Sustainable Finance and Corporate Law: Lessons from the US

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Keywords: corporate law, sustainable finance, regulatory reform, Securities & Exchange Commission, SEC, mandated sustainability disclosure, ESG, corporate sustainability, financial regulators, climate disclosure

JEL Classifications: G28, G30, G34, G38, K20, K22, L21

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Sustainable Finance and Corporate Law: Lessons from the US

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ABSTRACT

This chapter traces the trajectory of two major US sustainability initiatives, the Securities & Exchange Commission's climate risk disclosure rule and California's mandates requiring disclosure of climate-related risks and greenhouse gas emissions. The chapter explores the motivation behind both efforts and explains how the backlash against disclosure mandates led to challenges that in both cases have, to date, been successful. The success of the challenges has been due, in part, to distinctive features of the US regulatory structure.

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INTRODUCTION

As this book goes to print, the future of sustainable finance in the United States remains a work in progress. As in the rest of the world, the role of corporate law in promoting sustainable finance is in a state of flux. Initiatives at both the federal and state level have faced challenges, and their long-term survival is uncertain. Rather than generating greater support for sustainability, the US regulatory initiatives may have fueled the substantial backlash against it.

This chapter traces the trajectory of two major US sustainability initiatives – the effort by the Securities and Exchange Commission (SEC) to mandate greater disclosure of climate-related risks in public company

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securities filings (section II), and the mandates adopted by California[1] to require companies to report climate-related risks and greenhouse gas emissions (section III).[2] The chapter examines the background to these initiatives (section I), which built upon a system of voluntary sustainability disclosures. Although many market participants supported voluntary disclosure, some argued that it was not enough, and that greater transparency and comparability were necessary both to evaluate investments and to encourage firms to incorporate sustainability risks into their operational decisions.[3] The chapter describes the federal and state initiatives and also documents the political and public reactions to them.

In so doing, the chapter explores the factors that likely contributed to the adverse reaction to mandated sustainability disclosure in the US. These factors include the growing and broader backlash against sustainability and ESG.[4] Rather than recount that political story in detail, we consider issues of regulatory design and strategy. Our account highlights particular vulnerabilities of the regulatory approach taken by the US as well as aspects of the US regulatory structure that create distinctive challenges for mandatory sustainability disclosure. At the same time, we identify the unique advantage of the US federalist system, which offers the potential for tailored state level regulation as an alternative to a uniform national law (section IV).[5]

As we write, the political climate in the US does not bode well for mandatory sustainability disclosure by the SEC, and the prospect of substantive sustainability mandates is even more dubious. Yet, as the other

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[1] Other states are following California's lead. See infra n 119. We offer the California experience as an example of the alternatives to a uniform national policy that the US federalist system makes possible.

[2] Due to space limitations, we focus on environmental disclosure. The SEC has also engaged in rulemaking on human capital management disclosure. See infra n 25.

[3] Cynthia A Williams and Jill E Fisch, 'Request for Rulemaking on Environmental, Social and Governance (ESG) Disclosure' (1 October 2018) <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf> accessed 30 November 2025.

[4] ESG refers to environmental, social, and governance but lacks a precise definition. Elizabeth Pollman, 'The Making and Meaning of ESG' (2024) 14 *Harvard Business Law Review* 403 (reporting that "[i]n a survey of institutional investors, three-quarters of respondents said there is a lack of clarity around ESG terminology"). See also Eilis Ferran & Liam Ogburn, 'The ESG Global Context' Chapter 1, this volume.

[5] SEC Chairman Paul Atkins recently advocated a similar approach to shareholder proposals, maintaining that their permissibility should be the product of state competition for corporate charters rather than the subject of a mandatory federal rule. Paul S Atkins, Chairman, US Securities and Exchange Commission, 'Keynote Address at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala' (9 October 2025) <https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala> accessed 13 March 2026.

chapters in this book demonstrate, the need to promote corporate sustainability is unlikely to disappear. As such, it is important to understand the role that mandatory disclosure can play both in protecting capital market participants and enabling companies to manage their sustainability related risks more effectively. The distinctive features of the US regulatory system offer unique challenges but also unique potential for achieving those objectives.

I. Background to Sustainability Disclosure in the United States

The story of sustainability disclosure in the US starts with an extensive system of voluntary disclosure. Beginning in the mid 1970s, chemical, fossil fuel, and tobacco companies began issuing social and environmental reports in response to shareholder engagement by socially responsible investors and to enhance their reputations and forestall regulation.[6]

The majority of public companies have embraced the trend. According to research from the Governance & Accountability Institute, 94% of Russell 1000 companies published a sustainability or ESG report in 2024.[7] This includes 99% of the S&P 500, which are the largest US companies.[8] In addition to standalone reports, many US companies make voluntary disclosures in other investor communications such as quarterly earnings calls and annual reports.[9] Shareholder proposals and private engagement by investors also played a substantial role in pushing issuers to disclose sustainability information and to extend their disclosures to areas of particular investor concern. Disclosures relating to climate change and greenhouse gas emissions, for example, have been among the most prominent topics of shareholder proposals in recent years.[10] The impact of

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[6] Verso, 'The History of the Sustainability Report: How It Has Evolved' (20 August 2024) <https://verso.de/en/blog/the-history-of-the-sustainability-report-how-it-has-developed/> accessed 30 November 2025 ('In the 1980s, chemical companies published so-called environmental reports on their environmental activities. These were voluntary and mainly served to improve their image, as the industry was subject to strong criticism.').

[7] Governance and Accountability Institute, '2025 Sustainability Reporting In Focus' <https://www.ga-institute.com/research/research/sustainability-reporting-trends/2025-sustainability-reporting-in-focus/> accessed 30 November 2025.

[8] Ibid.

[9] Kevin Eckerle, Brian Tomlinson and Tensie Whelan, 'ESG and the Earnings Call' (Harvard Law School Forum on Corporate Governance, 17 June 2020) https://corpgov.law.harvard.edu/2020/06/17/esg-and-the-earnings-call/ accessed 30 November 2025.

[10] Subodh Mishra, 'Climate Shareholder Proposals: A More Sophisticated Discourse' (*Harvard Law School Forum on Corporate Governance*, 10 October 2024) https://corpgov.law.harvard.edu/2024/10/10/climate-shareholder-proposals-a-more-sophisticated-discourse/ accessed 30 November 2025.

these proposals is reflected in the fact that, "as of July 31, 2024, 95% of S&P 500 companies disclose Scope 1 and Scope 2 emissions, and approximately 79% disclose their Scope 3 emissions."[11]

Although voluntary disclosure is now widespread, critics have repeatedly argued that it is insufficient. One of the complaints is a lack of comparability across issuers due to differing information and metrics.[12] Another is a lack of reliability. Sustainability reports are not filed with the SEC, and most industry participants believe they consequently subject issuers to reduced liability risk for false or incomplete statements.[13] In that vein, sustainability reports were often prepared by marketing personnel and with limited oversight by legal or compliance teams.[14] Because the reports

[11] Scope 1 are emissions that are generated directly by the company, Scope 2 are indirect emissions that are linked to the company's own energy consumption, and Scope 3 emissions, by contrast, occur outside the company's direct control but are associated with or linked to their products or services. See Madison Condon, 'What's Scope 3 Good For?' (2023) 56 *UC Davis Law Review* 1921, 1923 (defining Scope 1, Scope 2 and Scope 3 emissions); *FTSE Russell, "Solving the Scope 3 Conundrum: Scope 3 Regulatory Landscape, Materiality and Reporting Challenges"* (LSEG, January 2024). <https://www.lseg.com/content/dam/ftse-russell/en_us/documents/reports/solving-the-scope-3-conundrum.pdf> accessed 13 March 2026 (explaining that Scope 3 emissions often account for over 80 % of corporate carbon footprints).
[12] See, eg, Virginia Harper Ho, 'ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting' (2019) 41 *University of Pennsylvania Journal of International Law* 249, 255 ('the proliferation of competing private standards and the lack of alignment between voluntary sustainability reporting and disclosure produced in corporate annual reports and other public filings have reduced the usefulness of ESG information for investment analysis'); Silvia Balp and Giovanni Strampelli, 'Institutional Investors as the Primary Users of Sustainability Reporting' in Kern Alexander, Matteo Gargantini, and Michele Siri (eds), *The Cambridge Handbook of EU Sustainable Finance: Regulation, Supervision and Governance* (Cambridge University Press 2025) 431–448 (explaining that the lack of comparability in the Non-Financial Reporting Directive prompted the focus on standardization in the Corporate Sustainability Reporting Directive).
[13] But see Colin Myers and Jason J Czarnezki, 'Sustainable Business Law? The Key Role of Corporate Governance and Finance' (2021) 51 *Environmental Law* 991, 1016 (citing examples of litigation against issuers for statements made in sustainability reports).
[14] The quality of these disclosures is frequently a function of issuer size. Many S&P 500 issuers, for example, have obtained assurance on their sustainability reports from external auditors. See Center for Audit Quality (CAQ), 'S&P 500 Sustainability Reporting and Assurance Analysis' (June 2025) https://www.thecaq.org/sp-500-and-esg-reporting accessed 30 November 2025. The numbers are lower for smaller companies--48% of Russell 1000 companies reported obtaining external assurance over their ESG reporting in 2023. Daniel Goelzer, 'What Backlash? ESG Reporting Continues to Grow' (Audit Committee and Auditor Oversight Update, 5 October 2024) <https://www.auditupdate.com/post/what-backlash-esg-reporting-continues-to-grow> accessed 30 November 2025.

are voluntary, issuers tend to focus on disclosing positive information, leading to claims of greenwashing.[15]

Several mechanisms have emerged to address these concerns. One is the role of standard setters. Global organizations such as the Global Reporting Initiative (GRI), the Sustainability Accounting Standards Board (SASB, now part of the ISSB), and the Task Force on Climate-related Financial Disclosures (TCFD) provide standardized metrics and frameworks for sustainability reporting.[16] These standard setters facilitate the implementation of accountability through assurance providers—typically accounting firms or specialized consultancies that conduct independent audits of ESG data, lending credibility to the reports. Among the larger public companies, most obtain some type of verification of assurance of their sustainability disclosures, and the number that do so is increasing.[17]

Another mechanism to enhance the reliability of voluntary reporting is ESG rating organizations. Today hundreds of independent organizations gather information – including public data and information supplied by issuers – and evaluate those issuers on their environmental, social and governance performance. Such organizations include, among others, MSCI, Sustainalytics (Morningstar), S&P Global, FTSE Russell (LSEG), and ISS. Studies report, however, that these organizations use widely varying methodologies, leading to inconsistency among their scores.[18]

Investors have also used private ordering to encourage their portfolio companies to increase their sustainability disclosure. Efforts range from private engagement, often by the largest institutional investors, to the more public process of submitting shareholder proposals. Empirical studies of the shareholder proposal process reveal that a significant number seek

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[15] See, e.g., Jill E Fisch, 'Making Sustainability Disclosure Sustainable' (2019) 170 *Georgetown Law Journal* 923, 947–48; Maria Roszkowska-Menkes, Maria Aluchna and Bogumił Kamiński, 'True Transparency or Mere Decoupling? The Study of Selective Disclosure in Sustainability Reporting' (2024) 98 *Critical Perspectives on Accounting* 102700 (reporting that '69% of negative sustainability events were not fully disclosed').
[16] Ho, 'ESG Disclosure' (n. 12) 264-67.
[17] Desiré Carroll, 'S&P 500 Analysis: ESG Reporting Continues to Evolve' (19 July 2024) <https://www.thecaq.org/aia-sp-500-analysis-esg-reporting-continues-to-evolve accessed> 30 November 2025.
[18] Rakhi Kumar and Ali Weiner, 'The ESG Data Challenge' (March 2019) <https://conferences.pionline.com/uploads/conference_admin/ESG_Data_Challenge1.pdf> accessed 30 November 2025 (reporting, using 2018 data, that the ESG scores reported by MSCI and Sustainalytics were consistent for only about half of covered companies); Quinn Curtis, Jill E Fisch, and Adriana Z Robertson, 'Do ESG Mutual Funds Deliver on Their Promises?' (2021) 120 *Michigan Law Review* 393, 400 (reporting that there are over 600 ESG ratings organizations and that both their methodologies and their ratings vary substantially).

increased sustainability disclosure and find that many receive substantial amounts of support.[19]

NGOs, private actors, and investor organizations aid investors in these efforts, helping to coordinate disclosure efforts, developing industry-specific standards, and working with investors to apply pressure to issuers.[20] The Principles for Responsible Investment (PRI) is an international initiative that has developed a voluntary set of principles to encourage investors to incorporate ESG principles into their investment practices. Climate Action 100+ facilitates investor engagement with carbon emitters on greenhouse gas emissions. The Center for Political Accountability, a nonprofit, compiles the Zicklin Index, an index of corporate transparency regarding political expenditures, and works with investors to increase that transparency.[21] As You Sow, another nonprofit, works with investors to promote corporate environmental and social responsibility. Specific large institutional investors have also played a role. In 2022, for example, BlackRock publicly declared its support for consistent climate-related disclosures.[22]

Despite the extensive volume of voluntary sustainability disclosure, critics have continued to call for regulation to provide standardized disclosure, to increase the reliability of the disclosed information and to ensure that issuers remain committed to transparency.[23] These calls played

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[19] Jill E Fisch and Adriana Z Robertson, 'Shareholder Proposals and the Debate Over Sustainability Disclosure' in Luca Enriques and Giovanni Strampelli (eds), *Board–Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices* (Cambridge University Press 2025). The extent to which shareholders will continue to support ESG initiatives in the evolving political climate remains uncertain. See Leah Malone and Emily Holland, 'Sustainability and ESG: Where Are We Now?' (Harvard Law School Forum on Corporate Governance, 6 October 2024) https://corpgov.law.harvard.edu/2024/10/06/sustainability-and-esg-where-are-we-now/ accessed 16 February 2026 (reporting reduced support for ESG proposals during the 2024 proxy season).

[20] Dan Puchniak and Umakanth Varottil, 'Climate-Related Shareholder Activism as Corporate Democracy: A Call to Reform Acting in Concert Rules' (2025) 50 *Iowa Journal of Corporation Law* 617, 631–32 (describing various investor networks and alliances); Amelia Miazad, 'Investor Climate Alliances' (2025) 102 *Washington University Law Review* 797 (analyzing climate alliance dynamics and offering a case study of CA100+).

[21] See, e.g., Jill Fisch & Adriana Robertson, Proxies for Politics, Dec. 22, 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5894542.

[22] BlackRock, 'BlackRock Supports Consistent Climate-Related Disclosures; Urges Global Coordination' (Policy Spotlight, August 2022) https://www.blackrock.com/corporate/literature/whitepaper/spotlight-blk-supports-consistent-climate-related-disclosures-issb-august-2022.pdf accessed 30 November 2025.

[23] See, eg, Virginia Harper Ho, 'Nonfinancial Risk Disclosure & the Costs of Private Ordering' (2018) 55 *American Business Law Journal* 407 (arguing that the current system

a role in spurring the SEC to adopt its climate risk disclosure rule, discussed in the next section.

II. The Rise and Fall of the SEC Climate Disclosure Rule

A. A Brief History of SEC Sustainability Disclosure

The SEC's approach to sustainability disclosure evolved over several decades.[24] To date, the SEC has concentrated on climate-related disclosure.[25] Investors asked the SEC to require greater environmental disclosure for years[26] and finally found a receptive audience in the Biden Administration's SEC. In March 2022, the SEC proposed its first climate-specific disclosure rule.[27] The proposal sought to require issuers to disclose greenhouse gas (GHG) emissions (Scopes 1, 2, and, in some cases, 3), as well as their climate-related governance, strategy, and risk management policies. The release contemplated, for the first time, mandating specific environmental disclosures in annual reports.

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of voluntary disclosure of non-financial information is inadequate for meaningful comparative analysis and requires standardization and regulation).

[24] See Nell Minow, Vice Chair, ValueEdge Advisors, 'Comment Letter on SEC Rulemaking' (25 May 2020) <https://www.sec.gov/comments/s7-22-19/s72219-7228539-217030.pdf> accessed 13 March 2026 (recounting 50 year history of SEC considering 'whether ESG 1 disclosures are material and should be incorporated into its integrated disclosure regime').

[25] The SEC has also considered disclosure mandates for human capital management. In 2020, the SEC adopted a rule requiring issuers to disclose material information regarding their human capital resources. Securities and Exchange Commission, 'Modernization of Regulation S-K' (Final Rule, Release No 33-10825, 26 August 2020) 85 Federal Register 63726 (effective 9 November 2020); Securities and Exchange Commission Investor Advisory Committee, 'Recommendation of the Investor-as-Owner Subcommittee Regarding Human Capital Management Disclosure' (21 September 2023) <https://www.sec.gov/files/spotlight/iac/20230921-recommendation-regarding-hcm.pdf> accessed 17 February 2026 (stating that the 2020 requirements 'fall short of giving investors the full information needed for accurate valuation of human capital'); Patrick M Corrigan, 'Can the SEC Mandate Disclosures that Contain Both Financial and Social Information: The Case of Human Capital Management Disclosures' (2025) 54 *Southwestern Law Review* 24 (offering a case study of the SEC's disclosure requirements regarding human capital management).

[26] For example, a 2018 petition for rulemaking drew the support of investors representing more than $5 trillion in assets. Williams and Fisch (n 3).

[27] Securities and Exchange Commission, 'The Enhancement and Standardization of Climate-Related Disclosures for Investors' (Securities Act Release No 33-11042; Exchange Act Release No 34-94478, 11 April 2022) 87 Federal Register 21334 (to be codified at 17 CFR pts 210, 229, 232, 239 and 249).

The proposed rule drew immediate controversy and prompted a record number of comment letters.[28] Although many commentators were supportive of the SEC's objectives, even supporters questioned aspects of the rule. Among the most frequent objections were the rule's anticipated cost to issuers and the requirement that issuers disclose Scope 3 emissions.[29] SEC Commissioner Hester Peirce, dissenting from the proposal observed cynically, "we are not the securities and environment commission, at least not yet."[30] Congress held multiple hearings on the proposed rule, questioning the SEC's legal authority to adopt it and citing the high costs it would impose on issuers. The Senate introduced legislation to overturn the rule, with the bill's sponsor describing the rule as "federal overreach at its worst, and the SEC should stay in its lane".[31] A group of 21 law and finance professors submitted a comment letter charging the SEC with catering to the demands of a "small but powerful cohort of institutional investors . . . promoting climate consciousness as part of their business models."[32]

The SEC nonetheless proceeded and, after an extended comment period, adopted a final rule.[33] The final rule reduced some of the more burdensome elements of the proposal—most notably narrowing Scope 3 disclosure requirements—as well as adopting an extended timeframe for its implementation. In addition, the final rule explicitly adopted financial materiality qualifiers. Several investors and commentators expressed support for the rule, although many felt that it did not go far enough. Ceres, a non-profit that works with investors to promote sustainability, stated that

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[28] Lee Reiners and Morgan Smith, 'Summary of Comment Letters for the SEC's Proposed Climate Risk Disclosure Rule' (Duke Department of Economics, August 2022) <https://econ.duke.edu/dfe/climate-risk/2022/08/summary-comment-letters-secs-proposed-climate-risk-disclosure-rule> accessed 30 November 2025 (noting it is the 'most anticipated, and contested, rulemaking in the history of the SEC.').

[29] Ibid.

[30] Hester M Peirce, 'Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors' (21 March 2022) <https://www.sec.gov/newsroom/speeches-statements/peirce-climate-disclosure-20220321> accessed 13 March 2026.

[31] Ted Godbout, 'SEC's Climate Disclosure Rule Comes Under Congress' Crosshairs' (NAPA, 4 April 2024) <https://www.napa-net.org/news/2024/4/secs-climate-disclosure-rule-comes-under-congress-crosshairs/> accessed 13 March 2026.

[32] Lawrence A Cunningham et al, 'The SEC's Misguided Climate Disclosure Rule Proposal' (2022) 41 *Banking & Financial Services Policy Report* 1 (GWU Legal Studies Research Paper No 61) <https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2851&context=faculty_publications> accessed 13 March 2026; but see Securities Law Scholars, 'Comment Letter on the SEC's Authority to Require Climate-Related Disclosures' (17 June 2022) File No S7-10-22 https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf accessed 15 March 2026 (providing analysis that the SEC has the authority to mandate climate-related disclosures).

[33] SEC The Enhancement and Standardization of Climate-Related Disclosures (n 27).

it "welcome[]" the "landmark SEC rule" as an "important step forward to bring the US closer in line with its global counterparts."[34] CalPERS, the largest pension fund in the US, "applaud[ed]" the rule but observed that "more needed to be done."[35]

As soon as the SEC adopted the rule, several states, industry groups, and trade associations filed suit challenging it. Among the arguments raised by plaintiffs were that the rule was outside the scope of the SEC's authority, inconsistent with the Administrative Procedure Act, and in violation of the Major Questions Doctrine. To avoid duplicative litigation, the challenges were consolidated in the Eighth Circuit under *Iowa v. SEC*[36], and the SEC itself imposed a stay of the rule before its effectiveness to avoid compliance uncertainty.[37]

The status of both the rule and the litigation are uncertain. On March 27, 2025, the Commission formally voted to stop defending the rule and instructed the SEC counsel to withdraw from the litigation. Shortly thereafter, 18 states and the District of Columbia—intervenor respondents in support of the rule—moved to hold the consolidated case in abeyance. On April 24, 2025, the Eighth Circuit granted the motion and ordered the SEC to file a status report by July 23 regarding whether it intended to retain, revise, or rescind the rule. In its July 2025 status report, the Commission stated that it does not plan to revisit or formally reconsider the rule at this time—but it refuses to defend it in the pending litigation.[38] As a result, the rule is currently in legal limbo.

The next section explains why the unique political economy of the US, combined with the inherent limitations in the SEC's capabilities as a federal administrative agency, exposed the climate disclosure rule to attack.

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[34] Ceres, 'Ceres Welcomes Landmark SEC Rule on Corporate Climate Disclosure' (Ceres, 6 March 2024) https://www.ceres.org/resources/news/ceres-welcomes-landmark-sec-rule-on-corporate-climate-disclosure.

[35] CalPERS, 'CalPERS Applauds SEC Transparency Climate Disclosure Rule, Notes More to Be Done' (6 March 2024) <https://www.calpers.ca.gov/newsroom/calpers-news/2024/calpers-applauds-sec-transparency-climate-disclosure-rule-notes-more-to-be-done> accessed 13 March 2026.

[36] State of Iowa v SEC, No 24-01522 (8th Cir, filed 2024).

[37] Sara Dewey and Sarah Hart-Curran, 'Eighth Circuit Says SEC Must Defend or Revise Climate Risk Disclosure Rule' (*EELP*, 10 April 2024) <https://eelp.law.harvard.edu/eighth-cursuit-says-sec-must-defend-or-revise-climate-risk-disclosure-rule/> accessed 12 March 2026.

[38] Ibid.

B. Political and Institutional Obstacles to The SEC's Climate Disclosure Rule

Two interrelated factors help explain why the SEC's climate disclosure rule faced so many challenges. First, climate disclosure got caught up in the broader backlash against ESG, which was growing stronger and more organized in 2022, just as the SEC proposed its rule. Whether to separate climate change from other issues, such as gender or racial diversity, has long been debated in the sustainable investing community.[39] The inclusion of climate change in the ESG movement made it susceptible to claims that climate change was not financially material, but a social value, and that its disclosure did not benefit issuers or their shareholders but society generally. Second, as a federal administrative agency, the SEC faces political and legal limitations on its exercise of regulatory power, limitations that have increased under the Trump administration.

i. The ESG backlash

With critics spanning the political spectrum, the legitimacy of the ESG movement in corporate governance was always on shaky ground.[40] Some institutional investors briefly and vocally supported ESG initiatives – perhaps most famously Larry Fink, CEO of BlackRock who, in his 2018 letter to CEOs titled "A Sense of Purpose" stated that corporations had to deliver not only financial performance but a positive contribution to society.[41] Critics questioned both the authenticity and the legitimacy of institutional support for ESG initiatives, however. Progressives doubted that large financial institutions were meaningfully addressing environmental or social issues and described their efforts as "performative stewardship" designed to stave off regulation.[42] Conservatives argued that ESG was undemocratic because it allowed progressives to introduce a "woke" agenda into the market; an agenda they could not advance successfully through the political process.[43] As a result of this political pressure, in 2023, Larry Fink

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[39] Jeffrey N Gordon, 'Unbundling Climate Change Risk from ESG' (CLS Blue Sky Blog, 26 July 2023) <https://clsbluesky.law.columbia.edu/2023/07/26/unbundling-climate-change-risk-from-esg/> (arguing that climate change should be "unbundled" from the broader ESG movement because it includes social goals that are more difficult to justify under a financial materiality standard and also more difficult to measure).
[40] Pollman (n. 4).
[41] Larry Fink, 'A Sense of Purpose: Larry Fink's Annual Letter to CEOs' (*BlackRock*, 2018) http://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter accessed 16 February 2026 .
[42] Benjamin Braun, 'From Performativity to Political Economy: Index Investing, ETFs and Asset Manager Capitalism' (2016) 21(3) *New Political Economy* 257.
[43] Mike Pence, 'Republicans Can Stop ESG Political Bias' (*Wall Street Journal*, 26 May 2022) <https://www.wsj.com/opinion/only-republicans-can-stop-the-esg-madness-woke-

declared that he would no longer use the term ESG which had become "weaponized" by both the "far left" and "far right."[44] BlackRock has similarly reduced the extent to which it supports ESG shareholder proposals.[45]

While the ESG backlash may have begun as mere political posturing and rhetoric, its toolkit has become far more robust, and includes widespread legislation, regulation, congressional investigations, executive orders, and litigation. In addition to limiting the scope of permitted ESG activities, these efforts may attach legal consequences to companies' efforts to comply with sustainability obligations imposed by other sovereigns. For example, state attorneys general are threatening enforcement actions against companies that comply with EU legal mandates requiring sustainability disclosure.[46]

When the Biden administration was in power in 2022, conservative states began enacting a wave of anti-ESG legislation. These laws vary, but many prevent state pension funds from working with asset managers that consider non-financial interests in their investment decisions. The legislation then defines non-financial interests to include climate change, DEI, and a sprawling list of other environmental topics.[47] Many of these laws are based on model legislation drafted by the Heritage Foundation, a conservative thinktank. The Heritage Foundation's *State Pension Fiduciary Duty Act* is illustrative—it takes the position that fiduciaries act with "a purpose to further social, political, or ideological interests", and not financial interests, if they engage in stewardship that goes beyond legal mandates in "eliminating, reducing, offsetting, or disclosing greenhouse gas emissions" or in "divesting from, limiting investment in, or limiting the activities or investments of, any company, for failing or not committing, to meet environmental standards or disclosures."[48]

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musk-consumer-demand-free-speech-corporate-america-11653574189> accessed 16 February 2026.

[44] Isla Binnie, 'BlackRock's Fink Says He's Stopped Using "Weaponised" Term ESG' (*Reuters*, 26 June 2023) <https://www.reuters.com/business/environment/blackrocks-fink-says-hes-stopped-using-weaponised-term-esg-2023-06-26/> accessed 16 February 2026.

[45] Simon Jessop, 'BlackRock Trims Support for Some ESG Resolutions in AGM Season' (*Reuters*, 21 August 2024) <https://www.reuters.com/sustainability/blackrock-trims-support-some-esg-resolutions-agm-season-2024-08-21/> accessed 16 February 2026.

[46] Letter from Sixteen Attorneys General to Mark Zuckerberg (6 October 2025) https://www.corpgov.net/wp-content/uploads/2025/11/Meta_CSRD_CSDDD.pdf accessed 16 February 2026.

[47] Letter from Sixteen Attorneys General to Mark Zuckerberg (6 October 2025) https://www.corpgov.net/wp-content/uploads/2025/11/Meta_CSRD_CSDDD.pdf accessed 16 February 2026.

[48] Heritage Foundation, 'State Pension Fiduciary Duty Act' https://www.heritage.org/article/state-pension-fiduciary-duty-act accessed 16 February 2026.

To date, twenty-one states have adopted some form of anti-ESG legislation.[49] Texas has taken a particularly ambitious approach, with far-reaching legislation and strong enforcement and compliance monitoring. In February 2026, a court declared the Texas anti-ESG statute unconstitutional.[50] The Texas Comptroller maintains a list of blacklisted companies, including major financial institutions and over three hundred investment funds, that are banned from Texas because they allegedly boycott fossil fuel companies.[51] The pressure appears to be working. Recently, the Texas comptroller rewarded BlackRock by removing it from the list of excluded companies after the firm exited investor climate alliances and reduced the number of its fund offerings that exclude oil and gas.[52] In addition, in November 2024, Texas Attorney General Ken Paxton sued BlackRock, Vanguard and State Street alleging that they violated antitrust laws to drive up the price of coal.[53] In February 2026, Paxton announced that Vanguard agreed to settle the litigation by paying $29.5 million. Paxton termed the settlement a "landmark" and "one of the most significant enforcement actions ever taken against coordinated ESG-driven market manipulation"[54]

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[49] Ropes & Gray LLP, 'Navigating State Regulation of ESG' <https://www.ropesgray.com/en/sites/navigating-state-regulation-of-esg> accessed 16 February 2026.

[50] Ayden Runnels, 'Texas Law Barring State Investment in Firms Boycotting Fossil Fuels Declared Unconstitutional' (*The Texas Tribune*, 4 February 2026) <https://www.texastribune.org/> accessed 16 February 2026; *American Sustainable Business Council v Hegar* No 4:24-cv-00732-ADA (*WD Tex*, 4 February 2026);

[51] Texas Comptroller of Public Accounts, 'Texas Comptroller Glenn Hegar Announces Update to List of Financial Companies that Boycott Energy Companies' (Press Release, 3 June 2025) <https://comptroller.texas.gov/about/media-center/news/20250603-texas-comptroller-glenn-hegar-announces-update-to-list-of-financial-companies-that-boycott-energy-companies-1746731924320> accessed 16 February 2026,

[52] Ibid.

[53] Office of the Attorney General of Texas, 'Attorney General Ken Paxton Sues BlackRock, State Street, and Vanguard for Illegally Conspiring to Manipulate Energy Markets, Driving Up Costs for Consumers' (Press Release, 27 November 2024) https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-sues-blackrock-state-street-and-vanguard-illegally-conspiring-manipulate accessed 15 March 2026.

[54] Office of the Attorney General of Texas, 'Attorney General Paxton Secures Historic Industry-Changing Agreement with Vanguard to Protect Coal Industry' (Press Release, 30 January 2025) https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-secures-historic-industry-changing-agreement-vanguard-protect-coal-industry accessed 15 March 2026.

Congress has considered anti-ESG legislation.[55] For example, House Republicans introduced a bill that would require retirement plan fiduciaries to consider only "pecuniary factors" when making investment decisions.[56] While Congress has failed to enact legislation, it has held hearings and subpoenaed representatives from large pension funds, proxy advisory firms, and asset managers, asking them to address claims that ESG investing violates fiduciary duties or antitrust laws. For example, a hearing on *Proxy Power and Proposal Abuse: Reforming Rule 14a-8 to Protect Shareholder Value*, focused on "whether the shareholder proposal process…has been co-opted by activist investors who prioritize narrow policy goals over maximizing shareholder value."[57]

The Trump Administration has accelerated the backlash against ESG. President Trump has signed executive orders reversing a variety of ESG mandates and programs from DEI-mandates to clean energy initiatives. These efforts increase the financial risk associated with ESG and are perhaps one reason for the substantial withdrawals of assets from ESG funds.[58] The SEC has also taken an increasingly restrictive approach to the use of shareholder proposals to allow shareholders to vote on ESG-related issues. In February 2025, the SEC announced new guidance reversing the Biden Administration's approach to the inclusion of shareholder proposals that raise substantial policy implications.[59] This was followed, in October 2025, by a speech in which SEC Chairman Atkins took the position that precatory proposals addressing environmental and social issues are not permitted under Delaware law and invited issuers to seek authority from the SEC to exclude them.[60]

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[55] US House Committee on Financial Services, 'Proxy Power and Proposal Abuse: Reforming Rule 14a-8 to Protect Shareholder Value' (*Hearing*, 10 September 2025) <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=410861> accessed 16 February 2026.

[56] James Van Bramer, 'Republicans Introduce Anti-ESG Bill for Retirement Investing' (*PlanSponsor*, 3 November 2025) <https://www.plansponsor.com/republicans-introduce-anti-esg-bill-for-retirement-investing/> accessed 16 February 2026.

[57] US House Committee on Financial Services, 'Chairman Hill: We Have Seen The Shareholder Proposal Process Diverted Away From The Critical Business Strategy' (Press Release, 10 September 2025) <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=410861> accessed 16 February 2026.

[58] US House Committee on Financial Services, 'Chairman Hill: We Have Seen The Shareholder Proposal Process Diverted Away From The Critical Business Strategy' (Press Release, 10 September 2025) <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=410861> accessed 16 February 2026.

[59] US Securities and Exchange Commission, 'Shareholder Proposals: Staff Legal Bulletin No 14M (CF)' (12 February 2025) <https://www.sec.gov/about/shareholder-proposals-staff-legal-bulletin-no-14m-cf#_ftnref4> accessed 17 February 2026.

[60] Atkins (n 5).

These moves reflect a broader retreat from collaboration with global partners and allies over sustainability. While the Biden-era SEC was working with global financial regulators towards the convergence of climate-related disclosure standards, the current SEC halted those efforts. Going even further, Chairman Atkins has warned that the SEC may conduct a "retrospective review" of its 2007 decision to allow foreign issuers to use IFRS standards without reconciling to US GAAP, because the IFRS now includes the ISSB, which he views as a "backdoor to achieve political or social agendas."[61]

Pressure on US issuers is also intensifying—state and federal lawmakers and agencies are trying to punish companies that comply with EU climate disclosure regulations. For example, the PROTECT USA Act prohibits US issuers from complying with any foreign sustainability due diligence regulation, including the EU CSDDD.[62] Although Federal legislation is difficult to enact, issuers are also facing pressure from state lawmakers—fifteen state attorneys general have warned major technology companies not to comply with EU disclosure regulations or risk investigation for violating US state laws that prohibit ESG investing.[63]

Backlash in the US is fueled, at its core, by greater contestation about the perceived need for corporate sustainability. Unlike in the EU, climate change remains hotly contested in the US, with almost half of the Republican members of Congress denying that it is even occurring.[64] In contrast, in the EU there is broad consensus that climate risk is occurring and needs to be mitigated to protect markets and society. Importantly, this consensus is reflected in the EU's constitutional framework, including the Treaty on European Union and the Charter of Fundamental Rights of the European Union, which requires the integration of environmental protection and sustainability into EU policies.[65]

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[61] Ibid.

[62] United States Senator Bill Hagerty, 'Hagerty Introduces Legislation to Protect U.S. Businesses from European Regulators' Power Grab' (Press Release, 12 March 2025) <https://www.hagerty.senate.gov/press-releases/2025/03/12/hagerty-introduces-legislation-to-protect-u-s-businesses-from-european-regulators-power-grab/> accessed 18 February 2026 (noting that Senator Hagerty is introducing this legislation to respond to a "power grab" by European regulators.).

[63] Mark Segal, 'Multi-State Coalition Warns Microsoft, Google, Meta Against Complying with EU's CSRD & CSDDD Sustainability Laws' (*ESG Today*, 5 November 2025) <https://www.esgtoday.com/multi-state-coalition-warns-microsoft-google-meta-against-complying-with-eus-csrd-csddd-sustainability-laws/> accessed 18 February 2026.

[64] Kat So, 'Climate Deniers of the 118th Congress' (*Center for American Progress*, 18 July 2024) <https://www.americanprogress.org/article/climate-deniers-of-the-118th-congress/> accessed 18 February 2026.

[65] Ferran and Ogburn, (n 4), 10.

In the US, the increasingly partisan and polarized nature of sustainability poses an ongoing challenge to legislation implementing substantive sustainability standards and greater sustainability disclosure. Moreover, the political nature of the debate increases the likelihood that any measures adopted in one administration will be overturned by its successor, as evident in the previously-described approaches to ESG shareholder proposals and SEC-mandated climate disclosure. The resulting policy instability poses practical concerns for companies that need to make investment decisions in reliance on government policies.

Commentators might have expected that US-style federalism, together with the political insulation of administrative agencies, would enable the SEC to withstand some of the political pressures that fueled the ESG backlash in the states and Congress. To understand why it is challenging for the SEC to overcome these political pressures, we now turn to the agency's institutional design, which differs from EU financial regulators in many important ways.

ii. The institutional and political limitations of the SEC

The Securities Exchange Act of 1934[66] established the SEC as "a bipartisan, expert, and independent agency."[67] The independent agency model, which was part of President Franklin Delano Roosevelt's New Deal, was designed to implement a different form of regulation than what the political branches –the Legislature and the Executive– could impose.[68] The idea was that regulating complex industries in matters such as capital markets, banking and antitrust, required expertise on the part of their regulators. In addition, businesses required regulatory stability, and insulating regulators from political pressure and partisan bias promoted that stability.

The design of the SEC falls within that model. The leadership of the SEC is explicitly bipartisan; the statute provides that while the President appoints the SEC commissioners, including the Chair, no more than three of the five commissioners may be members of the same political party. The

[66] 15 USC § 78a

[67] Donald C Langevoort, John Coates, John C. Coffee, Jr., James D. Cox, Jill E. Fisch and Merritt B. Fox, 'The Shadow SEC: The Value of an Independent SEC' (Columbia Law School Blue Sky Blog, 24 February 2025) <https://clsbluesky.law.columbia.edu/2025/02/24/the-shadow-sec-the-value-of-an-independent-sec/> accessed 17 February 2026.

[68] AC Pritchard and Robert B Thompson, *A History of Securities Law in the Supreme Court* (OUP 2023)); Jill E Fisch, 'Overseeing the Administrative State' (2024) 47 *Seattle University Law Review* 899, 909.

commissioners are appointed to staggered and limited terms and, at least in theory, cannot be removed by the President except for cause.[69] The first SEC commissioners were highly expert in capital market regulation and played critical roles in drafting the federal securities laws.[70]

At the same time, however, the SEC derives its authority from Congress, which gave it a limited statutory mandate. Specifically, the SEC's authority is limited to protecting investors, maintaining fair markets, and facilitating capital formation.[71] Furthermore, US securities laws are anchored to a single materiality standard, which mandates the disclosure of information that is financially material to the reasonable investor.[72] In contrast, EU law embraces a double or impact materiality standard, encompassing both financial and impact materiality.[73] Moreover, Congress has distributed regulatory authority among multiple administrative agencies, and each agency is limiting to regulating within its sphere. As a result, the power to regulate environmental issues is vested in the Environmental Protection Agency, not the SEC; the power to regulate the commodities market is vested in the Commodities Futures Trading Commission, and so forth.

This institutional design poses challenges for climate disclosure.[74] To the extent that climate disclosure is understood to protect social harms as opposed to investors or markets, it falls outside of the SEC's mandate. The Environmental Protection Agency (EPA), and not the SEC, is tasked with addressing the social harms caused by environmental externalities. At the same time, the EPA lacks the authority to mandate financial disclosure. This siloed structure leaves climate disclosure in a regulatory void. In addition, although the SEC has the power to require sustainability disclosures with the scope of its statutory mandate, that power is limited to disclosures by public companies; it generally lacks the authority to mandate any private company disclosures.[75]

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[69] The extent of the President's power to remove agency heads is the subject of two pending Supreme Court cases. *Trump v Slaughter* No 25-332 (US Supreme Court, cert granted 2 September 2025); *Trump v Cook* No 25A312 (*US Supreme Court*, 1 October 2025).
[70] Fisch, 'Overseeing the Administrative State' (n 67) 911.
[71] 15 U.S.C. § 78n(a).
[72] See, eg, Virginia Harper Ho, 'Climate Disclosure Line-Drawing & Securities Regulation' (2023) 56 UC Davis Law Review 1875, 1890 (explaining that single materiality involves 'financial risk to the company itself').
[73] Ferran and Ogburn (n 4).
[74] Alessio Maria Pacces and David T Zaring, 'The Divergence of Mandatory Climate Disclosure in the US and the EU' (2026) 88 *Law and Contemporary Problems* 115.
[75] E.g., Atinuke O Adediran, 'Disclosing Corporate Diversity' (2023) 109 *Virginia Law Review* 307, 327.

In addition, concerns about agency accountability led to a variety of mechanisms that reduce the insulation of the SEC. The Administrative Procedure Act implemented a variety of measures, such as the notice and comment process, that increase the transparency of the SEC's actions and provide vehicles for public input, but these measures both reduce the SEC's insulation and subject its actions to political influence.[76] And the SEC remains subject to congressional oversight; it is required to report to Congress every year on its activities, and Congress controls the agency's funding.[77]

Given this, there is a longstanding tension between the SEC's ability to operate as an independent administrative agency, and the reality that it is fundamentally political. Commentators have argued that the SEC is a partisan institution, and partisan bias is reflected in securities enforcement and disclosure rules—notably, recent scholarship suggests that partisanship among securities administrators is increasing.[78] The SEC's climate disclosure rule reflected the policy priorities of the Biden administration, which mandated an "all agency" approach to addressing climate risk. Likewise, the current SEC's undoing of the climate rule and resistance to global environmental or social disclosure reflect the Trump administration's pro-fossil fuel agenda and crackdown against regulations designed to promote sustainability. The SEC's political influence is also evident in its current composition. Although its statutory structure is bipartisan, the SEC currently has three commissioners who are all Republicans because the administration has not nominated any Democratic commissioners.[79]

Efforts by both the Trump administration and the Supreme Court to reduce the scope of administrative agency power have exacerbated these concerns. The Trump administration's Executive Order, "Ensuring Accountability For All Agencies," has dealt a serious blow to the SEC's independence.[80] Among other things, it requires federal agencies, including the SEC, to submit proposed regulations to the White House for review, and moves oversight of agency budgets to the executive branch to ensure policy

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[76] Congress supplemented the APA with the Federal Advisory Committee Act and the Sunshine Act to increase the transparency and accountability of agency decisionmaking. Fisch, 'Overseeing the Administrative State' (n 67) 916-917.
[77] Langevoort, et al. (n 67).
[78] Reilly S Steel, 'Partisan Bias in Securities Enforcement' (2024) Journal of Law, Economics, and Organization <https://doi.org/10.1093/jleo/ewae019>; Joseph Engelberg and others, 'The Partisanship of Financial Regulators' (2023) 36 Review of Financial Studies 4373.
[79] 'Trump's Wall Street Regulators Set to Enter Rare GOP Only Era' *Bloomberg Law* (31 December 2025) <https://news.bloomberglaw.com/securities-law/trumps-wall-street-regulators-set-to-enter-rare-gop-only-era> accessed 12 March 2026.
[80] Exec Order No 14215, 90 Fed Reg 10447, 10448 (18 February 2025).

alignment. Therefore, the current SEC's rulemaking and enforcement decisions are more vulnerable than ever to executive branch scrutiny.

In recent years, the US Supreme Court has issued several decisions reducing the power and independence of administrative agencies. These include the Court's formal endorsement of the major questions doctrine in *West Virginia v. EPA*,[81] and the elimination of Chevron deference in *Loper Bright*.[82] In pending cases, the Court is set to reconsider the extent to which the president has the power to remove the heads of independent agencies such as the Federal Trade Commission and members of the Board of Governors of the Federal Reserve.[83] The Administration has urged the Court to uphold this assertion of presidential power, even though doing so would involve overruling a ninety-year-old precedent.[84]

Limitations on the independence of agencies like the SEC subject them to substantial pressure to accede to the demands of the politically accountable branches and especially the President, and the growing application of the major questions doctrine casts doubt on even the power of the SEC to mandate broad-based sustainability disclosure without explicit congressional authorization. In contrast, in the EU, the legal authority for climate disclosure is rooted in the EU's foundational treaties and national regulation.[85] For example, the European Climate Law (the European Green Deal) introduces a set of legal targets, including climate neutrality by 2050, that are binding on member states. Member states are required to report their strategies for complying with these targets.[86] The EU also has implemented specific climate-related mandates. For example, the EU's emissions trading system requires industries to pay for their emissions.[87] This is not to suggest that the EU's climate disclosure rules are immune from political forces—political and market forces have already caused EU regulators to scale back their ambitious climate disclosure.[88]

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[81] *West Virginia v EPA*, 597 US 697, 699-700 (2022).
[82] *Loper Bright Enters. v. Raimondo*, 603 US 369 (2024).
[83] K&L Gates LLP, 'Supreme Court to Redefine the President's Power to Fire Independent Agency Heads: Implications for Business' (25 November 2025) https://www.klgates.com/Supreme-Court-to-Redefine-the-Presidents-Power-to-Fire-Independent-Agency-Heads-Implications-for-Business-11-25-2025 accessed 17 February 2026. European Commission, 'National Long-Term Strategies' (*European Commission*) <https://commission.europa.eu/energy-climate-change-environment/implementation-eu-countries/energy-and-climate-governance-and-reporting/national-long-term-strategies_en> accessed 17 February 2026.
[84] *Humphrey's Executor v. United States*, 295 US.602 (1935).
[85] Article 3 TEU and Article 11 TFEU; Ferran and Ogburn, (n 4).
[86] European Commission, 'National Long-Term Strategies (n 84).
[87] Ibid.
[88] See, eg, Karl Mathiesen, 'There's No Green Backlash, EU Climate Chief Insists' *Politico* (2 December 2025) <https://www.politico.eu/article/what-green-backlash-says-eu-

Most notably, the European Parliament voted in November 2025 to reduce and simplify the reporting and due diligence obligations under its sustainability disclosure reporting system.[89] But the *legitimacy* of EU's climate disclosure regime is on much stronger footing.

Although the administrative state was intended to provide a degree of insulation from these shifting political forces, this retrenchment in the scope of agency authority together with the politicization of the SEC limit agency rulemaking as an alternative.[90] Given these structural and political constraints, the federal government in the US is not equipped to propose a durable climate disclosure rule. This uncertainty has created an opportunity for states like California to fill the void, as we discuss in the next section.

III. CALIFORNIA ENACTS CLIMATE DISCLOSURE LAWS

On October 7, 2023, after the SEC issued its proposed climate rule, but before it adopted the final rule, California enacted three landmark climate-related disclosure laws—the Climate Corporate Accountability Act (SB 253),[91] the Climate Related Financial Risk Act (SB 261)[92] and the Voluntary Carbon Market Disclosures Act (AB 1305).[93] By enacting this legislation, California became the first US state to address climate change through mandating corporate disclosure.[94] Advocates applauded California's boldness and the breadth of the laws, while critics claimed that they constitute unconstitutional overreach. Industry groups, including the US and California Chamber of Commerce, have challenged the suite of laws on grounds ranging from the First Amendment to federal preemption.[95] In

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climate-chief/> accessed 17 February 2026 (explaining that the EU's environmental and climate rules have faced pushback from conservative political parties and industry).

[89] European Parliament, 'Sustainability reporting and due diligence: MEPs back simplification changes' (Press release, 13 November 2025) https://www.europarl.europa.eu/news/en/press-room/20251106IPR31296/sustainability-reporting-and-due-diligence-meps-back-simplification-changes accessed 12 March 2026.

[90] See Fisch (n. 67), 899 (arguing that "agency decisionmaking has become increasingly polarized and the product of political influence rather than scientific or technical expertise.").

[91] Climate Corporate Data Accountability Act, SB 253, 2023–24 Leg Reg Sess (Cal 2023)

[92] Climate Related Financial Risk Act, SB 261, 2023-2024 Leg Reg Sess (Cal 2023), SB 253 and 261 have been consolidated into one bill known as SB 219. SB 219 Greenhouse gases: climate-related financial risk, 2023–24 Leg Reg Sess (Cal 2024).

[93] Voluntary Carbon Market Disclosures Act, AB 1305, 2023–24 Leg, Reg Sess (Cal 2023).

[94] See Sarah E. Light, 'The Law of the Corporation as Environmental Law,' 71 *Stanford Law Review* 137 (2019) (arguing for expanding the boundaries of environmental law to encompass corporate governance).

[95] *Chamber of Commerce of the United States of America v California Air Resources Board* Case No 2:24-cv-00801-ODW-PVCx (CD Cal, filed 30 January 2024); Michael Gerrard and Eric W Orts, 'New California Legislation Would Be a Major Step Forward for Climate Disclosure' (*Climate Law Blog*, 8 August 2023)

November 2025, the Ninth Circuit Court of Appeals issued a preliminary injunction, staying the enforcement of SB 261.[96] As this chapter goes to press, the Court has not yet issued a final ruling on the merits, and litigation remains ongoing.

The political economy shaping California's legislation diverges sharply from the dynamics of federal rulemaking that have stymied the SEC's climate disclosure efforts. As legislation, the California effort enjoys several advantages. Notably, unlike the SEC which can only impose disclosure requirements on reporting companies, California can regulate both public and private companies.[97] In addition, as products of the legislative process, California's laws avoid challenges based on the narrow statutory authority and legitimacy of administrative agency rule-making.[98] The California legislature is also not limited to adopting disclosure requirements focused on investors and the capital markets, but may implement legislation aimed at benefiting consumers, stakeholders, and society at large. In addition, California's legislation was supported not just by investors but by many issuers, including the largest companies operating in California such as Salesforce, Apple, and Ikea.

A. California's Expansive Suite of Climate Disclosure Bills

California's climate disclosure bills are consistent with its role in pioneering environmental regulation.[99] The Climate Corporate Accountability Act (SB 253) requires companies with more than $1 billion in total annual revenues that do business in California to disclose their Scope 1, 2, and 3 emissions.[100] The Climate-Related Financial Risk Act (SB

<https://blogs.law.columbia.edu/climatechange/2023/08/08/new-california-legislation-would-be-a-major-step-forward-for-climate-disclosure/> accessed 13 March 2026.

[96] Paul H Kerr, Jackson W Roberts and Jonathan E Nelson, 'Ninth Circuit Enjoins California Climate Disclosure Laws' (*Skadden, Arps, Slate, Meagher & Flom LLP*, 19 November 2025) <https://www.skadden.com/insights/publications/2025/11/ninth-circuit-enjoins-california> accessed 13 March 2026.

[97] Academics and commentators have long proposed tasking agencies outside of the SEC with corporate ESG disclosure to address private companies. *See e.g.* Virginia Harper Ho, 'Modernizing ESG Disclosure' (2022) *University of Illinois Law Review* 277, 349. ("Congress could also consider authorizing the EPA or other agencies to extend environmental or climate reporting obligations to large private companies that do not fall within the SEC's purview.")

[98] To be fair, the laws delegate considerable monitoring and enforcement authority to California Air Resources Board (CARB), an agency that faces legitimacy and capacity constraints that are akin to, but arguably less severe than, the SEC. See, eg, Climate Corporate Data Accountability Act (n. 91).

[99] David Vogel, *California Greenin': How the Golden State Became an Environmental Leader* (Princeton University Press 2018).

[100] Climate Corporate Data Accountability Act (n. 91).

261) has a lower revenue threshold of $500,000 and requires public and private companies doing business in California to issue TCFD reports.[101] While initial estimates projected that SB 253 would apply to over 5,400 companies and SB 261 to over 10,000, recent estimates have scaled those numbers back to roughly 2,600 and 4,100, respectively.[102] Still, the sheer number of companies impacted is impressive—by way of comparison, the SEC's final climate disclosure rule would have applied to approximately 2,800 US public companies.[103] It is not just the number of companies that is important—California's new laws reach the so-called "Carbon Majors," the 91 largest energy companies globally responsible for over 63 percent of global emissions.[104] It is perhaps unsurprising then, that the fossil fuel industry is among the fiercest critics of California's climate disclosure bills.

In addition, the Voluntary Carbon Market Disclosures Act (AB 1305) imposes disclosure requirements on companies that rely on voluntary offsets or make climate-related commitments or claims, such as "net zero" or "carbon neutral."[105] AB 1305 relies on disclosure of carbon offsetting and accounting methods to nudge companies to reduce total carbon emissions in the so-called real economy.

The reach of California's regulation is ambitious. It extends to all public and private companies of a sufficient size that do business in California as well as parent companies located outside of California, and subsidiaries of non-US-based companies.[106] Given that nearly 80% of companies

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[101] Climate-Related Financial Risk Act (n. 92).

[102] Watershed, 'California's Climate Disclosure Rules: A Guide for Companies' (*Watershed*, 18 September 2025) <https://www.watershed.com/blog/california-ccdaa-a-guide-for-companies> accessed 10 March 2026 (discussing why subsequent revisions to the legislation have substantially reduced the number of companies impacted).

[103] AP, "SEC Approves Weakened Climate Disclosure Rule after Pushback," *Associated Press*, March 6, 2024, https://apnews.com/article/climate-change-sec-disclosure-companies-emissions-risks-b5bb510f9167ef396ee2fbc5a02ba1cf.

[104] Richard Millar, Robbie M Andrew and others, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 Climatic Change 229 (noting that this paper was the first to identify the 'carbon majors'); Matteo Gatti, Suren Gomtsian and Alessandro Romano, 'Corporate Governance for Carbon Majors' (EUI Law Working Paper No 787/2024, *Rutgers Law School*, 1 July 2024) https://ssrn.com/abstract=4887604 accessed 13 March 2026 (forthcoming).

[105] Disclosure of carbon offsets is widely supported by pro-climate academic think tanks and NGOs. Berkeley Carbon Trading Project, 'Academic Support Letter for AB 1305 & SB 390' (*University of California, Berkeley*, 17 April 2023) <https://gspp.berkeley.edu/assets/uploads/page/BCTP-Academic-support-letter-AB1305%7CSB390.pdf> accessed 10 March 2026.

[106] Department for Business, Energy and Industrial Strategy, 'Consultation Outcome: Mandatory Climate-related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and LLPs' (28 October 2021) <https://www.gov.uk/government/consultations/mandatory-climate-related-financial-disclosures-by-publicly-quoted-companies-large-private-companies-and-llps> accessed

operating in California are private, state legislation has an obvious comparative advantage over federal securities regulation which only imposes disclosure mandates on public companies. California's focus on private companies is also important because it addresses the "brown-spinning" that has plagued efforts to reduce the actual GHG emissions in the real economy.[107] Equally important, California law requires disclosure of Scope 3 emissions, although its Scope 3 disclosure mandates are, at present, more limited than those of the EU. Still, the inclusion of Scope 3 emissions in the disclosure requirement for greenhouse gas emissions aligns California with efforts in the EU and beyond.[108]

In contrast to the SEC's rulemaking process, the process by which California adopted its climate rules involved sustained efforts to engage with local businesses and to generate buy-in. These efforts stem, in part from California's distinctive business base. California is home to a substantial number of prosocial companies and benefit corporations who were early advocates of sustainability disclosure.[109] For companies like Patagonia, climate disclosure advances their prosocial brand reputation. Moreover, for those prosocial companies that are also public benefit corporations, lobbying for climate regulation is at least aligned with, if not required by, the board's fiduciary duties to advance the public benefit purpose. Patagonia offers a good example—its charter specifies its public benefit purpose as follows:

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10 March 2026, archived at <https://perma.cc/EL7Z-8PFZ> (announcing a goal to make TCFD-compliant climate disclosures mandatory economy-wide)(announcing a goal to make TCFD-compliant climate disclosures mandatory economy-wide).

[107] Alperen Gözlügöl and Wolf-Georg Ringe, 'Private Companies: The Missing Link on the Path to Net Zero' (2022) 22(2) *Journal of Corporate Law Studies* 887 ; Ravi Jagannathan, Iwan Meier and Valeri Sokolovski, 'Dirty Business: Transition Risk of Factor Portfolios' (NBER Working Paper 33535, 2025); Hiroko Tabuchi, 'Oil Giants Sell Dirty Wells to Buyers With Looser Climate Goals, Study Finds' (*The New York Times*, 10 May 2022) <https://www.nytimes.com/2022/05/10/climate/oilfield-sales-pollution.html> accessed 13 March 2026 (describing 'brown-spinning' or when public companies transfer their dirty assets to less transparent privately held companies).

[108] Renee Jones, 'The Cost of Non-Convergence: The US Climate Disclosure Rule in the Context of Emerging Global Standards' (2024) 26 *University of Pennsylvania Journal of Business Law* 1109; Stavros Gadinis, 'Dissonance in Climate Disclosure: The SEC, EU, California, and ISSB Regimes' (*Harvard Law School Forum on Corporate Governance*, 11 July 2024).

[109] In contrast to a state like Texas, California also lacks the substantial base of fossil fuel companies that are most threatened by sustainability disclosure. This likely explains California's history of leadership on climate and sustainability issues.

> "To produce high-quality products while causing no unnecessary harm, and use the company's resources to protect nature and biodiversity, support thriving communities, and fight the environmental crisis."[110]

The climate legislation built on a multi-year campaign by advocates of corporate sustainability. One example was Ceres, which describes itself as a nonprofit advocacy organization that aims to "accelerate the transition to a cleaner, more just, and resilient world."[111] It has worked extensively with diversified asset owners, such as pension funds, as well as values-aligned investors, like religious organizations and impact investors. In particular, Ceres has a long history of working with California's large and influential pension funds, CalPERs and CalSTRs.

Ceres formally co-sponsored all three bills early on. It then provided the institutional backing and the infrastructure for garnering industry support.[112] Importantly, many of the largest California companies that Ceres was trying to persuade were already members of the Ceres' Company Network. This "repeat play" between Ceres and large companies in California built trust and encouraged companies to support Ceres' lobbying and advocacy efforts.

Apple provides an example of a company that eventually publicly supported the California legislation, due to these networks and advocacy efforts, despite the costs that climate disclosure would impose on the company. Scope 3 disclosures present a unique data challenge for Apple given that those emissions include everything from how individual consumers all over the world are charging their iPhones to whether those consumers recycle products that are no longer in use. Nonetheless, Apple has a history of engaging with Ceres and other large companies to promote sustainability. For example, Apple joined the Ceres network in 2015, committing to improve its climate disclosure and commitments, and following through with ambitious goals like "Apple 2030," an agreement to achieve carbon neutrality across its entire value chain by 2030.[113]

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[110] Patagonia Works, *Annual Benefit Corporation Report* (Patagonia Works, 2023–24) https://www.patagonia.com/on/demandware.static/-/Library-Sites-PatagoniaShared/default/dw2f8292a3/PDF-US/Patagonia-2023-2024-BCorp-Report.pdf accessed 10 Mar 2026.

[111] *California Climate Corporate Data Accountability Act* (n 91).

[112] Sara Sciammacco, 'Companies Call for Climate Disclosure Legislation as California Lawmakers Return to Session' (*Ceres*, 14 August 2023) <https://www.ceres.org/resources/news/companies-call-for-climate-disclosure-legislation-as-california-lawmakers-return-to-session> accessed 13 March 2026.

[113] Zoya Mirza, 'Apple Backs California Climate Bill Requiring Large Companies to Disclose Carbon Footprint' (*ESG Dive*, 14 September 2023) <https://www.esgdive.com/news/apple-backs-california-climate-bill-carbon-footprint-disclosures-1B-companies/693667/> accessed 10 March 2026.

C. Legal Challenges

Litigation challenging the California climate disclosure legislation is ongoing. On January 30, 2024, a coalition of industry participants including the US Chamber of Commerce and American Farm Bureau Federation filed a lawsuit against the California Air Resources Board.[114] The complaint alleged that the California disclosure laws violate the First Amendment (by compelling corporations to make disclosures about climate change), and the Supremacy Clause and Dormant Commerce Clause, because it empowers California to act as a "de facto" national emissions regulator.

The future remains uncertain. On August 13, 2025, the US District Court for the Central District of California denied the request by the US Chamber of Commerce and other industry groups to block enforcement of SB 253 & SB 261 while the legal case proceeds.[115] However, on November 18, 2025, the Ninth Circuit granted a temporary injunction that pauses enforcement of SB 261, while SB 253, which requires the disclosure of Scope 1-3 emissions, remains in force. Since many issuers were already preparing to comply with both mandates, the impact of this stay is unclear.[116]

Despite these legal challenges, advisors are already recommending that issuers prepare disclosures that are California-compliant, which "is the most efficient hedge against multistate exposure".[117] This is similar to the so-called Brussels effect, which refers to the extraterritorial reach of EU sustainability disclosure mandates.[118]

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[114] Michael R Littenberg, Marc Rotter and Peter Witschi, 'California Corporate Climate Disclosures Partially Enjoined – Next Steps for Compliance?' (*Ropes & Gray LLP*, 19 November 2025) <https://www.ropesgray.com/en/newsroom/alerts/2025/11/california-corporate-climate-disclosures-partially-enjoined-next-steps-for-compliance> accessed 13 March 2026.

[115] *Chamber of Commerce of the United States of America v California Air Resources Board* (Order Denying Plaintiffs' Motion for Preliminary Injunction) CD Cal Case No 2:24-cv-00801-ODW-PVC (13 August 2025).

[116] Cooley LLP, 'Ninth Circuit Stays SB 261 as CARB Announces Numerous Company-Friendly Expectations for First Year California Climate Reporting' (*Cooley*, 24 November 2025) <https://www.cooley.com/news/insight/2025/2025-11-24-ninth-circuit-stays-sb-261-as-carb-announces-numerous-company-friendly-expectations-for-first-year-california-climate-reporting> accessed 10 March 2026 ('Given the uncertainty, we expect many companies will continue finalizing their reporting in the event the stay is lifted, and the original deadline is reinstated').

[117] Jones (n 108).

[118] See Kern Alexander and Aline Darbellay, 'Disclosure Regulation and Sustainability' in Kern Alexander, Matteo Gargantini and Michele Siri (eds), The Cambridge Handbook of

D. Other States Follow California's Lead

California has not stood alone in its efforts to mandate sustainability disclosure. Jurisdictions including New York, New Jersey, Colorado, and Illinois have recently proposed climate disclosure regimes modeled on California's.[119] Thus the California legislation may be the start of broader effort to mandate sustainability disclosure at the state level.

The pending legal challenges to California's climate disclosure laws may chill efforts by other states. At the same time, they enable California to serve as a testing ground what is legally feasible.[120] Amid the legal uncertainty, other states may benefit by waiting to see what portions of California's climate disclosure rules survive legal scrutiny and then tailoring their own rules to minimize litigation risk.

IV. The Promise and Limitations of Federalism

Given the political gridlock and inability of the federal government to address climate disclosure, it is not surprising that states, led by California, have stepped in to fill the void. There are both advantages and disadvantages to a federalist climate disclosure system which we identify here.[121] Among the advantages is the ability of states to act more quickly than the federal government, to experiment with different approaches, and to tailor disclosure regimes to local needs. At the same time, national regulation may be more efficient by subjecting companies to a single national standard. In addition, only a national regime can overcome the patchwork of regulations that are likely to result from the differing political and industry composition of individual states. This is analogous to tensions that arise between the European Union and legislation by member states.[122] While EU-level

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EU Sustainable Finance (Cambridge University Press 2025) 425 (discussing the Brussels effect with respect to the EU CSRD).

[119] Alma Petras, 'Both Convergence and Divergence Seen in Emerging State Climate Disclosure Bills' (*JD Supra*, 4 September 2025) <https://www.jdsupra.com/legalnews/both-convergence-and-divergence-seen-in-6953438/> accessed 10 March 2026 (noting that California's SB 253 and SB 261 'ignited a wave of copycat or companion proposals' in other states); New York State Senate, 'New York State Senate Passes Legislation to Strengthen Climate and Environmental Protections' (Press Release, 10 February 2026) <https://www.nysenate.gov/newsroom/press-releases/2026/new-york-state-senate-passes-legislation-strengthen-climate-and accessed> 13 March 2026.

[120] See nn 124 through 134 and accompanying text.

[121] The same concerns play a role in the choice between EU-level legislation and directives that are implemented through legislation at the member state level.

[122] An extensive literature considers the extent to which the EU can be characterized as a federalist system and compares its features to those of federalism in the US. See eg Koen

regulation promotes harmonization, member state regulation enables experimentation and customization in response to local needs.[123]

In the end, climate disclosure may chart the same course as past policy reforms, where states initiated laws and created convergence with other states, which ultimately paved the way for a national law. In the current polarized political climate, however, it is unclear whether the federalist approach will lead to even *more* divergence, which is ultimately inefficient and unworkable. This section will analyze the benefits and drawbacks of a federalist approach to climate disclosure.

A. The Advantages to a Federalist Approach

In periods of political dysfunction or extreme partisanship, like the present one, it is often impractical to implement federal law. The growing polarization over climate and individual state backlash against ESG, make a federal mandate on climate disclosure particularly challenging. As noted above, the SEC's attempt to do so raised a variety of concerns about the cost, practicality, and value of its mandates. A key advantage of federalism is that it enables individual states to fill this void and act as "laboratories" of policy innovation.[124] Testing climate disclosure mandates at the state level frees state lawmakers and regulators to experiment with different regimes, pinpointing what is feasible, both practically and legally.

Recalibrating a regulatory regime at the state level is also far simpler than rehauling national legislation. The design of California's climate disclosure laws is a particularly good example of this flexibility because the legislature has granted the California Air Resources Board (CARB) wide latitude in rulemaking and oversight. Since the legislation was enacted, CARB has been holding workshops to refine its scope, mandates, and implementation schedule. During this process, CARB has responded to concerns by various constituents, including industry. As a result, it has delayed implementation schedules and reduced penalties. Indeed, its strategy of responding to industry concerns has been so prevalent that it has frustrated the California senators who drafted the climate disclosure legislation. Indeed, Senator Wiener recently accused CARB of overstepping

Lenaerts, 'Federalism: Essential Concepts in Evolution—The Case of the European Union' (1997) 21 Fordham International Law Journal 746.

[123] Ferran and Ogburn, (n 4) 27 (discussing that neither CSRD nor CSDD are fully maximum harmonization directives, but explaining that the recent Simplification Omnibus reform package addresses this shortcoming by extending the scope of maximum harmonization in the CSDDD).

[124] *New State Ice Co v Liebmann* 285 US 262, 311 (1932) (Brandeis J dissenting) ('It is one of the happy incidents of the federal system that a single courageous State may ... serve as a laboratory; and try novel social and economic experiments ....').

its authority as an administrative agency by giving companies a one-year grace period.[125]

Federalism also encourages the diffusion of successful policies to other states.[126] As noted above, California is often the first mover in driving this diffusion, a concept that David Vogel has coined "the California Effect."[127] California's automobile emission standards in the 1960s, which prompted other states, and ultimately the federal government, to follow, is an early example. The California Effect has played out in wide-ranging areas including consumer protection, privacy, workplace safety, renewable energy, and animal welfare.[128]

This state-to-state policy diffusion, also known as horizontal diffusion,[129] is beneficial because it creates convergence among states.[130] Over time, this can pave the way for national legislation or regulation that is modeled on widely accepted and tested state laws.[131] This phenomenon, known as "bottom-up or vertical diffusion"[132] has led to uniform national regulation in policy areas from emissions standards to workplace safety.[133] For example, the California Air Resources Board developed emissions standards in 1966, and Congress expressly encouraged California to "expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation."[134] Over time, the EPA modeled several of its national

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[125] Jim Polson and Janet Adamy, 'California Regulator Gives Companies One Year Grace Period on Emissions Disclosure' (*Wall Street Journal*, 1 March 2025) <https://www.wsj.com/articles/california-regulator-gives-companies-one-year-grace-period-on-emissions-disclosure-80e7f14d> accessed 13 March 2026 ('Government agencies do not get to decide whether or not they follow the law').
[126] Bruce A Desmarais, Jeffrey J Harden and Frederick J Boehmke, 'Persistent Policy Pathways: Inferring Diffusion Networks in the American States' (2015) 109 *American Political Science Review* 392.
[127] Ibid.
[128] Jens Frankenreiter, 'Is there a "California Effect" in Data Privacy Law? Why the EU is Not the World's Privacy Cop' (*ProMarket*, 21 October 2021) <https://www.promarket.org/2021/10/21/california-effect-data-privacy-gdpr> accessed 13 March 2026 ("California's landmark Senate Bills 253 and 261 ignited a wave of copycat or companion proposals in New York, Colorado, New Jersey, and Illinois."); Jones (n 108).
[129] Taleed El-Sabawi, 'MHPAEA & Marble Cake: Parity & the Forgotten Frame of Federalism' (2020) *124 Dickinson Law Review* 591, 599.
[130] Ibid.
[131] Heather K Gerken, 'Federalism All the Way Down' (2010) 124 *Harvard Law Review* 4
[132] El-Sabawi (n 129)
[133] Daniel A Farber, 'Environmental Federalism in a Global Economy' (1997) 83 *Virginia Law Review* 1283.
[134] *Motor & Equipment Manufacturers Association v EPA* 627 F2d 1095, 1109–11 (DC Cir 1979).

standards after California's. In the context of environmental regulation, CARB has played an outsized role in informing the EPA's standards. Examples range from CARB's chemical limits (VOC limits) in paints and solvents in the 1980s-90s which served as a blueprint for the EPA's national standards; a similar story played out in EV regulation.

A major critique of the SEC's climate disclosure rule is that it enforced a once-size-fits-all standard on issuers that were incorporated in different states. States differ along a variety of dimensions including their industry base. Climate disclosure requirements are likely to fall more heavily on certain industries such as fossil fuels which are concentrated in states such as Texas, Pennsylvania, and Louisiana. In contrast to this blunt approach, a federalist approach to climate disclosure enables states to align their mandates to what is workable in each state.[135] In some respects, this mirrors the EU's approach to climate disclosure. The EU frequently legislates through directives, which are not directly binding on any jurisdiction, but requires EU member states to implement that directive through country-specific legislation. The degree of harmonization produced by a directive varies—some establish minimum harmonization, allowing states to adopt stricter rules while others impose full harmonization, limiting variation in member state regulation. Recent sustainability reporting measures, including the CSDDD and CSRD, mostly adhere to minimum harmonization.[136]

B. The Disadvantages of a Federalist Approach to Climate Disclosure

There are numerous practical disadvantages and legal limitations to a federalist approach. To begin with, the flipside of a highly tailored approach is regulatory fragmentation and overlapping standards, which burden businesses with high compliance costs. To navigate this, corporations often comply with the strictest standard, which, as discussed above, is often California's. While this may be logical, albeit costly, as a business matter, there are also normative concerns with California using its market power to

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[135] Danielle Stokes, 'Renewable Energy Federalism' (2022) 106 *Minnesota Law Review* 1757, 1759–60.

[136] Global Policy Watch, *EU CSDDD/CSRD Omnibus Published in Official Journal: Transposition, Delegated Acts, and Guidelines Are Next* (Global Policy Watch, 26 Feb 2026) https://www.globalpolicywatch.com/2026/02/eu-csddd-csrd-omnibus-published-in-official-journal-transposition-delegated-acts-and-guidelines-are-next/; see also Veronika Montes and Daja Apetz-Dreier, *EU Institutions Agree Substance-Related Amendments to CSRD and CSDDD Under ESG Omnibus* (Morgan Lewis, Mar 2026) https://www.morganlewis.com/pubs/2026/03/eu-institutions-agree-substance-related-amendments-to-csrd-and-csddd-under-esg-omnibus.

become the de facto national regulator.[137] California's high standards may, and often do, override the interests of less populated states.

Notwithstanding these concerns, corporations can, at least in theory, invest in one consistent internal compliance standard. But the California Effect only works when standards vary in degree, not when legal mandates are in direct conflict, such that complying with one state's law requires violating another's. That is the world that corporate executives are currently navigating in the US. Although state-level variation may reflect policy innovation and experimentation, it may also be tethered to partisan politics.[138]

The rapid spread of both anti and pro-ESG legislation seems to fit this pattern, portending a future with conservative and progressive laws that are irreconcilable. Unfortunately, we may already be there—as previously discussed, Texas enacted legislation preventing its state funds from doing business with entities that boycott or divest from the fossil fuel industry,[139] while Maine *requires* its state funds to divest from it.[140] Although a federal court recently struck down Texas' law as unconstitutional, the broader trend of polarized legislation is likely to continue in climate disclosure, with progressive states mandating and conservative states prohibiting climate disclosure.

Another weakness of federalism is its potential to result in a regulatory "race to the bottom."[141] To the extent that states are legally limited in their ability to regulate economic activity that occurs outside their borders – a point we consider in further detail below – businesses may seek to avoid burdensome regulations by shifting their operations to a different state. Often, businesses choose to operate in states with lax environmental or workplace safety standards. States have an interest in remaining attractive places to do business because they suffer the loss of jobs and tax revenue when businesses move jurisdictions. In these cases, federalism does not create better policies or more tailored policies but dilutes standards and ultimately harms the state's citizens.

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[137] Elizabeth Earle Beske, 'Horizontal Federalism & the Big State "Problem"' (2024) 65 *Boston College Law Review* 2685.
[138] Stefano DellaVigna and Woojin Kim, 'Policy Diffusion and Polarization across U.S. States' (2025) *Review of Economic Studies* 70.
[139] Texas Legislature, 87th Legislature, Regular Session (2021), codified at Texas Government Code ch 809.
[140] Maine Revised Statutes, Title 5, § 1957-1 (2023) https://legislature.maine.gov/statutes/5/title5sec1957-1.html accessed 17 February 2026].
[141] Kirsten H Engel, 'State Environmental Standard-Setting: Is There a Race and Is It to the Bottom?' (1996) 48 *Hastings Law Journal* 271.

In addition to these practical challenges, there are significant legal limits to a federalist approach to climate disclosure. The legal theories underlying this litigation, and the many other lawsuits challenging both pro-and anti-ESG legislation—are far too wide-ranging to address fully here. We end this section with a brief discussion of the Dormant Commerce Clause because it illuminates the constraints of a federalist approach to climate disclosure.

Article I of the US Constitution gives Congress authority over interstate commerce and commerce with foreign nations. Effectively, the doctrine prevents states from regulating extraterritorially and ensures that the United States "speaks with one voice" in matters of foreign commerce. The Chamber of Commerce's pending litigation alleges, among other claims, that California's climate disclosure laws violate the Dormant Commerce Clause by regulating activity beyond California's borders.[142] It remains to be seen whether the extraterritorial reach of California's disclosure laws is improper.[143] Under the prevailing balancing test in *Pike v. Bruce Church, Inc.*, a court may find that the burden on interstate commerce is too high because large compliance costs outweigh California's interest in climate-risk transparency.[144]

However, the Supreme Court's recent decision in *National Pork Producers Council v. Ross* complicates the analysis.[145] Although *Pike* suggests a pathway for challenging California's disclosure regime, *Pork Producers* upheld a similarly far-reaching California regulation requiring that producers of eggs and meat adhere to humane animal treatment standards to sell their products in California. As Katherine Florey has observed, this decision has left the broader question of how far the Dormant Commerce Clause limits a state's ability to regulate extraterritorially unresolved.[146] Whether California's climate disclosure laws will survive a dormant Commerce Clause challenge is therefore unclear.[147]

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[142] Chamber v. California Air Resources Board, No. 2:24-cv-00801 (C.D. Cal. Jan. 30, 2024).
[143] *Healy v Beer Institute*, 491 U.S. 324 (1989) (holding that a state law regulating out-of-state pricing violated the Commerce Clause by impermissibly controlling interstate commerce).
[144] *Pike v Bruce Church, Inc* 397 US 137 (1970).
[145] *National Pork Producers Council v Ross* 598 US 356 (2023).
[146] Katherine Florey, 'The New Landscape of State Extraterritoriality' (2024) 102 *Texas Law Review* 1135, 1137–38 (discussing the constitutional doctrines that limit states' ability to regulate extraterritorially and observing that the National Pork case extended those limits—"Yet even as various Justices express anxiety about state law that extends too broadly, the Court sheds remarkably little light on which doctrines, if any, should step in to promote restraint.").
[147] Nat'l Pork Producers (n 145).

California's climate disclosure laws may also violate the Foreign Dormant Commerce Clause.[148] This doctrine is rooted in preserving the federal government's control over diplomacy and trade, which can be undermined when states, particularly large and powerful ones like California, adopt conflicting positions. Of course, not all state laws that diverge from federal preferences violate the Foreign Dormant Commerce Clause—otherwise California's privacy and consumer-protection laws would be unconstitutional. But in the context of climate-disclosure mandates the federal government has not remained merely silent, as was the case with privacy, but has made its position clear—it opposes mandatory climate disclosure and has been leveraging its trade policy to weaken emerging global standards. As Curtis Milhaupt has observed, geopolitical rivalry is increasingly impacting private businesses.[149] Sustainability disclosure is one example of this phenomenon at play. Moreover, the US exports oil and benefits from fossil fuel expansion, at least in the short term. This creates the possibility that the same cross-border activity will face conflicting obligations across red states, blue states, and the federal government.

Whatever the pros and cons, the US federalist system, coupled with the growing geopolitical concerns surrounding sustainability, mean that sustainability disclosure in the US will chart a path that is different from the EU's approach.

V. Conclusion

The current regulatory and political limbo with respect to sustainability disclosure in the United States creates an exceedingly difficult environment for issuers[150] Going forward, issuers will likely face inconsistent and potentially conflicting disclosure requirements as well as backlash against the adoption of sustainable business practices. Recent signals that EU disclosure mandates may be changing add to that difficulty.[151] At the same time, investors are likely to continue to demand sustainability information

[148] Japan Line, Ltd. v County of Los Angeles 441 US 434 (1979) (emphasizing the need for the nation to speak with "one voice" to preserve uniformity). Although the doctrine has largely been applied to state tax laws, ESG mandates may raise similar concerns when they impose overlapping financial or reporting burdens.

[149] Curtis J Milhaupt, 'Corporate Governance in an Era of Geoeconomics' (2025) 25(2) *Journal of Corporate Law Studies* 281, 281–320.

[150] Michael S McDonough, Jillian Marullo and Cara M MacDonald, 'Navigating the Diverging Landscape of Climate Disclosure Laws' (*Gravel2Gavel Construction & Real Estate Law Blog*, 12 May 2025) <https://www.gravel2gavel.com/climate-disclosure-laws-trump-states> accessed 13 March 2026.

[151] Yusuf Khan, 'EU Set to Scale Back Sustainability Reporting Rules for Companies' (*Wall Street Journal*, 9 December 2025).

and to argue that an issuer's sustainability practices involve decisions and risks that are economically material.

We have had informal conversations with industry participants, and those conversations suggest that the shifting regulatory landscape is not undermining the robustness of climate disclosure, at least not yet. This is consistent with the data that we discuss above—issuers are still producing climate disclosure and increasingly obtaining assurance for them. At the same time, issuers are attempting to stay out of the political fray by removing terms like "ESG" from reports or refraining from making "Net-Zero" commitments that may attract scrutiny for state attorneys general.

Two factors likely contribute to the state of play. First, it is important to remember that the demand for sustainability disclosure arose, in the first instance from market forces. Investors demanded this information and their demands were a substantial factor generating regulatory reform. In response to what appeared to be cohesion among investor and regulator preferences, large public companies did the reasonable thing—they invested time and resources into building sustainability reporting systems. Many companies now have extensive infrastructure and personnel dedicated to climate reporting. Accounting firms also stepped in, and the assurance practices for climate reporting rapidly matured. Given the mandates for Scope 3 that require data from smaller companies, the ripple effects extended beyond the large issuers. In short, the ESG backlash emerged after the climate reporting infrastructure was well underway. Having invested resources in sustainability reporting, issuers are unlikely to dismantle those efforts immediately, especially given the potential that the regulatory perspective on such disclosure may shift in the future with the political winds.

The backlash has reached a fever pitch and will undoubtedly impact the quantity and quality of climate reporting. But the degree of that impact remains uncertain because countervailing forces remain strong. Jurisdictions like California, other states, and numerous countries continue to require climate reporting. The combined influence of these forces means that issuers will continue to benefit from maintaining their climate disclosure efforts.

In addition, the regulatory state of play remains uncertain. As our discussion notes, the US federalist system offers multiple vehicles for regulatory experimentation. States have served as laboratories with respect to a variety of controversial policy issues. In some cases, state innovation has coalesced in a uniform national policy; in other areas, state-level variation remains. Whether or not California's current efforts survive judicial challenge, sustainability disclosure remains an important policy issue, not only in California but across multiple jurisdictions, and we can expect further developments by states designed to counterbalance the political trends at the federal level.

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