28, 2025). The accounting firm Ernst & Young supported the proposed changes, and assumed that they would be enacted. Ernst & Young Glob. Ltd., *IFRS Developments No. 9: ISSB Proposes Amendments to Greenhouse Gas (GHG) Emissions Disclosures* (Apr. 2025), <https://www.ey.com/content/dam/ey-unified-site/ey-com/en-gl/technical/ifrs-technical-resources/documents/ey-gl-devel-9-issb-ed-ifrs-2-amendments-04-2025.pdf>.

¹³⁴ See Cal. Air Res. Bd., SB 253 & SB 261 Implementation, <https://ww2.arb.ca.gov/resources/fact-sheets/sb-253-sb-261-implementation>.

Under the new framework, companies must disclose Scope 1, 2, and, in some cases, Scope 3 emissions. Scope 1 covers direct emissions from a company's operations, while Scope 2 includes indirect emissions from purchased electricity or energy. Scope 3, the most expansive category, encompasses indirect emissions across the supply chain. This requirement places significant responsibility on companies to track and report emissions throughout their value chain, particularly where their environmental footprint may be less visible, such as through suppliers or product use. The climate disclosure rules in California were passed through legislation by the California Legislature. In September 2023, two bills were passed, mandating climate-related disclosures for corporations. These bills were signed into law by Governor Gavin Newsom and established statutory requirements for companies to report their GHG emissions and climate-related risks.

The Climate Corporate Data Accountability Act requires large corporations that do business in California and have revenues of more than \$1 billion to publicly disclose their Scope 1, 2, and 3 emissions on an annual basis.¹³⁵ The other state law requires companies with over \$500 million in annual revenues to disclose climate-related financial risks, following the framework established by the Task Force on Climate-related Financial Disclosures (TCFD).¹³⁶ These statutory requirements are enforced by state agencies, in particular the California Air Resources Board (CARB).¹³⁷

Litigation over these laws is still ongoing, with a first amendment challenge in discovery, as of this writing.¹³⁸

7. *Conclusion*

Despite similar climate goals, the legal frameworks governing securities disclosure in the U.S. and EU differ so substantially that regulatory alignment is unlikely. In the U.S., constitutional doctrines and narrow statutory mandates hem in the SEC. In the EU, by contrast, climate policy and financial regulation can proceed in tandem—at least for now. Nonetheless, even as formal regulation diverges, indirect convergence may emerge through global supply chains, private standard-setting, and the extraterritorial implications of rules developed in Europe and states like California. These are interesting questions for future research.

¹³⁵ Climate Corporate Data Accountability Act, S.B. 253, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

¹³⁶ Greenhouse Gases: Climate-Related Financial Risk Act, S.B. 261, 2023–2024 Leg., Reg. Sess. (Cal. 2023)

¹³⁷ California Air Resources Board, Draft 2022 Scoping Plan Update: Building Blocks 2.0, pt. 2 (June 23, 2023), https://ww2.arb.ca.gov/sites/default/files/2023-07/BP2.0_Pt2_draft_ToPost_06232023.pdf and State Air Resources Board: Greenhouse Gases, A.B. 197, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

¹³⁸ *Chamber of Commerce of the United States of America v. California Air Resources Board*, No. 2:24-cv-00801, 2024 WL 1234567 (C.D. Cal. Nov. 5, 2024).

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