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Climate Disclosure and the Transformation of Gatekeeping

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For helpful discussions and comments, I thank Luca Enriques, Howell Jackson, Renee Jones, Michael Kaufman, Alessandro Romano, and Joel Seligman. This article was presented at the Institute for Law & Economic Policy Conference "Gatekeeping in a Post-Chevron World," hosted by the University of California, Berkeley, School of Law in October 2024. Special thanks to market participants who contributed their expertise, including Loyti Cheng and Betty M. Huber.

Abstract

How might enhanced climate disclosures disrupt the verification practices of gatekeepers in major capital markets transactions? This essay explores this question, using the SEC's now-stayed 2024 Climate Rule as a guide. The essay begins by examining the established architecture of gatekeepers' verification practices. These are complex, yet standardized, relying on a web of experts, each with their own area of specialization, constructed in response to liability concerns. Enhanced climate disclosures are likely to expand the responsibilities of traditional gatekeepers, especially securities underwriters, while also prompting issuers to rely on attestation providers—green gatekeepers who certify the accuracy and completeness of registrants' greenhouse gas (GHG) emissions metrics and other climate information. The essay considers how these verification practices must change to sustain due diligence defenses under federal securities law, as verification increasingly requires environmental expertise. The essay concludes by addressing a core policy question: Should GHG emissions metrics be certified by experts? While expert certification can improve accuracy, the essay argues against such expertisation, in contrast to the approach in the Climate Rule. The Securities Act ensures that liability for these disclosures must fall somewhere: if not with experts, then with underwriters. Even if underwriters now lack the environmental expertise of attestation providers, they have unique incentives and capabilities to shift risk to the right gatekeepers, to monitor those gatekeepers effectively, and they have a track record of doing so.

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Abstract

How might enhanced climate disclosures disrupt the verification practices of gatekeepers in major capital markets transactions? This essay explores this question, using the SEC's now-stayed 2024 Climate Rule as a guide.

The essay begins by examining the established architecture of gatekeepers' verification practices. These are complex, yet standardized, relying on a web of experts, each with their own area of specialization, constructed in response to liability concerns. Enhanced climate disclosures are likely to expand the responsibilities of traditional gatekeepers, especially securities underwriters, while also prompting issuers to rely on attestation providers—green gatekeepers who certify the accuracy and completeness of registrants' greenhouse gas (GHG) emissions metrics and other climate information. The essay considers how these verification practices must change to sustain due diligence defenses under federal securities law, as verification increasingly requires environmental expertise.

The essay concludes by addressing a core policy question: Should GHG emissions metrics be certified by experts? While expert certification can improve accuracy, the essay argues against such expertisation, in contrast to the approach in the Climate Rule. The Securities Act ensures that liability for these disclosures must fall somewhere: if not with experts, then with underwriters. Even if underwriters now lack the environmental expertise of attestation providers, they have unique incentives and capabilities to shift risk to the right gatekeepers, to monitor those gatekeepers effectively, and they have a track record of doing so.

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Introduction

Gatekeepers involved in major capital markets transactions perform a vital role in reducing information asymmetry between issuers and investors, helping assure the accuracy of corporate disclosures.[1] Their verification practices—complex, yet standardized, relying on a web of experts, each with their own area of specialization[2]—respond to the threat of liability: federal securities law holds key gatekeepers jointly and severally liable with corporate issuers for disclosure errors in registration statements.[3] When disclosure errors are suspected, attention invariably falls on these actors, with investors (and their lawyers) asking, "Where were the gatekeepers?"

Recently, gatekeepers' standardized verification patterns have faced disruption as companies increasingly disclose climate-related information in their key filings. In particular, the Securities and Exchange Commission's (SEC's) Climate Rule,[4] adopted in 2024, threatened to upend gatekeeping practices by introducing attestation providers—green gatekeepers tasked with certifying the accuracy and completeness of registrants' greenhouse gas (GHG) emissions metrics[5]—and expanding the responsibilities of traditional gatekeepers, namely, underwriters, auditors, and lawyers.[6] This imposes a significant added burden, especially on underwriters, given their limited subject matter expertise and analytical competence. Crucially, the Climate Rule raised the question of where liability for false GHG emissions metrics should rest, whether with underwriters, despite their limitations, or with the nascent and untested attestation providers. In effect, the Climate Rule would have transformed not only corporate disclosures but potentially also the architecture of information verification.

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[1] Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L. J. 1045, 1046 (2019) ("Disclosure's purpose, then, is to diminish asymmetries and the space for fraud, … To achieve these purposes, the system depends on gatekeepers").

[2] *See* Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1591-1603 (2010) [hereinafter, Tuch, *Multiple Gatekeepers*].

[3] Under Section 11 of the Securities Act of 1933, the registration statement is not just the issuer's responsibility. 15 U.S.C. § 77k(a). Rather, "the Securities Act makes no such distinction. The underwriters are just as responsible as the company if the [registration statement] is false." Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 696 (S.D.N.Y. 1968). *See also* 77 CONG. REC. 2910, 2934 (1933) (Statement of Rep. Chapman) ("Under its provisions the issuer, the underwriter, and the technical expert … are held responsible for making a full disclosure of every material fact in connection with an issue of corporate securities."). As to joint and several liability, see 15 U.S.C. § 77k(f)(1).

[4] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

[5] *See infra* Pt II. For a broad account of green gatekeepers, see Luca Enriques, Alessandro Romano & Andrew F. Tuch, *Green Gatekeepers*, 109 MINN. L. REV. 609 (2024).

[6] *See infra* Pt II.C.

Amid challenges to its legality, the Climate Rule faces an uncertain fate.[7] Nevertheless, enhanced climate disclosures seem inevitable,[8] raising concern about how effectively gatekeeping can assure their accuracy. Whatever its fate, the Climate Rule matters. First, at the time of writing, it remains possible that the Climate Rule, or a similar regime, could still govern corporate climate disclosures. Unless formally rescinded or amended,[9] the Climate Rule may be revived in the future. And even if the Rule is rescinded, similar provisions could be introduced.[10] Second, the Rule—shaped by years of input and detailed analysis—serves as a valuable case study of green gatekeeping; we can learn from it to guide future regulatory design.[11] Finally, mandatory disclosure regimes in other jurisdictions—such as international and state regimes—may result in similar mandated disclosures and thus have a comparable impact on companies, even if the Climate Rule does not go into effect.[12]

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[7] Soon after its adoption, the Climate Rule faced multiple legal challenges to its legality, which were consolidated in the Eighth Circuit Court of Appeals, prompting the SEC under the Biden administration to stay the rule pending judicial review. The Enhancement and Standardization of Climate-Related Disclosures for Investors; Delay of Effective Date, 89 Fed. Reg. 25804, 25804 (Apr. 12, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (announcing that the effective date of the SEC Climate Rule would be "delayed pending the completion of judicial review in consolidated proceedings in the Eighth Circuit"). The case is Iowa v. Securities and Exchange Commission, No. 24-1522 (8th Cir.) (Apr. 24, 2025).

In 2025, under the Trump administration, the SEC withdrew its defense of the Climate Rule. Securities and Exchange Commission (SEC), SEC Votes to End Defense of Climate Disclosure Rules, Mar. 27, 2025, https://www.sec.gov/newsroom/press-releases/2025-58. In response, intervening states asked the Eighth Circuit to delay the legal proceedings. See Era Anagnosti et al., SEC's Climate Rule Litigation Update: Is it Actually Over?, DLA Piper Insight, Apr. 17, 2025, https://www.dlapiper.com/en/insights/publications/2025/04/sec-climate-rule-litigation-update-is-it-actually-over. The Eighth Circuit granted this request, temporarily pausing the litigation. Order in Iowa v. Securities and Exchange Commission, No. 24-1522 (8th Cir.) (Apr. 24, 2025). In light of this, the Climate Rule remains on the books, although it is stayed.

[8] Companies are increasingly making enhanced climate disclosures voluntarily. As to the extent of voluntary disclosure, see S&P 500 Sustainability Reporting and Assurance Analysis, The Center for Audit Quality (June 2025), https://www.thecaq.org/sp-500-and-esg-reporting. As to mandated disclosure under other regimes, see infra note 12 and accompanying text.

[9] Doing so would require notice-and-comment rulemaking under the Administrative Procedure Act.

[10] *See* Era Anagnosti et al., *SEC's Climate Rule Litigation Update: Is It Actually Over?*, DLA Piper Insight, Apr. 17, 2025, https://www.dlapiper.com/en/insights/publications/2025/04/sec-climate-rule-litigation-update-is-it-actually-over ("APA-based rescissions lack permanence, and a future administration could reintroduce similar regulations.").

In fact, only if the Eighth Circuit Court of Appeals, where challenges to the rule's legality are being heard, decides against the SEC, could the Commission's future rulemaking authority be limited. *See* Era Anagnosti et al., *SEC's Climate Rule Litigation Update: Is it Actually Over?*, DLA Piper Insight, Apr. 17, 2025, https://www.dlapiper.com/en/insights/publications/2025/04/sec-climate-rule-litigation-update-is-it-actually-over.

[11] Scholarly examination of design choices relevant to climate disclosure has tended not to focus on the assurance of these disclosures. As to design choices available under mandatory climate disclosure, see John Armour, Luca Enriques & Thom Wetzer, *Mandatory Corporate Climate Disclosures: Now, But How?*, COLUM. BUS. L. REV. 1085, 1124-42 (2021); Scott Hirst, *Saving Climate Disclosure*, 28 STAN. J. L., BUS. & FIN. 91 (2023); Madison Condon, Sarah Ladin, Jack Lienke, Michael Panfil & Alexander Song, *Mandating Disclosure of Climate-Related Financial Risk*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 745 (2022).

[12] *See, e.g.,* Corporate Sustainability Reporting Directive (CSRD) (E. U. rule requiring climate disclosure); CAL. HEALTH & SAFETY CODE §§ 38532–38533 (Deering, LEXIS through 2024 Reg. Sess.). Public companies could include enhanced corporate disclosures, such as GHG emissions metrics, in registration statements (or in disclosures incorporated by

Scholars have examined corporate disclosures of climate-related and other information about environmental, social, and governance (ESG) issues, though relatively little attention has been paid to gatekeeper certifications of climate disclosures. Recent scholarship examines the liability implications of climate-related disclosures, whether mandated or not, with important contributions assessing the merits of legal reform to address the novel challenges these disclosures pose.[13] In particular, scholars have focused on corporate liability—that is, the liability of issuers or registrants making climate-related claims. Concern about corporate liability is understandable, given that it is issuers (or registrants) that are subject to disclosure obligations.[14] Yet gatekeepers also warrant attention, given their roles in reducing information asymmetry.

This Essay assesses how enhanced climate disclosures might disrupt the verification practices of gatekeepers in major capital markets transactions, using the SEC Climate Rule as a case study. The specific effects of these changes are not easily predicted. Enhanced climate disclosure and attestation

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reference into registration statements) if required to disclose them elsewhere, even absent an SEC mandate. Such disclosure may help avoid the appearance of withholding material information from US investors.

[13] *See, e.g.*, Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 101 (2020); Kevin S. Haeberle, *Reforming Securities Litigation & Enforcement for ESG* (June 27, 2024), https://ssrn.com/abstract=4879039; Kevin S. Haeberle, *Fraud-on-the-Market Liability in the ESG Era*, 98 TUL. L. REV. 641 (2024); Aneil Kovvali, *ESG and Securities Litigation: A Basic Contradiction*, 73 DUKE L. J. 1229 (2024); Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. Rev. 91 105-6 (2017); James Park, *ESG Securities Fraud*, 58 WAKE FOREST L. REV. 1149 (2023); Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L. J. 967, 972-73 (2019).

Scholars have also focused on the legality of the SEC Climate Rule, as to which see Jill E. Fisch, George S. Georgiev, Donna M. Nagy & Cynthia A. Williams, *Comment Letter of Securities Law Scholars on the SEC's Authority to Pursue Climate-Related Disclosure* (June 6, 2022), https://ssrn.com/id=4129614; George S. Georgiev, *The Market-Essential Role of Corporate Climate Disclosure*, 56 U.C. DAVIS L. REV. 2105 (2023); George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 RUTGERS L. REC. 101 (2022); Letter from Lawrence A. Cunningham, Professor of Law, George Washington Univ., Corresponding Author, on Behalf of Twenty-Two Professors of Law and Finance (Apr. 25, 2022), https://bit.ly/3WGj8nx (noting the Proposal's citation patterns); Jill E. Fisch, George S. Georgiev, Donna Nagy & Cynthia Williams, *Climate Change, West Virginia v. EPA, and the SEC's Distinctive Statutory Mandate*, 47 ADMIN. & REG. L. NEWS 9 (2021–2022); Jerry W. Markham, *US Securities Exchange Commission and the "Deep Administrative State,"* 14 AM. U. L. REV. 151 (2024).

[14] For a parallel contribution, studying sustainability gatekeepers generally (a class of gatekeepers that encompass those gatekeepers discussed here), without examining gatekeeping practices arising under Section 11 of the Securities Act, see Luca Enriques, Alessandro Romano & Andrew F. Tuch, *Sustainability Assurance*, LAW & CONTEMP. PROBLEMS (2025) (forthcoming). *See also* Enriques, Romano & Tuch, *supra* note 5, (examining general principles for regulating green gatekeepers, including those in securities settings, without explicitly considering the SEC Climate Rule). For other important contributions considering aspects of green gatekeeping, see, e.g., Roy Shapira & Asaf Eckstein, *Compliance Gatekeepers*, 41 YALE J. REG. 469 (2024); Iris H-Y Chiu, *Standardization in Corporate Social Responsibility Reporting and a Universalist Concept of CSR? – A Path Paved with Good Intentions*, 22 FLORIDA J. INT'L L. 361, 387–91 (2010); Quinn Curtis et al., *Green Bonds, Empty Promises*, 102 N.C. L. REV. 131, 172–75 (2023); Marco Dell'Erba & Michele Doronzo, *Sustainability Gatekeepers: ESG Ratings and Data Providers*, 25 U. PA. J. BUS. L. 355 (2023); Longjie Lu, *Regulating ESG Rating Firms as the Gatekeepers for ESG Finance*, 19 CAP. MKTS L.J. 184 (2024); Paul Rose, *Sustainability Verification*, 72 AM. U.L. REV. 1017 (2022); Emily Strauss, *Climate Change and Shareholder Lawsuits*, 20 N.Y.U. J. LAW & BUS. 95, 118 (2023); Lin Lin & Yanrong Hong, *Developing a Green Bonds Market: Lessons from China*, 23 EURO. BUS. ORG. L. REV. 143 (2022).

would likely transform gatekeepers' standardized pattern of information verification, both because of the need for a new type of gatekeeper and because it may inspire new practices by traditional gatekeepers striving to establish due diligence defenses. As to design choices open to policymakers, this Essay argues that the best choice—the one that most effectively deters disclosure errors—may well be to treat GHG emissions metrics as non-expertised, so that underwriters, rather than expert attestation providers, are liable for their accuracy.

Part I grounds the discussion in an overview of gatekeeper liability and verification patterns as they exist now, without mandatory climate disclosure. The result of liability under Section 11 of the Securities Act of 1933, and gatekeepers' responses to it, is that verification of registration statements has become a standardized process carried out by an interlocking web of gatekeepers. For non-expertised parts of registration statements, underwriters bear sole responsibility among gatekeepers. Underwriters can avoid liability by establishing due diligence defenses,[15] which they can often satisfy by relying on the services of other gatekeepers, including lawyers and accountants. Underwriters might obtain the services of these gatekeepers in one of three ways: engaging them at market prices; employing them, bringing their services within the underwriting firm; or obtaining written assurances from issuer-engaged gatekeepers.[16] To varying extents, underwriters rely on all three methods as they attempt to avoid Section 11 liability or shift risk in the event that they face such liability. In contrast, experts such as auditors face liability for defects in any part of a registration statement purporting to be made on their expert authority (e.g., audited financial statements), a defense they satisfy by reference to their own due diligence in preparing that portion.

Enhanced climate disclosure, as the SEC Climate Rule demonstrates, may bring meaningful change to gatekeepers' standardized verification patterns, as described in Part II. The Climate Rule, the "most anticipated, and contested, rulemaking in the history of the SEC,"[17] requires two categories of registrants to file attestation reports prepared by attestation providers that provide assurance as to

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[15] Underwriters also bear liability for expertised parts of registration statements but benefit from a generous defense. See 15 U.S.C. § 77k(b)(3)(C). As to the defenses, see 9 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 322–73 (Wolters Kluwer, 5th ed. 2018). Regarding § 11, see generally id. at Ch. 11.C.d; JOHN COFFEE, JR., HILLARY A. SALE & CHARLES K. WHITEHEAD, SECURITIES REGULATION: CASES AND MATERIALS 919–22, 962–76, 980–82, 992–95 (Foundation Press, 14th ed. 2021).

[16] *See infra* Pt II.A.

[17] Lee Reiners, *Summary of Comment Letters for the SEC's Proposed Climate Risk Disclosure Rule*, THE FINREG BLOG (Sept. 1, 2022), https://sites.duke.edu/thefinregblog/2022/09/01/summary-of-comment-letters-for-the-secs-proposed-climate-risk-disclosure-rule/.

scope 1 and/or scope 2 GHG emissions.[18] Large accelerated filers (a category of registrant representing thirty-four percent of all registrants)[19] are required to obtain reasonable assurance, equivalent to the assurance provided by an audit of a company's financial statements included in a Form 10-K.[20] These reports are regarded as expertised under Section 11, exposing their preparers to Section 11 liability.[21] Other attestation reports are required to provide "limited" assurance only and are non-expertised, meaning that their providers bear no Section 11 liability.

With enhanced climate disclosures like those under the Climate Rule, underwriter practices would likely change. Part II shows how. Underwriters bearing responsibility for GHG emissions would seek to establish a due diligence defense, which requires expertise they likely lack. Where possible, underwriters would seek assurance from issuer-engaged attestation providers (required under the Climate Rule), but they might need to go further, either employing or engaging environmental scientists or others with the required expertise. Underwriters would also carry responsibility for numerous climate-related disclosures beyond GHG emissions, some of which would require environmental expertise.[22]

Part III preliminarily assesses the transformation of gatekeepers' information-verification roles under climate-disclosure mandates, assessing the relative merits of putting responsibility on either underwriters or experts (that is, attestation providers) for the accuracy of GHG emissions metrics. While the threat of Section 11 liability would lead these gatekeepers to take more precautions, counterintuitively, the goal of deterring climate disclosure errors may be better served, at least in the near term, by treating GHG emissions information as non-expertised. This would mean underwriters, rather than attestation providers, would be subjected to liability for their accuracy, subject to defenses. Attestation providers range widely in expertise and, relative to underwriters, lack resources and reputational constraints.[23] Underwriters, on the other hand, can use their clout to marshal the resources of numerous gatekeepers as they seek to mitigate their exposure to liability. While some concerns about attestation providers might be overcome if their services were performed by public

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[18] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21732–50 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (Items 1505, 1506).

[19] *Id.* at 21831.

[20] *Id.* at 21737–79.

[21] All attestation providers are nevertheless exposed to liability under Section 10(b) and related Rule 10b-5 of the Securities Exchange Act.

[22] *See infra* Pt II.C.

[23] Enriques, Romano & Tuch, *supra* note 5, at 645–50 (discussing reputational constraints).

accounting firms (that also audit financial statements), this Essay urges caution in requiring the expertisation of attestation reports for GHG emissions. The appeal of Section 11 is that expertised and non-expertised information alike benefit from gatekeepers seeking to perform due diligence. Ultimately, non-expertisation may be preferable, given the unique incentives and capacities of underwriters.

I. Gatekeeping Before Mandatory Climate Disclosure and Attestation

Part I establishes the state of play in gatekeeping of securities offerings.[24] It shows how the Securities Act, in particular Section 11, has shaped gatekeeping practices, incentivizing issuers to rely on multiple kinds of gatekeepers and assurances to apportion liability. In turn, these gatekeepers also seek to diffuse liability by sharing it with others.

A. Gatekeepers

Scholars use the term "gatekeeper" to refer to those actors who can influence the conduct of corporate actors, typically their clients, thereby deterring wrongdoing.[25] In the securities setting, the relevant wrongdoing amounts to material misstatements or omissions in disclosures to investors. Gatekeepers observe their clients' conduct and access their confidential information, which positions them to intervene to prevent client wrongdoing.

Gatekeepers also lend their clients reputational capital, helping to mitigate information asymmetry between issuers and investors.[26] As repeat players, gatekeepers have weak incentives to deceive and stronger incentives to build and preserve reputations for propriety than do occasional market participants like issuers.[27] As Ronald Gilson and Reinier Kraakman put it, a gatekeeper "rents the issuer its reputation," representing to the market that it has evaluated the issuer's claims and is

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[24] This Part derives from and extends Tuch, *Multiple Gatekeepers*, *supra* note 2, at 1634–48.

[25] *See* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 890 (1984) [hereinafter Kraakman, *Corporate Liability Strategies*] ("The first requisite for gatekeeper liability is, of course, an outsider who can influence controlling managers to forgo offenses.").

[26] *See* Andrew F. Tuch, *The Limits of Gatekeeper Liability*, 73 WASH. & LEE L. REV. ONLINE 619 (2017).

[27] JOHN ARMOUR ET AL., *PRINCIPLES OF FINANCIAL REGULATION* 121–22 (2016) (gatekeepers have "less of an incentive to deceive" than corporate issuers do).

prepared to "stake its reputation on their accuracy."[28] Put succinctly, gatekeepers, whether their role is legally mandated or market-driven, assuage investors' fear of being sold "lemons."[29]

Since gatekeepers are on hand to prevent wrongdoing, they become targets for liability when disclosure wrongs occur.[30] As Howell Jackson has observed, gatekeeper liability "makes sense" when a corporation "becomes insolvent or otherwise judgment-proof before [its] wrongdoing comes to light."[31] Accordingly, gatekeeper liability is a form of collateral or secondary liability, useful when issuer liability alone fails to sufficiently deter corporate wrongdoing. When effective, gatekeeper liability minimizes the total costs of misconduct and enforcement.[32]

B. Gatekeeper Liability under Federal Securities Law

Section 11 of the Securities Act reflects legislators' view that issuer liability alone fails to sufficiently deter issuer wrongdoing.[33] The provision first imposes civil liability for material misstatements or omissions in registration statements, the disclosure document used by issuers when offering securities to the public.[34] Issuers face strict liability without the benefit of any defenses.[35] The provision also names two types of gatekeepers as potential defendants: underwriters and experts, the latter being persons "whose profession gives authority to a statement made by [them], who ha[ve] with [their] consent been named as having prepared or certified any part of the registration

[28] Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 620-22 (1984).

[29] This is a reference to the used car market. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 489–90 (1970) (unable to distinguish between high and low-quality products, buyers will offer the same discounted price for both, driving high-quality products out of the market and potentially leading to the market's collapse).

[30] *See, e.g.*, *Report of the Legal Opinions Committee, ABA Section of Business Law, Legal Opinions and Negative Assurance Letters to Underwriters on Intellectual Property Matters*, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/2025-legal-opinions-negative-assurance-letters.pdf (2025) at 1 ("When claims, principally under Section 11 of the Securities Act, are made alleging materially false statements or material omissions, underwriters are routinely included as defendants.").

[31] Howell E. Jackson, *Reflections on Kaye, Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions,* 66 S. CAL. L. REV. 1019, 1047–48 (1993); Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 56–57 (2003) ("The basic need to expand liability to third parties is generally justified by the failure of primary liability to produce sufficient deterrence.").

[32] Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 61 (1986) ("the general problem remains one of selecting the mix of direct and collateral enforcement measures that minimizes the total costs of misconduct and enforcement.").

[33] *See* Securities Act § 11, 15 U.S.C. § 77k (2024).

[34] *Id.* § 77k(a).

[35] *Id.* § 77k(b). The issuer's liability is absolute with one exception: The issuer has the improbable defense available to all defendants of showing that the plaintiff knew of the untruth or omission at the time the plaintiff acquired the security. 11(a), § 77k(a).

statement."[36] This category of experts includes, but is not limited to, auditors, engineers, and appraisers.[37]

As Figure 1 shows, Section 11 divides registration statements into expertised and non-expertised parts, with underwriters as the "first line of defense" against misstatements or omissions in non-expertised material.[38] Underwriters face strict liability unless they can establish a due diligence defense, which requires proving that "after reasonable investigation, [they had] reasonable ground to believe and did believe . . . that the statements therein were [not false or misleading]."[39] Otherwise put, underwriters must reasonably investigate matters disclosed in non-expertised portions of a registration statement and form a reasonably grounded belief as to their veracity.

Figure 1: Potential Section 11 Liability for Erroneous Disclosures in Registration Statements

Relevant Portion of Registration Statement	**Liable Party**
Non-expertised part	Underwriters, subject to a due diligence defense
Expertised part	Experts, subject to a due diligence defense Underwriters, subject to a reliance defense

Expertised parts of registration statements purport to be authorized by an expert. For instance, audited financial statements are expertised parts of registration statements, having been prepared or certified by an accounting firm. Experts face strict liability for disclosure errors in the parts they expertise, subject to a due diligence defense.[40] For expertised parts of registration statements, underwriters benefit from a more generous "reliance" defense, which protects them from liability if they can prove that they did not believe and did not have reason to believe that the relevant statements

[36] *Id.* § 77k(a)(4).

[37] *See* § 11(a),§ 77k(a). The statute also imposes liability on those who control enumerated defendants. § 15, § 77o(a).

[38] *In re* Worldcom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 662 (S.D.N.Y. 2004) (internal citation omitted). *See also* IX LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 386-93 (6th ed. 2019).

[39] Securities Act § 11(b)(3)(A), 15 U.S.C. § 77k(b)(3)(A) (2024). The due diligence defense is understood to apply a negligence standard. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 208 (1976) ("[E]xperts such as accountants who have prepared portions of the registration statement are accorded a 'due diligence' defense. In effect, this is a negligence standard.").

[40] Securities Act § 11(b)(3)(A), 15 U.S.C. § 77k(b)(3)(A) (2024).

were untrue or that there was a material omission.[41] As for non-expertised parts of registration statements, the liability structure assures that gatekeepers with relevant expertise face incentives to investigate the accuracy and completeness of a registration statement.[42] Expert and underwriter liability is layered on top of issuer liability, with the issuer and gatekeepers jointly and severally liable for damages.[43]

In response to potential liability under Section 11, underwriters routinely condition their seal of approval on receipt of "comfort" or "negative assurance" letters from lawyers and accountants attesting to the accuracy of various non-expertised parts of the registration statement.[44] As shown in Figure 2, the issuer's law firm will provide a negative assurance letter (which follows the requirements of Rule 10b-5 under Section 10(b) of the Securities Exchange Act) attesting that the firm's lawyers are unaware of any material misstatements or omissions in the registration statement. The issuer-engaged auditor, similarly, will provide underwriters a comfort letter giving assurance concerning financial information throughout the registration statement, including information disclosed in the text, charts, and graphs—information that is separate from the audited financial statements, which are expertised portions of a registration statement.

Underwriters adopt these measures for two purposes. First, obtaining assurance buttresses—though it does not satisfy—an underwriter's due diligence defense. In determining whether the due diligence defense is established, the underwriter's "receipt of [a] comfort letter[] will be important evidence."[45] Second, obtaining assurance shifts liability to other gatekeepers. The letters allow underwriters to "recover on a theory of negligent or fraudulent preparation of the [negative assurance or] comfort letter for any liability the underwriters incur to investors, provided sued-upon misrepresentations were also the subject of [such] a . . . letter."[46]

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41 *See id.* § 77k(b)(3)(C).

42 *See infra* Pt I.

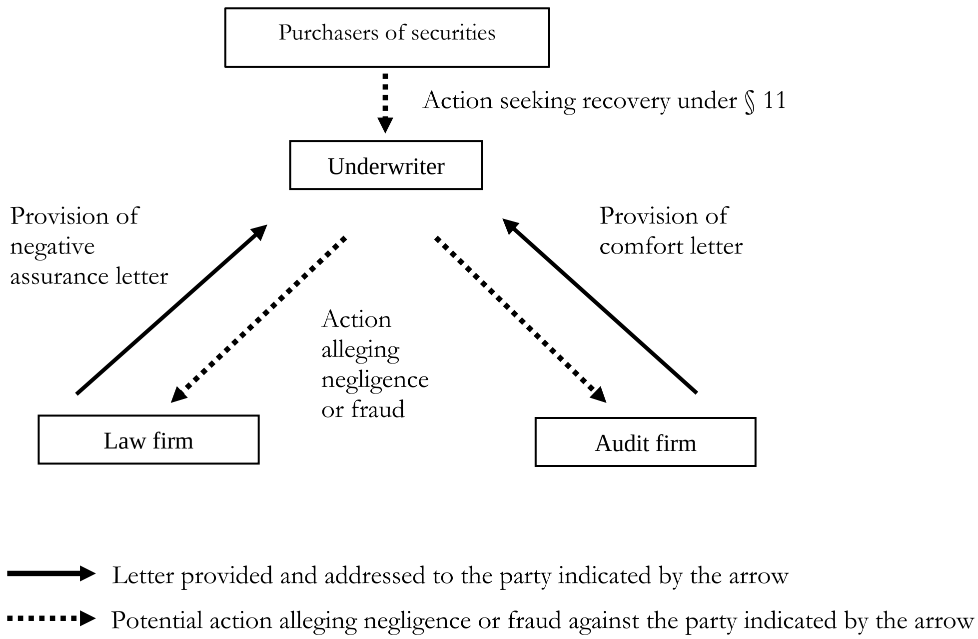
43 *See* 15 U.S.C. § 77j(f)(1). Section 11 also provides for rights of contribution as in cases of contract. *Id.*

44 *See* JAMES D. COX, ROBERT W. HILLMAN, DONALD C. LANGEVOORT & ANN M. LIPTON, SECURITIES REGULATION: CASES AND MATERIALS 119-20 (10th ed., 2022).

45 *In re* Worldcom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 683–84 (S.D.N.Y. 2004) ("In assessing the reasonableness of the investigation, [the underwriters'] receipt of the comfort letters will be important evidence, but it is insufficient by itself to establish the defense . . . . If their initial investigation leads them to question the accuracy of financial reporting, then the existence of an audit or a comfort letter will not excuse the failure to follow through with a subsequent investigation of the matter").

46 *See* JAMES D. COX, ROBERT W. HILLMAN, DONALD C. LANGEVOORT & ANN M. LIPTON, SECURITIES REGULATION: CASES AND MATERIALS 119–20 (10th ed., 2022). In addition to receiving negative assurance letters from the issuer's lawyers, the underwriters receive equivalent letters from their own lawyers. Although the device referred to here contemplates the corporation's lawyers facing liability for negligent or fraudulent preparation, the same would apply to the underwriter's

Figure 2: Potential Section 11 Liability for Non-Expertised Portions of Registration Statements



Gatekeepers may also face liability for disclosure errors in other SEC filings, including periodic reports, primarily under Section 10(b) of the Securities Exchange Act and related Rule 10b-5.[47] The threat of such liability again provides strong incentives for due diligence. Gatekeepers face potential Rule 10b-5 liability as either primary violators or in actions brought by the SEC for aiding and abetting a Rule 10b-5 violation.[48] Gatekeepers may face primary liability for misstatements or omissions made

own lawyers, especially since the lawyer-client relationship exists. See generally Restatement (Third) of the Law Governing Lawyers § 48 (2000) (describing the duty of care owed by a lawyer to its client); Ernest L. Folk III, *Civil Liabilities Under the Federal Securities Acts: The BarChris Case*, 55 VA. L. REV. 1, 12 n.54 (1969) (justifying the omission of lawyers from the list of defendants facing liability under § 11 on the ground that they face potential liability for professional malpractice to their client).

[47] 17 C.F.R. § 240.10b-5 (forbidding, among other things, the making of "any untrue statement of a material fact . . . in connection with the purchase or sale of any security"). The "in connection with" requirement is satisfied if a corporation releases fraudulent statements "to its shareholders or to the investing public," including through news media. Sec. & Exch. Comm'n v. Tex. Gulf Sulphur Co., 401 F.2d 833, 861–62 (2d Cir. 1968). Rule 10b-5 is violated if the statements are made "in a manner reasonably calculated to influence the investing public." *Id.* at 862.

[48] Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 185 (1994) (gatekeepers are shielded from aiding and abetting liability under Section 10(b) in private actions). Pursuant to Section 20(e) of the Securities Exchange Act, secondary actors face aiding and abetting liability in actions brought by the SEC. Securities Exchange Act of 1934 § 20(e), 15 U.S.C. § 78t(e) (2024).

with scienter—that is, recklessly or with an intent to deceive, manipulate, or defraud.[49] The scope of gatekeeper primary liability is contested,[50] although it has narrowed with recent Supreme Court rulings, most notably *Janus Capital Group, Inc. v. First Derivative Traders*,[51] according to which gatekeepers face liability as primary violators under Rule 10b-5 if they are regarded as the *maker* of the statement, "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."[52] (Preparing or drafting a statement on behalf of another would be insufficient to qualify a gatekeeper as a statement's maker.[53])

Establishing a due diligence defense is crucial for gatekeepers facing actions under Rule 10b-5, as it is under Section 11, since doing so typically negates the existence of scienter,[54] a relevant consideration for both primary and aiding-and-abetting liability. To negate scienter, gatekeepers will thus focus on the reasonableness of their investigations to establish a due diligence defense.

C. The Gatekeeping Web

The result of this liability regime and of gatekeepers' incentives to shift risk is that verification of registration statements has become a standardized process carried out by an interlocking web of

[49] Cent. Bank, 511 U.S. at 191 ("The absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, . . . may be liable as a primary violator under 10b-5 . . . ."). As to scienter, *see* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); 17 C.F.R. § 240.10b-5 (2024).

[50] *See, e.g.,* Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* §12:210 ("The courts have been far from clear in delineating what makes someone a primary violator as opposed to merely an aider and abettor."). For detailed discussion of gatekeeper liability under Rule 10b-5 (focusing on auditors), see Colleen Honigsberg et al., *The Changing Landscape of Auditors' Liability*, 63 J. L. & ECON. 367, 368–77 (2020); James Park, *Auditor Settlements of Securities Class Actions*, 14 J. EMPIRICAL LEG. STUD. 169, 173–79 (2017); Eric L. Talley, *Cataclysmic Liability Risk Among Big Four Auditors*, 106 COLUM. L. REV. 1641, 1650–58 (2006).

[51] Janus Cap. Grp., Inc., v. First Derivative Traders, 564 U.S. 135, 142 (2011). *See* Honigsberg et al, *supra* note 50, at 400-02 (finding that the heightened liability standards for primary liability under Janus v. First Derivative significantly reduced auditors' liability exposure). *But see* Park, *supra* note 50, at 196 (concluding that differing liability standards for auditors may not affect liability exposure and questioning whether narrowing the scope of Rule 10b-5 liability has precluded substantial liability for auditors). Another decision illustrating the narrow scope of a secondary actor's liability under Rule 10b-5 in private securities actions is Stoneridge Inv. Partners, LLC. v. Sci.-Atlanta, Inc., 552 U.S. 148, 159-61 (2008) (identifying the narrow risk of scheme liability under Rule 10b-5 for secondary actors such as gatekeepers).

[52] Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142 (2011).

[53] *Id.*

[54] Cf. John C. Coffee, Jr., *A Statutory and Case Law Primer on Due Diligence Under the Federal Securities Law*, in P.L.I. Corporate Law and Practice Course Handbook Series, Conducting Due Diligence, 886 PLI/Corp 11, 13 (1995). For example, in *In re* Software Toolworks Inc., 50 F.3d 615, 626–27 (9th Cir. 1994), the Court explained, "Because we conclude that the Underwriters acted with due diligence in investigating [the company's business and revenues], we also hold that the Underwriters did not act with scienter [under § 10(b)] regarding those claims."

gatekeepers, each with unique areas of expertise and performing distinct roles.[55] In effect, by making underwriters uniquely responsible among gatekeepers for non-expertised portions of the registration statement, the statute treats underwriters as either the "cheapest cost avoiders"—and therefore the most effective gatekeepers at reducing the costs of securities fraud—or, to use another Calabresean notion, the "best bribers": the actors that can most cheaply identify and enter into arrangements with other gatekeepers to reduce the costs of securities fraud.[56] Importantly, underwriters have no contractual obligation to underwrite a securities transaction until the eve of the deal, when the underwriting agreement with the issuer is executed.[57] Until that time, underwriters will carefully avoid any such obligations and may withdraw from the offering.[58] Underwriters thus have strong incentives to continue due diligence until that time, and they can exert pressure on other gatekeepers to do the same (and require comfort and negative assurance letters from them), on the basis that those gatekeepers also benefit from the deal closing.

Accordingly, Section 11's approach of making underwriters the sole gatekeeper liable for non-expertised parts of registration statements appears to reflect a nuanced legislative attempt to address the possibility that material misstatements and omissions are best deterred by multiple gatekeepers. The elaborate risk-shifting framework described above represents a market response to that approach. Underwriters, in other words, have responded to the incentive created by securities law to satisfy their due diligence defense by engaging third-party gatekeepers with the requisite expertise, obtaining the expertise themselves, or shifting responsibility to issuer-engaged gatekeepers with that expertise . This kind of thorough appraisal of issuer claims helps overcome information asymmetries and thereby promotes market efficiency. Gatekeepers with financial, legal, and accounting expertise review non-expertised portions of registration statements, even though only underwriters face gatekeeper liability for those portions under Section 11.

This risk-shifting framework does not entirely succeed in shifting liability from underwriters to other gatekeepers. Assurance letters to underwriters may be extraordinarily narrow,[59] as encouraged

[55] *See* Andrew F. Tuch & Joel Seligman, *The Further Erosion of Investor Protection: Expanded Exemptions, SPAC Mergers, and Direct Listings*, 108 IOWA L. REV. 303, 313-15 (2022); Tuch, *Multiple Gatekeepers*, *supra* note 2, at 1601–04.

[56] Tuch, *Multiple Gatekeepers*, *supra* note 2, at 1648 (citing GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 150 (Yale Univ. Press 1970)).

[57] *See* Ernest L. Folk, III, *Civil Liabilities Under the Federal Securities Acts: The* BarChris *Case*, 55 VA. L. REV. 1, 55 (1969).

[58] *See* Patrick M. Corrigan, *The Seller's Curse and the Underwriter's Pricing Pivot: A Behavioral Theory of IPO Pricing*, 13 VA. L. & BUS. REV. 335, 346-47 (2019).

[59] In their negative assurance letters, law firms make representations that are "extraordinarily narrow." Frank Partnoy, *Barbarians at the Gatekeepers? A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491, 492 (2001).

by professional associations such as the American Bar Association (ABA) and the American Institute of Certified Practicing Accountants (AICPA).[60] In its guidance, the ABA asserts that a "lawyer is not an insurer of the adequacy of the disclosure in an offering document or a 'reputational intermediary.'"[61] The ABA then describes approvingly the following customary qualifications in letters by lawyers:

> Virtually all negative assurance letters state that counsel does not assume any responsibility for the accuracy, completeness, or fairness of the offering document, except to the extent that specific sections are addressed in a separate opinion or confirmation. Some letters refer to limitations on counsel's professional engagement and the fact that many of the disclosures in an offering document are of a non-legal character. Some state that counsel is relying on the judgment of management or others regarding the adequacy of disclosure. Many [letters] state that counsel has not undertaken to verify the facts contained in the disclosure document.[62]

For example, a law firm's opinion letter might state that lawyers in the firm take no responsibility for financial and statistical data, and confine their opinions to facts within the actual knowledge of lawyers who worked on the matter.[63]

Underwriters wanted to treat a comfort letter from an accounting firm (an expert) as largely satisfying their due diligence defense for accounting matters in non-expertised parts of a registration statement.[64] Underwriters warned that if they could not rely on comfort letters, they would need to hire their own experts to review accountants' work (here, unaudited financial statements). Although

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[60] *See, e.g.*, *Report of the Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, Negative Assurance in Securities Offerings (2008 Revision)*, 64 BUS. LAW. 395, 396–97 (2009) [hereinafter ABA Negative Assurance Report]; American Institute of Certified Practicing Accountants, AU-C § 920, *Letters for Underwriters and Certain Other Requesting Parties* (2025). *See also* Public Company Accounting Oversight Board, *AS 6101: Letters for Underwriters and Certain Other Requesting Parties*, https://pcaobus.org/oversight/standards/auditing-standards/details/AS6101 (last visited Nov. 10, 2025).

[61] ABA Negative Assurance Report, *supra* note 60, at 402. Similarly, the AICPA counsels auditors not to "make any statements, or imply, that the auditor has applied procedures that the auditor determined to be necessary or sufficient for the requesting party's purposes." American Institute of Certified Practicing Accountants, AU-C § 920, *Letters for Underwriters and Certain Other Requesting Parties* 38 (2025).

[62] ABA Negative Assurance Report, *supra* note 60, at 402.

[63] Tuch, *Multiple Gatekeepers*, *supra* note 2, at 1650.

[64] *In re* Worldcom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 681-82 (S.D.N.Y. 2004) ("The Underwriter Defendants contend that, pursuant to Sections 11(b)(3)(A) and 12(a)(2), they were entitled to rely on Andersen's comfort letters for WorldCom's unaudited interim financial statements for the first quarter of 2000 and 2001 so long as the Lead Plaintiff is unable to show that the Underwriter Defendants were on notice of any accounting red flags."); *id.* at 682 ("According to the Underwriter Defendants, so long as there are no red flags that bring the auditor's assessment into question, the receipt of a comfort letter "goes a long way to establish" due diligence with respect to all matters of accounting.").

courts have not obligated underwriters to hire their own experts,[65] they have not relieved them of this obligation either; rather courts have recognized that underwriters may need to hire their own experts to perform a reasonable investigation under Section 11. In *Worldcom*, the court was remarkably noncommittal on this question, explaining that "the term 'reasonable investigation' [as used in Section 11] encompasses many modes of inquiry between obtaining comfort letters from an auditor and doing little more, on one hand, and having to re-audit a company's books on the other."[66] The court was clear that underwriters may need to hire their own accounting experts, cautioning that "if aggressive or unusual accounting strategies regarding significant issues come to light in the course of a reasonable investigation, a prudent underwriter may choose to consult with accounting experts to confirm that the accounting treatment is appropriate and that additional disclosure is unnecessary."[67] This guidance alone suggests that underwriters must perform a reasonable investigation of unexpertised financial statements rather than simply taking assurance from the auditor's comfort letter. Moreover, "[i]f [underwriters'] initial investigation leads them to question the accuracy of financial reporting, then the existence of an audit or a comfort letter will not excuse the failure to follow through with a subsequent investigation of the matter."[68] It is uncertain whether underwriters need accounting expertise to perform a "reasonable" or an "initial" investigation and thereby be in a position to question the accuracy of financial statements, but this seems unlikely given their own expertise, by virtue of their status as broker-dealers.[69] Courts have refused to lay down rigid rules. As one court put it, what amounts to due diligence "is a question of degree, a matter of judgment in each case."[70]

The upshot is that, influenced by professional self-regulatory organizations, issuer-engaged lawyers and auditors have offered only narrowly framed assurances. To perform due diligence under Section 11, underwriters may need to go further by engaging or employing their own lawyers and

[65] *In re* Worldcom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 684 (S.D.N.Y. 2004) ("Nothing in this Opinion should be read as imposing that obligation on underwriters [to hire their own accounting firms] or the underwriting process.").

[66] *Id.*

[67] *Id.* (citing I*n re* Software Toolworks Inc., 50 F.3d 615, 624 (9th Cir. 1994)).

[68] *Id. See also id.* at 683 ("In assessing the reasonableness of the investigation, [underwriters'] receipt of the comfort letters will be important evidence, but it is insufficient by itself to establish the defense.").

[69] To get licensed, individuals working for broker-dealers are tested on their knowledge of "the markets and the securities industry and its regulatory structure." *See Qualification Exams*, FINRA, https://www.finra.org/registration-exams-ce/qualification-exams (last visited Oct. 30, 2025).

[70] Escott v. BarChris Const. Corp., 283 F. Supp. 643, 697 (S.D.N.Y. 1968) ("It is impossible to lay down a rigid rule suitable for every case defining the extent to which such verification must go. It is a question of degree, a matter of judgment in each case.").

auditors. If, instead, they rest on these narrow assurances, gaps or weaknesses in the gatekeeping net may result.

The structure of Section 11 also makes experts responsible for statements they make in registration statements. Here, responsibility tends to lie only with the specific accountants, engineers, and so on who provide the relied-upon expertise.[71] The pooled expertise of multiple gatekeepers is unhelpful because each expert's liability is limited to the portion of the registration statement that they author, which is included in the registration statement with their consent; pooling is therefore unlikely. Accordingly, precautions for expertised portions are taken by the expert alone. Underwriters must be wary of red flags, but, because they benefit from a more generous reliance defense, need not shift risk for expertised sections to other gatekeepers.[72]

In sum, in the absence of mandated climate disclosure like the SEC Climate Rule, the world of gatekeeping is one in which underwriters, lawyers, and subject matter experts, collectively face the prospect of liability for disclosure errors in registration statements. Experts take responsibility for their statements, and underwriters take responsibility for non-expertised statements while seeking to avoid liability by obtaining assurances from other gatekeepers. This system, though imperfect, helps to deter disclosure errors because gatekeepers bring their skills to bear and are reputationally conscious and deep-pocketed, so that liability has force.

The question now is what might happen to this complex, but predictable, gatekeeping ecosystem under mandated climate disclosure, such as a rule modeled on the SEC Climate Rule.

[71] Securities Act of 1933 § 11(a)(4), 15 U.S.C. § 77k(a)(4).

[72] *See In re* Worldcom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 664–66 (S.D.N.Y. 2004).

II. Gatekeeping after Mandatory Climate Disclosure and Attestation

Mandatory climate disclosure and attestation would likely transform this pattern of information verification by gatekeepers, both because of the requirement for a new type of gatekeeper and because it may inspire new practices by traditional gatekeepers striving to establish due diligence defenses. This Part considers the liability risk gatekeepers would face under the SEC Climate Rule, were it implemented, and theorizes how gatekeeping practices would change in response. In doing so, Part II offers guidance as to how information verification practices will likely change under future mandatory disclosure regimes. This discussion sets up Part III, which argues that GHG metrics should be unexpertised parts of registration statements, ensuring that underwriters are jointly and severally liable with issuers under Section 11 for these metrics' accuracy.

A. Mandated Climate Disclosure and Assurance

As adopted, the SEC Climate Rule requires U.S. public companies and foreign private issuers to disclose climate-related risks and metrics in periodic reports and registration statements, as well as the attestation of GHG metrics.[73] While the final rule is less stringent than the proposed rule, the final rule represents a meaningful expansion of the climate-related disclosures required of public companies.[74] The SEC Climate Rule requires registrants to disclose climate-related risks and their impact on strategy, results of operations, and financial condition; information about the governance, oversight, and management of climate-related risks; and climate-related targets or goals.[75] Specifically, the Rule requires certain categories of registrants to disclose GHG emissions and climate-related financial metrics.[76] The Rule also requires new disclosures in audited financial statements, including disclosures of financial effects of severe weather events and other natural conditions.[77] At a more granular level, issuers are further obligated to disclose estimates and assumptions underlying their

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[73] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21669-76 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

[74] *See* Davis Polk, *Amid storm of controversy, SEC adopts final climate disclosure rules* (Mar. 11, 2024)https://www.davispolk.com/insights/client-update/amid-storm-controversy-sec-adopts-final-climate-disclosure-rules ("Changes from the proposal include elimination of Scope 3 disclosures, scaled back attestation requirements, additional materiality qualifiers and narrower financial statement triggers."). As to the proposed rule, *see* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21334.

[75] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21669-76 (Items 1501–1504).

[76] *Id.* at 21732–37 (Item 1505).

[77] *Id.* at 21912.

financial statements when these estimates and assumptions are materially affected by risks and uncertainties associated with severe weather events and other natural conditions.[78]

One of the Rule's most consequential provisions requires accelerated filers and large accelerated filers to disclose Scope 1 and/or Scope 2 GHG emissions, if material to the registrant, as summarized in Figure 3.[79] Large accelerated filers and accelerated filers represent about thirty-four percent and ten percent, respectively, of all domestic registrants.[80] The Rule exempts smaller reporting companies and emerging growth companies.[81] Covered registrants are obligated to describe the methodology, inputs, and assumptions used to calculate their reported GHG emissions, including the protocol or standard used in reporting.[82] Notably, the disclosure requirements vary from those already mandated under the Environmental Protection Agency's Greenhouse Gas Reporting Program, which instructs direct GHG emitters, fossil fuel suppliers, industrial gas suppliers, and facilities that inject carbon dioxide underground to publicly report their GHG emissions above certain thresholds.[83]

The SEC Climate Rule further requires that attestation providers assure the accuracy of material Scope 1 and/or Scope 2 GHG emissions in attestation reports.[84] Terminology notwithstanding, attestation providers are to submit reports providing "assurance" rather than "attestation": according to the SEC, attestation is somewhat synonymous with verification, while assurance refers to a narrower class of services performed in accordance with professional standards.[85] The Climate Rule provides for two levels of assurance in attestation reports, depending on the type of registrant: large accelerated filers must provide reasonable assurance while accelerated filers need

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[78] *Id.* at 21913.

[79] *Id.* at 21916-17, 21727. Proposed codification § 229.1500 defines Scope 1 admissions as "direct GHG emissions from operations that are owned or controlled by a registrant," and Scope 2 emissions as "indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by a registrant."

[80] *Id.* at 21831.

[81] *Id.* at 21916-17 (Item 1505(a)(3)(i).

[82] *Id.* at 21744, 21916-17 (Item 1505(b)(1)).

[83] *See* United States Environmental Protection Agency, EPA Fact Sheet- Greenhouse Gases Reporting Program Implementation (Nov. 2013), https://www.epa.gov/sites/default/files/2014-09/documents/ghgfactsheet.pdf. *See also* 40 CFR Parts 98.30-478. Confidential treatment of information is available and considered by the EPA on the case-by-case basis.

[84] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21674, 21916-17 (Item 1505). The regime requires large accelerated filers and accelerated filers to disclose material Scope 1 and 2 emissions. *See id.*

[85] *Id.* at 21769.

only provide limited assurance.[86] The assurance level relates to the "nature, timing, and extent of procedures required to obtain sufficient, appropriate evidence" to support a conclusion.[87] Reasonable assurance provides a "significantly higher" level of assurance than limited assurance, necessitating more thorough procedures.[88] Reasonable assurance results in a positive assurance—that emissions disclosures accord with the expressed standards; that is, "that the subject matter is free from material misstatement."[89] Limited assurance results in a negative assurance that the attestation provider is not aware of material changes required for disclosures to accord with the expressed standards.[90] By way of example, reasonable assurance is equivalent to the assurance provided in an audit of consolidated financial statements in a Form 10-K,[91] while limited assurance is equivalent to the "negative assurance" or 10b-5 letter provided by legal counsel in an offering of securities.[92]

Figure 3. GHG emissions disclosure and attestation requirements under the SEC Climate Rule

Registrant category	**Mandated disclosure of GHG emissions metrics?**	**Assurance of GHG emission required?**	**Type of attestation provider under Section 11**	**Gatekeeper liable for GHG emissions metrics**
Large Accelerated Filers	Yes	Yes—reasonable assurance	Expert	Expert attestation provider
Accelerated Filers	Yes	Yes—limited assurance	Non-expert	Underwriters
Other	No	No	N/A	N/A

86 The SEC Climate Rule exempts large accelerated filers and accelerated filers that are not an SRC (smaller reporting company) or EGC (emerging growth company).

87 *Id.* at 21747.

88 *Id.* at 21739.

89 *See id.* at 21738 n.1092; 21747.

90 *Id.*at 21738 n.1000, 21747.

91 *Id.* at 21737 n.1076.

92 *See, e.g.*, Report of the Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, *Negative Assurance in Securities Offerings* (2008 Revision), 64 Bus. Law. 395, 396–97 (2009).

The Climate Rule is not unique in requiring assurance of GHG emissions metrics. Under the Corporate Sustainability Reporting Directive adopted in 2022, the European Union imposes similar requirements on large and listed companies.[93] In addition, California requires business entities with some degree of connection to California to make broad-based disclosures of information relating to climate-related financial risks and Scopes 1, 2, and 3 GHG emissions. This includes requiring third-party assurance of GHG emissions and the disclosure of third-party verification for certain environmental claims.[94] Thus, even though the Climate Rule is unlikely to go into effect,[95] firms within its scope may still be subject to GHG-emissions assurance requirements under other laws.[96]

B. Green Gatekeepers: A New and Uncertain Frontier

Mandatory climate disclosure opens the door for a new type of "green" gatekeeper: the attestation provider. Green gatekeepers verify claims made about the sustainability characteristics of products or firms, promising to mitigate information asymmetries between firms and investors or consumers.[97]

The Climate Rule requires that attestation providers be "expert[s] in GHG emissions by virtue of having significant experience in measuring, analyzing, reporting, or attesting to GHG emissions."[98] Whether, then, they are also experts under Section 11 depends on the level of assurance they provide: only attestation providers that give reasonable assurance face Section 11 liability as experts.[99] In contrast, attestation providers offering limited assurance are not experts under Section 11 and so would avoid Section 11 liability for their reports.[100] Concerned that "the potential for [S]ection 11

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[93] For a detailed description of EU regulations, see Luca Enriques, Alessandro Romano & Andrew F. Tuch, *Sustainability Assurance*, *Law & Contemp. Probs.* (forthcoming 2025).

[94] CAL. HEALTH & SAFETY CODE § 38533 (Deering, LEXIS through 2024 Reg. Sess.).; CAL. HEALTH & SAFETY CODE § 38532 (Deering, LEXIS through 2024 Reg. Sess.).

[95] *See supra* notes 7 - 12 and accompanying text.

[96] Even if other laws do not require disclosure and assurance of GHG emissions in registration statements, some companies might voluntarily make these disclosures in registration statements if demanded by investors.

[97] Enriques, Romano & Tuch, *supra* note 5, at 612. An attestation provider is a type of assurance provider.

[98] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21917 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (Item 1506(b)(1)).

[99] The SEC's Climate Rule includes a safe harbor for certain forward-looking information, but the safe harbor does not apply to statements of historical fact. § 229.1507(b)(1). Under changes to Rule 436, 17 C.F.R §230.436, reports at the reasonable assurance level would be part of the registration statement prepared or certified by such a gatekeeper within the meaning of Sections 7 and 11 of the Securities Act.

[100] As non-experts, attestation providers would not face Section 11 liability since they would not a category of defendant under Section 11. *See* § 11(a), § 77k(a).

liability would deter or reduce the number of attestation providers willing to accept these engagements,"[101] the SEC imposed Section 11 liability only on those providers giving attestation reports at the higher assurance level—that is, providers of reports for large accelerated filers.

Of course, even if attestation providers avoid Section 11 liability, they would be exposed under Section 10(b) of the Exchange Act and Rule 10b–5 as primary violators. In actions brought by the SEC, they could also be liable for aiding and abetting as a violation of Rule 10b-5.[102] Since establishing a due diligence defense tends to negate the existence of scienter,[103] gatekeepers have incentives to focus on the reasonableness of their investigations, as they do under Section 11.

If attestation reports must be included in registration statements but are non-expertized, it is the underwriters that face liability for their accuracy and completeness.[104] Accordingly, relieving attestation providers of the risk of Section 11 liability simply shifts such liability to underwriters, requiring them to reasonably investigate the accuracy of the registrant's GHG emissions metrics— a requirement that presents them with three options, including combinations thereof. First, underwriters could engage third-party attestation providers, buying their services at market prices to verify GHG emissions metrics, much as they engage outside legal counsel for other verification purposes. Second, underwriters could employ attestation providers, bringing within their firms the skills and services that they might otherwise contract for with third parties. Third, underwriters could obtain assurances from issuer-engaged attestation providers—those required under the Rule to provide attestation reports—much as underwriters seek negative assurance letters from issuer-engaged auditors and law firms regarding non-expertised parts of registration statements. Each option has implications for attestation providers, requiring cooperation between underwriters and attestation providers.

Although courts have yet to opine on the matter, the standard expected of underwriters and attestation providers for purposes of establishing a due diligence defense may differ little. What is required of gatekeepers in establishing due diligence is a reasonable investigation and reasonably grounded belief in the accuracy of the attestation report, with the standard of reasonableness being

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101 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21757 ("We determined to include this amendment [to Rule 436 to provide that reports at the limited assurance level shall not be considered a part of the registration statement], in part, because we agree with commenters that the potential for section 11 liability could deter or reduce the number of attestation providers willing to accept these engagements.[1394] However, we are limiting the exception to those GHG emissions attestation engagements performed at a limited assurance level to encourage GHG emissions attestation providers to perform such engagements.").

102 *See supra* notes 48 - 54 and accompanying text.

103 *Id.*

104 *See supra* note 100 and accompanying text.

"that required of a prudent man in the management of his property."[105] Case law suggests that auditors are held to the standards of their profession and, accordingly, that reasonable conduct will be "generally accepted" conduct.[106] Given the relative infancy of the sustainability assurance profession,[107] courts have yet to opine on the standards expected of attestation providers. Moreover, courts hold underwriters to high standards; they may not simply rely on experts as to unexpertised parts of registration statements.[108] Nothing suggests that courts would expect less of underwriters verifying GHG emissions metrics than they would of attestation providers as experts.

The Climate Rule is rather vague on the expertise expected of attestation providers. It defines expertise by reference to attestation providers' experience in measuring, analyzing, reporting, or attesting to GHG emissions; such expertise is required to be "significant."[109] The Rule also imposes independence restrictions on attestation providers, requiring that they be independent of the registrant and any of its affiliates.[110] However, GHG-emissions attestation providers face no licensing requirements, unlike lawyers, auditors, and underwriters.[111] And while public accounting firms—the likes of the Big 4, which are generally highly respected—are capable of providing attestation services, these services are generally provided by other firms in the United States, primarily engineering firms and "boutique" consulting firms.[112] (Recent data for S&P 500 firms shows that these engineering and

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105 Section 11(c).

106 BarChris Constr. Corp., 283 F. Supp. 643, 703 (S.D.N.Y. 1968) ("Accountants should not be held to a standard higher than that recognized in their profession."). *See also id.* (faulting the accounting firm for failing to investigate further as required by "[g]enerally accepted accounting standards").

107 *See* Thomas Bourveau et al., *Public Company Auditing Around the Securities Exchange Act: Historical Lessons for ESG Assurance*, 100 *ACCT. REV*. 107 (2025).

108 *See supra* notes 64 - 70 and accompanying text.

109 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21917 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (Item 1506).

110 *Id.*

111 For instance, the American Bar Association formulates rules of professional conduct for lawyers. *See* LEXIS MODEL RULES OF PROF'L CONDUCT (1983). These rules, which provide a blueprint for state legal ethics codes, are applied by state courts and state bar associations to adjudicate complaints against lawyers. For accountants, the American Institute of Certified Practicing Accountants adopts a code of professional regulation for its members. *See* AICPA CODE OF PROFESSIONAL CONDUCT AND BYLAWS §2.100.001 (2014). Underwriters must be registered as broker-dealers; FINRA supervises their conduct. For greater discussion, see Andrew F. Tuch, *The Self-Regulation of Investment Bankers*, 83 GEO. WASH. L. REV. 101, 110-123 (2014).

112 *See* GOVERNANCE & ACCOUNTABILITY INSTITUTE, INC., SUSTAINABILITY REPORTING IN FOCUS 6-7 (2024), https://www.ga-institute.com/research/research/sustainability-reporting-trends/2024-sustainability-reporting-in-focus/, at 32 (presenting data that in 2023, engineering firms and "small consultancy/boutique" firms together provided "external assurance" services to 78 percent, 77 percent, and 81 percent of the Russell 1000 companies, S&P 500 companies, and "smallest half by market cap" of Russell 1000 companies, respectively, that obtained external assurance of ESG disclosures).

consulting firms provide over eighty percent of attestation services).[113] Regardless of the identity of the verifier of GHG emissions metrics, sustainability/ESG assurance—the broader concept into which assurance of GHG emissions metrics falls—is at a nascent stage of development. To Thomas Bourveau and coauthors, "[t]the development of public company auditing in the early 20th century bears a striking resemblance to current developments in ESG assurance."[114] They describe sustainability assurance practices as "heterogeneous and in flux," amid "standardization efforts," akin to the state of financial audits a century ago.[115] If courts had regard to the state of assurance standards, they would be less likely to expect more of attestation providers in verifying GHG emissions metrics than they would of underwriters.

As for the standards with which attestation reports themselves must comply, the Climate Rule is agnostic. Attestation reports are required to conform in form and content to standards that are "[p]ublicly available at no cost or that are widely used for GHG emissions assurance" and "[e]stablished by a body or group that has followed due process procedures."[116] But the Rule does not otherwise specify the standards, leaving attestation providers to select among many. Standards that would satisfy the Rule include those of the AICPA, International Auditing and Assurance Standards Board, Public Company Accounting Oversight Board (PCAOB), and International Organization for Standardization.[117] This diversity reflects the unsettled nature of sustainability assurance standards; none are "generally accepted." Again, this contrasts with the significantly more mature state of financial auditing, where public accounting firms perform audits and prepare reports under generally accepted auditing standards determined by the PCAOB, under the supervision of the SEC.[118] This difference would weigh against courts expecting more of attestation providers verifying GHG emissions metrics than they would of underwriters.

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113 *See* Brandon Gipper, Samantha Ross & Shawn X. Shi, *ESG Assurance in the United States*, 30 REV. ACCT. STUD. 1753 (2025) (Figure 3) (in 2020, for S&P 500 companies, 19 percent of ESG assurance was conducted by public accounting firms, referred to as financial auditors, as opposed to engineering and specialized engineering or consulting firms).

114 Thomas Bourveau et al., *Public Company Auditing Around the Securities Exchange Act: Historical Lessons for ESG Assurance*, 100 ACCT. REV. 107 (2025).

115 *Id.*

116 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21917, 21754 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (Item 1506(a)(2), (c)).

117 *Id.* at 21762

118 For a detailed discussion of the institutional and legal structure of accounting, see HOWELL E. JACKSON, LOUIS KAPLOW, STEVEN M. SHAVELL, W. KIP VISCUSI & DAVID COPE, ANALYTICAL METHODS FOR LAWYERS 124-26 (3d ed. 2017)

C. Effects of the Climate Rule on Traditional Gatekeepers

In addition to requiring a new type of gatekeeper, the SEC Climate Rule, were it given effect, would meaningfully expand the role of traditional gatekeepers by imposing new disclosure mandates that they would be tasked with vetting. All registrants are required to disclose a range of climate-related information in non-expertised parts of registration statements, including climate-related risks and their impact on strategy, results of operations, and financial condition; information about governance, oversight, and management of climate-related risks; climate-related targets or goals; and GHG emissions metrics.[119] (Separately, GHG emissions disclosed by large accelerated filers must be expertised, as discussed above.) The Rule makes underwriters responsible for the accuracy and completeness of these extensive new disclosures.

Many of the required disclosures fall outside the protection of safe harbors for forward-looking statements, which would otherwise protect underwriters from liability. The Climate Rule does apply familiar safe harbors from Section 27A of the Securities Act and Section 21E of the Securities Exchange Act, but many of the required disclosures are encompassed by provisions to which these safe harbors expressly do not apply. [120] For example, some disclosures are beyond the scope of the safe harbors because they present historical facts rather than forward-looking statements.[121] Although safe harbors may apply to disclosures of climate-related targets and goals, they would not protect historical information, including information regarding progress made toward meeting goals or regarding carbon avoidance, reduction, or removal.[122]

i. Underwriter Response to Liability for Disclosure of GHG Emissions Metrics

Consider underwriters' likely response to the threat of Section 11 liability for errors in GHG emissions metrics in non-expertised parts of registration statements. Recall that underwriters have three options available (including combinations of these options) as they seek to satisfy their due

[119] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21669-76 (Items 1501-1504).

[120] *See id.* at 21773, 21918-19 (Item 1507).

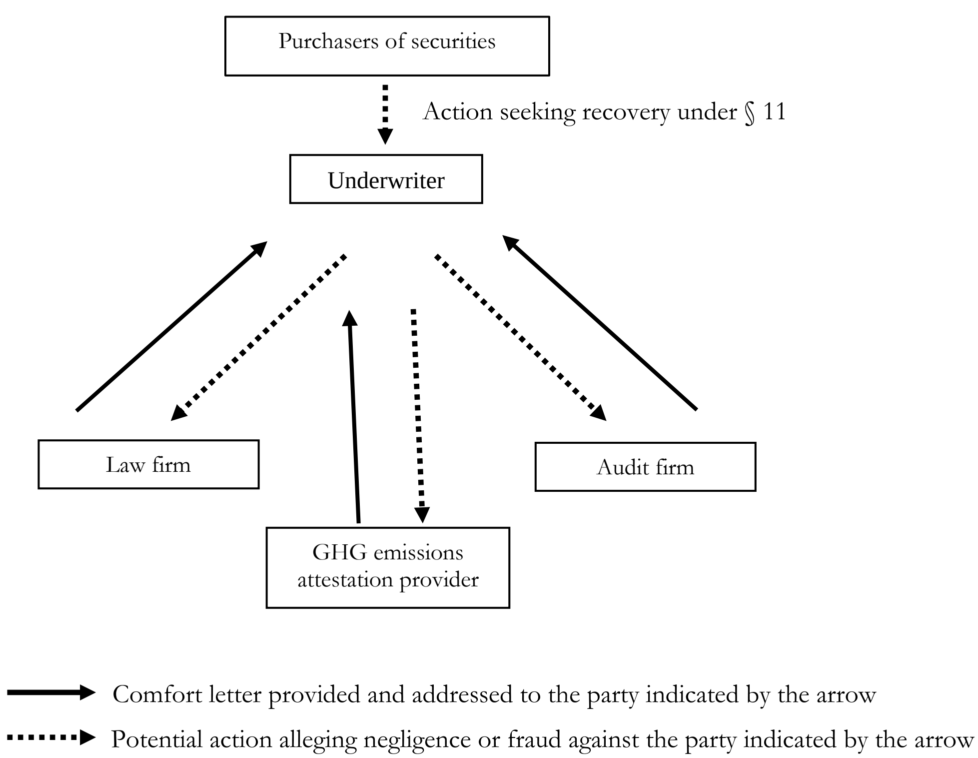
[121] For example, reported Scope 1 and Scope 2 emissions for the most recently completed fiscal year would be historical facts about a company's past emissions.

[122] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. at 21720, 21916 (Item 1504).

diligence defenses: engage third-party attestation providers, employ third-party attestation providers, or obtain assurances from issuer-engaged attestation providers.[123]

Underwriters' likely response would depend on a comparison of costs and benefits, with a special focus on the probability that any of the options would provide a satisfactory due diligence defense. It stands to reason that underwriters would prefer to rely on assurances from issuer-engaged attestation providers, as illustrated in Figure 4. This method would shift responsibility at low cost: underwriters typically do not pay for assurances provided by issuer-provided gatekeepers, making this option less expensive than engaging or employing those gatekeepers. However, it is not clear how far a negative assurance letter from an attestation provider would go toward satisfying underwriters' due diligence defense—recall the lack of definitive judicial guidance concerning the comfort that underwriters may draw from experts' assurance letters.[124]

Figure 4: Potential Section 11 Liability for Non-Expertised Portions of Registration Statement under Mandatory Climate Disclosure



[123] *See* Pt. II.A.

[124] *See supra* notes 66 - 68 and accompanying text.

If issuer-provided gatekeepers are not available or are unwilling to provide assurances for underwriters, or if underwriters conclude they cannot rely on letters from attestation providers to satisfy due diligence, underwriters would either employ (make) or engage (buy) attestation services. Analysis of this make-or-buy decision begins with Ronald Coase's foundational insight that a firm will make products or services internally until the costs of doing so equal the costs of relying on the market to provide.[125] Assuming that either of these options would satisfy the due diligence defense, the underwriter would weigh the production-cost benefits of relying on the market (that is, of engaging third-party attestation services) against the transaction costs of doing so. Transaction costs would be the costs of searching for, contracting with, and monitoring attestation providers.[126] As to the production-cost advantages, one could imagine that there are substantial economies of experience—the reduction in cost owing to the accumulation of experience over time, otherwise known as "learning by doing"[127]—in labor-intensive activities like attesting to GHG emissions. Third-party attestation providers may have significantly more experience than they would as employees of underwriters, producing cost savings. For comparison, in the securities-offerings setting, underwriters still routinely engage external legal counsel—known as underwriters' counsel—for key diligence roles, recognizing that production-cost advantages of relying on the market can exceed the transaction costs of doing so.[128]

ii. Underwriter Response to Liability for Other Non-Expertised Disclosures

Under the Climate Rule, underwriters face potential Section 11 liability for mandated disclosures of non-expertised climate disclosures apart from GHG metrics. With respect to these disclosures, there would be no issuer-provided gatekeepers from which to seek assurance. This would leave two options for underwriters seeking to conduct a reasonable investigation: make or buy

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[125] Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 394–95 (1937).

[126] DON E. WALDMAN & ELIZABETH J. JENSEN, INDUSTRIAL ORGANIZATION: THEORY AND PRACTICE 15 (Routledge, 5th ed. 2019); see also OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 18–22 (The Free Press, 1985) (distinguishing between production costs, the category of costs on which neoclassical microeconomic analysis has focused, and transaction costs, which include "the costs of drafting, negotiating, and safeguarding an agreement"). But cf. PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATION AND MANAGEMENT 33–34 (Prentice-Hall, 1992) (cautioning against the notion that a distinct conceptual separation exists between production and transaction costs).

[127] *See* DAVID BESANKO & RONALD R. BRAEUTIGAM, MICROECONOMICS 340 (Wiley, 6th ed. 2020).

[128] In recognition, Chambers and Partners, which ranks law firms and individual lawyers by subject category, provides rankings in the "Capital Markets" category specifically for "manager counsel," a reference to underwriters' counsel. *See* CHAMBERS AND PARTNERS USA GUIDE, https://chambers.com/legal-guide/usa-5 (last visited July 9, 2025).

attestation services, or seek to shift responsibility to lawyers certifying statements. It is difficult to predict whether lawyers would broaden their assurance letters to cover climate-related information. One could imagine some of the required disclosures falling within the scope of a lawyer's typical review, but in cases where disclosures require technical expertise, lawyers may resist. As it is, they provide heavily tailored assurances as suggested by the ABA. That said, since law firms are often under the sway of underwriters seeking to win their favor to secure future business, some firms may agree to include climate-related disclosures within the scope of their negative assurance letters.

iii. Effect of Liability on Auditors

A mandatory climate-related disclosure regime is likely to impose increased responsibility on auditors responsible for expertised parts of registration statements. Under the Climate Rule, notes to the audited financial statements are required to disclose the financial-statement effects of severe weather events and other natural conditions.[129] Notes are also required to disclose estimates and assumptions underlying financial statements., which estimates and assumptions are materially affected by exposure to risks and uncertainties associated with severe weather events and other natural conditions.[130] Auditors seeking to establish due diligence, then, would need to conduct reasonable investigations of this information, as they do of other material in audited financial statements.

In sum, mandatory climate disclosures would almost inevitably require traditional gatekeepers—underwriters, lawyers, and auditors—to verify climate-related claims, broadening the scope of claims they verify. The biggest effect would likely be felt by underwriters, who would look for new ways to shift risk, a necessity given the limits of their expertise.

III. Should Underwriters or Experts Be Liable for GHG Emissions Disclosures?

Assuming that Section 11 gatekeeper liability is warranted,[131] who should be liable? In assessing the likely transformation of gatekeepers' information-verification roles, Part III questions the merits

[129] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21912 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

[130] *Id.*

[131] Gatekeeper liability is secondary or collateral liability. It may be justified if primary liability, that is, liability on corporate issuers, fails to effectively deter disclosure errors. *See* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 868 (1984) ("[Gatekeeper liability] serves to remedy enforcement insufficiencies . . . ."); *id.* at 888 ("Enforcement insufficiency occurs when both enterprise and individual penalties fail to elicit sufficient compliance at an acceptable cost."); cf. Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 87-88 (1986), ("Gatekeeping might yield enforcement benefits and still be a poor strategy if, for example, additional penalties directed against wrongdoers could avert the same harm more cheaply."). The corporate issuer's asset

of expertisations of GHG emissions metrics, which would make experts liable. Issuer-engaged attestation providers—experts under Section 11—may seem most capable of verifying the accuracy of GHG emissions metrics, justifying liability, as discussed below. Nevertheless, there is good reason to instead hold underwriters liable for disclosure errors. For its part, the Climate Rule has it both ways, subjecting attestation providers to Section 11 liability for the GHG emissions metrics of large accelerated filers and underwriters to Section 11 liability for those of accelerated filers.[132]

Why might attestation providers be suitable targets for liability? The answer lies in their expertise. Because attestation providers have expertise, expert-attested GHG emissions disclosures may be more reliable than non-expertised disclosures. After all, we regard audited (and expertised) financial statements as more reliable than unaudited (and non-expertised) financial statements disclosed in registration statements, on the grounds that an audit by a public accounting firm registered with the PCAOB will lead to greater accuracy than underwriter due diligence. Holding attestation providers responsible provides incentives for these gatekeepers to take reasonable precautions to assure the accuracy of GHG emissions metrics.

However, there are reasons to question the value of expertisation by attestation providers of GHG emissions metrics, at least now, and to think that underwriters are likely to be more effective targets for liability under Section 11 than attestation providers. The structure of Section 11 assures that gatekeepers face liability for errors in disclosing emissions metrics appearing in non-expertised parts of registration statements, regardless of underwriters' expertise in assessing the accuracy and completeness of such disclosures. The question is whether this is sensible or whether, instead, attestation providers alone should bear responsibility. To be clear, the argument here is not against the provision of GHG metrics or their attestation, but against making attestation providers experts under Section 11. There are at least five reasons to doubt the merits of making attestation providers experts under Section 11.

First, the quality of assurance given by attestation providers is dubious, both because the standards they use are unclear and because their adherence to these standards is an open question. In general, it

insufficiency is the basis on which an analysis of gatekeeper liability typically proceeds. Jackson, *supra* note 31, at 1047–48 (observing that gatekeeper liability "makes sense" when a corporation "becomes insolvent or otherwise judgment-proof before [its] wrongdoing comes to light").

132 *See* Pt II.

is hard to feel comfortable with the credibility of firms providing assurance. After all, and as explained above, sustainability assurance is in its infancy.[133]

Starting with the standards, attestation standards for GHG emissions are unsettled and evolving, and none is "generally accepted."[134] According to one law firm, some widely used attestation standards "are general in nature and may not adequately address the complexities in reporting emissions data across the entire operational and geographic footprint of not only the company but also its Scope 2 GHG emissions suppliers."[135] Another law firm cautions that attestation standards "stand in contrast to the well-defined accounting and auditing standards under U.S. Generally Accepted Accounting Principles ("GAAP") and International Financial Reporting Standards ("IFRS") with respect to financial disclosures" and opines that relying on GHG-metrics attestation "provide[s] an undue sense of comfort and reliability."[136] The same law firm writes that attestation of GHG emissions "would be extraordinarily challenging, if not impossible, for registrants to implement at a level of accuracy that would yield information that is reliable and useful to investors."[137]

As for attestation providers themselves, academic research on the value of their services is mixed. One scholarly approach compares GHG attestation with financial auditing, showing how inadequate the former is in comparison to the latter. Researchers have found that auditing leads to the discovery of accounting errors before reporting, suggesting improved reporting quality and the need for fewer

133 *See supra* notes 107 - 108 and accompanying text.

134 Letter from Sullivan & Cromwell to Ms. Vanessa Countryman, Securities & Exchange Commission, *Re*: Comments on Climate-Related Disclosures for Investors Proposal (June 17, 2022), at 3 (referring to "the lack of generally accepted attestation standards for climate-related disclosures and the anticipated significant costs involvement in implementing the necessary assurance processes and procedures."

135 Letter from Jones Day to Vanessa A. Countryman, Securities & Exchange Commission, *Re:* SEC Climate Rule (June 16, 2022) at 14 ("Even though the Association of International Certified Professional Accountants (AICPA) has published a roadmap to assist audit practitioners with ESG attestation, these guidelines are general in nature and may not adequately address the complexities in reporting emissions data across the entire operational and geographic footprint of not only the company but also its Scope 2 GHG emissions suppliers."). *See also* Letter from Shearman & Sterling to Vanessa A. Countryman, Securities & Exchange Commission, *Re:* SEC Climate Rule (June 20, 2022) at 3 ("The high quality accounting standards underlying public company financial statements are the result of decades-long collaboration among securities regulators and accounting standard setters such as the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB), public company accounting and financial reporting departments, and auditors.").

136 Letter from Sullivan & Cromwell to Ms. Vanessa Countryman, Securities & Exchange Commission, *Re*: Comments on Climate-Related Disclosures for Investors Proposal (June 17, 2022) at 13. *See also* International Federation of Accountants, *The State of Play in Sustainability Assurance*, at 3 (June, 2021), https://www.ifac.org/knowledge-gateway/discussion/state-play-sustainability-assurance (noting the lack of consistent standards for sustainability assurance)."

137 Letter from Sullivan & Cromwell to Ms. Vanessa Countryman, Securities & Exchange Commission, *Re:* Comments on Climate-Related Disclosures for Investors Proposal (June 17, 2022) at 3.

accounting restatements.[138] In contrast, evidence from sustainability assurance suggests that "mistakes are more likely to be made and less likely to be discovered before reporting."[139] In other words, attestation providers do a relatively weak job of detecting errors before reporting.

Attestation users do not necessarily consider this a problem, as long as providers are willing to correct errors. Giovanna Michelon and coauthors suggest that assurance providers can use restatements of assurance reports in an attempt to build legitimacy.[140] Analysts generally view restatements of assurance reports less negatively than restatements in financial accounting because assurance standards are poorly defined, ambiguous, and often mistakenly applied.[141] Under these conditions, restatements may be evidence of assiduousness and reliability, rather than of ineptitude.[142] On the whole, analysts seem to believe that assurance is meaningful: even though sustainability assurance is less reliable than financial auditing, evidence suggests that investment analysts regard corporate social responsibility disclosures as more credible if they have been assured.[143]

Our question, however, is not so much whether attestation providers are taken as credible but whether they ought to be. Alongside the problem of poor application of unsettled standards is the further challenge posed by relying on engineering and consulting firms[144] that fail to rigorously report assurance determinations. According to one study, forty-one percent of non-accountant attestation

[138] *See, e.g.*, Bradley Pomeroy & Daniel B. Thornton, *Meta-analysis and the Accounting Literature: The Case of Audit Committee Independence and Financial Reporting Quality*, 17 EUROPEAN ACCT. REV. 305 (2008).

[139] Giovanna Michelon, Dennis M. Patten & Andrea M. Romi, *Creating Legitimacy for Sustainability Assurance Practices: Evidence from Sustainability Restatements,* 28 EUR.ACCT. REV. 395, 395 (2019).

[140] *Id.* at 416-18.

[141] *Id.* at 400.

[142] *Id.* at 416-18.

[143] *See* Ryan J. Casey et al., *Understanding and Contributing to the Enigma of Corporate Social Responsibility (CSR) Assurance in the United States*, 34 AUDITING: A J. OF PRACTICE & TH. 97 (2015) (the assurance of CSR reports is associated with a lower cost of capital, analyst forecast dispersion, and analyst forecast errors). *See also* Gipper, Ross & Shi, *supra* note 113, at Figure 10 (finding a positive – though not necessarily causal – association between sustainability assurance and more specific and higher-quality sustainability disclosures).

Other evidence is mixed as to whether assurance providers are "captured" by corporate managers who wish to signal their legitimacy at the expense of accuracy. *Cf.* David L. Owen et al., *The New Social Audits. Accountability, Managerial Capture or the Agenda of Social Champions*? 9 EUROPEAN ACCT. REV, 81–98 (2000); Brendan O'Dwyer & David L. Owen, *Assurance Statement practice in environmental, social and sustainability reporting. A Critical Evaluation*, 37(2) BRITISH ACCT. REV., 205 (2005) (finding evidence supporting the managerial capture hypothesis) *with* Katrin Hummel, Christian Schlick & Matthias Fifka, *The Role of Sustainability Performance and Accounting Assurors in Sustainability Assurance Engagements,* 154 J. OF BUS. ETHICS 733 (2019) (providing results inconsistent with managerial capture theory, finding that poor sustainability-performing firms obtain assurance to improve their internal sustainability-related systems while high sustainability-performing firms obtain assurance to enhance credibility with stakeholders).

[144] As to which, see *supra* notes 112 - 113 and accompanying text.

providers did not disclose the level of assurance they gave, and twenty-nine percent of such attestation providers failed to disclose the assurance standard they used.[145]

More broadly, commenters complain that attestation providers qualified to verify GHG emissions metrics are in short supply. One law firm worries that "few ESG advisory companies are likely to have the requisite environmental knowledge and industry experience needed to perform the attestation to meet both the SEC's standard and the company's expectation."[146] Writing about the proposed Climate Rule, this firm cautioned that the attestation requirements "will drive a major expansion in the marketplace, with the likely result that the universe of *qualified* attestation providers will lag behind the demand necessitated by the adoption of these rules."[147] Another law firm opined that "[t]he independence requirements applicable to such attestation providers further limit the number of qualified providers for some companies."[148] The SEC acknowledged that there may be too few attestation providers.[149]

Beyond the shortcomings of attestation standards and providers, a second reason to doubt attestation providers' suitability as experts under Section 11 is that underwriters themselves have stronger reputational incentives to assure the accuracy of corporate disclosures. The reason is that, as Luca Enriques, Alessandro Romano, and I recently explained, green gatekeepers are likely to face weaker reputational constraints than traditional gatekeepers such as underwriters.[150] Green gatekeepers face weaker reputational constraints because investors impose relatively light discipline, having fewer

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145 Giacomo Manetti, & Simone Toccafondi, *The Role of Stakeholders in Sustainability Reporting Assurance*, 107 J. BUS. ETHICS, 363 (2012).

146 *See* "Attestation: Practical Reflections on What the SEC Climate Proposal Will Require," *JD Supra* (Apr. 13, 2022), www.jdsupra.com/legalnews/attestation-practical-reflections-on-1884461/. *See also* Letter from Sullivan & Cromwell to Ms. Vanessa Countryman, Securities & Exchange Commission, *Re: Comments on Climate-Related Disclosures for Investors Proposal* (June 17, 2022) at 14 ("The number of qualified providers would likely be insufficient to meet the demand for their services prompted by the Proposed Rules, at least in the near term. Although an industry of qualified third-party providers likely would develop, the current lack of qualified attestation providers would prove challenging and costly for companies, especially smaller registrants, to adhere to the proposed attestation requirements, particularly given the short proposed implementation period."). *See also* Letter from Shearman & Sterling to Vanessa A. Countryman, Securities & Exchange Commission, *Re* SEC Climate Rule (June 20, 2022) at 11. ("It is not clear how many entities are currently in a position to make Scope 1 and Scope 2 attestations and it may take some time for a sufficient number of independent third parties to be viable. Auditors will also need adequate time to develop processes to audit the new financial statement disclosures.").

147 "Attestation: Practical Reflections on What the SEC Climate Proposal Will Require," *JD Supra* (Apr. 13, 2022), www.jdsupra.com/legalnews/attestation-practical-reflections-on-1884461/).

148 Letter from Jones Day to Vanessa A. Countryman, Securities & Exchange Commission, *Re:* SEC Climate Rule (June 16, 2022) at 9.

149 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21890 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

150 Enriques, Romano & Tuch, *supra* note 5, at 645-50.

incentives and less ability to punish misleading climate-related disclosures than other types of disclosures.[151] There are three factors at work. First, green gatekeepers' certifications may have the desired effect even when they are misleading: assurances from green gatekeepers enable environmentally conscious investors and consumers to feel good about their product choices, irrespective of how sustainable the chosen products actually are.[152] In other words, investors and consumers may be inclined to take certifications at face value because they seek to enjoy the "warm glow" of having behaved responsibly. Second, even investors who do care about the accuracy of green claims often face limited private costs, or no such costs, when green certifications are false, reducing their incentive to act.[153] Finally, given the complexity of green certifications, there is no easy way for green-conscious investors and consumers to detect false certifications, a prerequisite to disciplining gatekeepers.[154]

A third reason to reject liability for attestation providers in favor of underwriters is that attestation providers often lack substantial financial resources, limiting the deterrent effect of potential liability.[155] Underwriters, in contrast, are major firms with considerable assets at stake in the event of an adverse court ruling. Granted, little data is available on the resources of attestation providers, but we do know that, in the United States, most reports are provided by engineering and boutique consulting firms.[156] These firms are likely to have minimal assets relative to underwriters. Consider that gatekeeper liability "makes sense" precisely when corporations are insolvent or otherwise judgment proof,[157] so there is little reason to layer on liability for gatekeepers that are themselves likely unable to meet the demands of a significant damages award.

Fourth, underwriters may have greater sway over issuers than do attestation providers, allowing underwriters, but not attestation providers, to adopt the adversarial posture necessary to conduct due diligence. Underwriters have considerable influence because they have no obligation to proceed with a transaction until an underwriting agreement is signed, which occurs late in the deal, and because

[151] *Id.* at 645.

[152] *Id.* (citing Heidi Crumpler & Philip J. Grossman, *An Experimental Test of Warm Glow Giving*, 92 J. PUB. ECON. 1011, 1011 (2008)).

[153] *Id.* at 650-52.

[154] *Id.* at 645.

[155] For example, liability will not deter corporate wrongdoing where the corporation and its managers are judgment proof.

[156] *See supra* notes 112 - 113 and accompanying text.

[157] Jackson, *supra* note 31, at 1047–48.

their services, including those of their investment analysts, are highly valuable to issuers. Underwriters can use their influence to ensure issuers' cooperation in verifying GHG disclosures.

Finally, a key advantage of underwriters is that they have various methods for ensuring that the required expertise is brought to bear in investigating the accuracy of non-expertised parts of registration statements. As *Worldcom* teaches, even if an underwriter obtains comfort letters from experts, the underwriter remains responsible for performing a reasonable investigation.[158] In the case of GHG emissions disclosures, this may require them to separately employ or engage environmental scientists with the required expertise to verify GHG emissions metrics. In this way, whatever expertise attestation providers possess will be employed even if emissions disclosures are non-expertised.

Relatedly, underwriters are better suited than attestation providers to bear responsibility for GHG emissions disclosures, particularly if these metrics benefit from review by *multiple* gatekeepers, including lawyers. As experts under Section 11, attestation providers would have weak incentives to seek input from other gatekeepers since, in determining whether attestation providers performed due diligence, they would be assessed according to professional norms in their own industry—norms that may be less stringent in the attestation business than in the legal and accounting industries.[159] In contrast, underwriters have strong incentives to ensure relevant expertise is applied in verifying the accuracy of disclosures.

To be clear, this is not an argument against expertisation generally. Financial statements are routinely expertised by accounting firms: actuaries expertise insurance and reinsurance reserves, and engineers expertise natural resource reserves. These uses of experts are uncontroversial. But in these areas, the verification standards experts employ are significantly more settled than those of attestation providers. Again, the SEC acknowledged such shortcomings of GHG assurance standards and methodologies, but it had no plan to change the status quo. Instead, it relied on a lengthy phase-in period for the Climate Rule to provide time for standards and methodologies to develop.[160]

The architecture of the phase-in period indicates SEC's tacit recognition that expertisation is not needed. During the phase-in period, all attestation reports must be prepared at the limited assurance

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158 *In re* Worldcom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 683–84 (S.D.N.Y. 2004); *see also supra* note 45 and accompanying text.

159 Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 703 (S.D.N.Y. 1968) ("Accountants should not be held to a standard higher than that recognized in their profession."); *see also supra* note 106 and accompanying text.

160 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21862 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) ("[T]he final rules include a longer phase in period before [large accelerated filers] and [accelerated filers] are required to comply with the assurance requirements, which also provides additional time for standards and methodologies to further develop.").

level, including those for large accelerated filers. During this period, attestation providers would not be experts under Section 11. Rather, GHG emissions metrics would be included in non-expertised parts of registration statements for which underwriters have responsibility under Section 11. Subjecting underwriters to responsibility for GHG emissions may compel them to use issuer-engaged attestation providers in their investigations, such as by obtaining negative assurance letters from them. For these reasons, this approach may be preferable to eventually designating attestation providers as experts for attestation reports prepared for large accelerated filers.

Despite the deficiencies of attestation providers and their reports, mandated attestation may still make sense—but not the expertisation of their reports. Holding underwriters responsible for GHG emissions disclosures may compel them to use attestation providers in their investigations. On this reasoning, not only accelerated filers but also large accelerated filers should obtain attestation reports at the limited assurance level.

This analysis, suggesting that GHG emissions should be non-expertised under Section 11, applies specifically to the boutique engineering and consulting firms that currently dominate the attestation industry. It is possible that there are more effective attestation providers, and that these would be apt targets for liability. For instance, registered public accounting firms would be an alternative to engineering and consulting firms. These are mature firms subject to licensing rules and are required to use specified attestation standards. Accounting firms are reputationally conscious and deep-pocketed. Accountants possess relevant skills that consultants and engineers lack: non-accountant assurance providers "do not have the same professional assurance skill set, specifically with respect to error detection during engagement activities" as accountants and are less able to detect errors.[161] Accounting firms are also keen to provide GHG attestations for issuers. Unlike other professional services firms that opposed the Climate Rule when it was proposed, large accounting firms generally supported it.[162]

Yet, attestation by accountants also has downsides. Accounting firms are prone to conflicts of interest, and the attestation standards they are required to use for GHG emissions, developed by AICPA and IAASB, are regarded as lacking in coherence and standing in "stark contrast" to well-

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[161] Michelon, Patten & Romi, *supra* note 139, at 400.

[162] Lee Reiners, *Summary of Comment Letters for the SEC's Proposed Climate Risk Disclosure Rule*, THE FINREG BLOG (Sept. 1, 2022), https://sites.duke.edu/thefinregblog/2022/09/01/summary-of-comment-letters-for-the-secs-proposed-climate-risk-disclosure-rule/ ("Prominent law firms argued that the SEC does not have the legal authority to mandate climate-related disclosures … On the other hand, consulting firms Deloitte & Touche and Ernst & Young generally supported the proposed rule, recognizing the SEC'S authority without going into much detail.").

developed accounting and auditing standards.[163] And evidence is ambivalent as to whether public accounting firms would be more effective assurance providers than their non-accountant competitors.[164] Scholarship suggests that when assurance of corporate social responsibility reports is conducted by public accounting firms, issuers benefit from greater reductions in the cost of capital and analyst forecast dispersion, suggesting that assurance is taken seriously.[165] However, focusing on the assurance of GHG emissions, Anna Huggins and coauthors suggest that accountants lack valuable subject-matter expertise.[166] Their education, experience, and ongoing licensing requirements ensure rigorous quality control and stringent assurance procedures, but non-accountant assurance providers may have superior scientific expertise.[167] Other scholars also note accountants' "low levels of sustainability assurance knowledge" while pointing to "high turnover rates among personnel,"[168] which prevents the durable maintenance of that knowledge when it is attained. Public accounting firms and non-accountant assurance providers have distinct strengths and weaknesses, but it is not apparent that either should be experts under Section 11.[169]

Ultimately, it is not easy to target the right gatekeeper, but the genius of Section 11 is that expertised and non-expertised information alike benefit from gatekeepers seeking to perform due diligence. Accordingly, it is not self-evident that expertising information in registration statements would yield more accurate or complete disclosures.

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[163] *See* Letter from American Bar Association to Ms. Vanessa Countryman, Securities & Exchange Commission, *Re:* The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 24, 2022) at 32 ("The lack of coherent and generally accepted emissions calculation and attestation standards is in stark contrast to the well-defined accounting standards provided by U.S. GAAP and IFRS and auditing standards provided by the PCAOB.").

[164] Per a recent survey article comparing public accounting firms with other assurance providers, there is no clear indication of the determinants driving firm choice or "whether choosing professional accountants will lead to positive consequences for firms." Patrick Velte, *Determinants of the Selection of Sustainability Assurance Providers and Consequences for Firm Value: A Review of Empirical Research*, 33 MEDITARI ACCT. RES. 443 (2025).

[165] Ryan J. Casey et al., *Understanding and Contributing to the Enigma of Corporate Social Responsibility (CSR) Assurance in the United States*, 34 AUDITING: J. PRAC. & THEORY 97 (2015).

[166] Anna Huggins, Wendy J. Green, & Roger Simnett, *The Competitive Market for Assurance Engagements on Greenhouse Gas Statements: Is There a Role for Assurers from the Accounting Profession?*, 5 CURRENT ISSUES AUDITING A1 (2011).

[167] *Id.*

[168] Michelon, Patten & Romi, *supra* note 139, at 400. High turnover has given "fewer [employees] a long-term stake in ensuring that the firm's reputation remains intact." *See* Schumpeter, *When Size is Unaccounted for*, ECONOMIST, Sept. 21, 2024, at 61 (reporting that in 2023, PWC, one of the main accounting firms, "bid farewell to 94,000 [employees].").

[169] Public accounting firms may have a comparative advantage over non-accounting firms if their work auditing a company's financial statements yields positive knowledge spillover for their role as assurers of climate disclosures. However, providing multiple services may compromise a firm's independence, negatively affecting assurance or audit quality (or both). Concerns regarding such independence issues—specifically, the simultaneous provision of auditing and management advisory services—have been long-standing. *See, e.g.*, Dan A. Simunic, *Auditing, Consulting, and Auditor Independence*, 22 J. ACCT. RES. 679 (1984).

Conclusion

This Essay assesses how enhanced climate disclosures might disrupt the verification practices of gatekeepers in major capital markets transactions, using the SEC Climate Rule as a case study. Understanding these likely changes, and the incentives and options available to gatekeepers in responding to enhanced climate disclosure, sheds light on the design choices open to policymakers. Counterintuitively, the best choice—the one that most effectively deters disclosure errors—may well be to treat GHG emissions metrics as non-expertised, so that underwriters, rather than expert attestation providers, are liable for their accuracy.

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