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MURKY SKIES AHEAD! ANALYZING EXECUTIVE AUTHORITY AND FUTURE POLICIES REGARDING CORPORATE DISCLOSURE OF GREENHOUSE GASES

CHANDLER CRENSHAW*

INTRODUCTION

Should the CEO of a large public corporation be required to inform investors whether or not he or she eats oranges? This classical question posed by many corporate lawyers regarding disclosure requirements may seem like an oddity, but the Securities and Exchange Commission (“SEC”) requires corporations to disclose material information of importance to investors.¹ Steven Davidoff Solomon, a Berkeley law professor, describes the current law of materiality as “murky” and “quirky.”² Defining materiality, he sarcastically comments, “It’s all a matter of materiality.”³

A lack of a bright-line test for materiality sparked a growing movement to broaden disclosure requirements. Some lawyers insist the health of a CEO should be included.⁴ Similarly, environmentalists embrace the approach that materiality should be interpreted broadly. In their fight to curb climate change, environmentalists want corporate boards to inform investors of the amount of greenhouse gas emissions produced by its business.⁵

Authorized by a congressional statute, the SEC requires corporations through its Regulation S-K to disclose all material information that

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¹ Steven D. Solomon, *In Corporate Disclosure, a Murky Definition of Material*, N.Y. TIMES: DEALBOOK (Apr. 5, 2011), <https://dealbook.nytimes.com/2011/04/05/in-corporate-disclosure-a-murky-definition-of-material/> [<https://perma.cc/KKP9-E8KV>].

² *Id.*

³ *Id.*

⁴ David Sarno & Walter Hamilton, *Apple’s silence on Steve Jobs’ health may have broken federal securities rules*, L.A. TIMES (June 25, 2009), <http://articles.latimes.com/2009/jun/25/business/fi-apple-jobs25> [<https://perma.cc/M6UG-UXJ6>].

⁵ Letter from Henry M. Paulson, Robert E. Rubin & George P. Shultz, Risky Business Project, to Brent J. Fields, SEC Secretary 2 (July 20, 2016) (emphasis omitted), http://www.eenews.net/assets/2016/07/22/document_cw_01.pdf [<https://perma.cc/52NB-75WT>] [hereinafter Paulson, Rubin & Shultz].

may be of interest to investors.⁶ Material disclosures typically consist of information investors would or should like to know about companies, such as ongoing lawsuits, that will ultimately influence the price of the company's stock.⁷

Adhering to these concerns of environmentalist groups, the SEC in 2010 published interpretative guidelines signaling greenhouse gas emissions may be deemed material.⁸ Future rules may be issued. In a report released in early 2016, the SEC considered proposing new rules to expand the requirements of material disclosures to include greenhouse gas emissions.⁹ The agency argued climate change influences business, and investors of corporations need to know what business decisions are being made regarding greenhouse gas emissions.¹⁰ Currently, a rule has yet to be promulgated.

Due to a lack of clarity from the SEC, a growing divide now exists among environmentalists and the business community. Members of Congress, a few state attorneys general, and environmental coalitions lobbied the SEC for stricter rules.¹¹ On the other hand, some business authorities remain concerned about the SEC overreaching in its authority.¹²

This Note will address whether greenhouse gases should be considered a material disclosure for corporations under current SEC regulations. Upon review of Regulation S-K and case law, the SEC should avoid labeling emissions of greenhouse gases as "material" information for investors. While the SEC may have the best intentions in suggesting corporations disclose greenhouse gases as a way to highlight the issue of global warming, thereby reducing carbon dioxide emissions into the atmosphere, the call to propose a rule based on current law could lead to

⁶ See Regulation S-K, 17 C.F.R. § 229.101 (2011).

⁷ *Id.*

⁸ See generally SEC, COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, SEC Interpretation, Release Nos. 33-9106, 34-61469, FR-82 (Feb. 8, 2010), <https://www.sec.gov/rules/interp/2010/33-9106.pdf> [<https://perma.cc/8DK2-M6LF>] (providing guidance to public companies regarding the Commission's existing disclosure requirements as they apply to climate change matters).

⁹ See generally Business and Financial Disclosure Required by Regulation S-K, SEC Interpretive Letter, Release Nos. 33-10064, 34-77599 (2016), <https://www.sec.gov/rules/concept/2016/33-10064.pdf> [<https://perma.cc/B4FA-M4DR>] (seeking public comment on modernizing certain business and financial disclosure requirements in Regulation S-K).

¹⁰ *Id.*

¹¹ *Id.*

¹² David Gelles, *S.E.C. Is Criticized for Lax Enforcement of Climate Risk Disclosure*, N.Y. TIMES (Jan. 23, 2016), <https://www.nytimes.com/2016/01/24/business/energy-environment/sec-is-criticized-for-lax-enforcement-of-climate-risk-disclosure.html>.

information overload for investors and ultimately be ruled immaterial by the courts.

Ultimately, either Congress or the states should pass legislation in order for corporate disclosures to be considered material for investors on this issue. However, recent political shifts at both the federal and state levels may make the future of passing such statutes unclear. Environmental groups may be pressed to achieve disclosure through non-governmental means. Environmental groups should engage with corporations directly, raise awareness of societal impact issues with investors, and advocate for change through the political process.

I. SECURITIES AND EXCHANGE COMMISSION'S DISCLOSURE REQUIREMENTS

The SEC requires certain corporate disclosures through its Regulation S-K.¹³ The following section will present a brief history of the SEC and Regulation S-K. In addition, proposed changes to Regulation S-K regarding climate change amendments will be analyzed.

A. *The SEC and Regulation S-K*

During the Great Depression, Congress established the Securities and Exchange Commission with the Securities Act of 1933 and the Securities Exchange Act of 1934.¹⁴ The SEC states its mission “is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”¹⁵ Through the Corporate Finance Office, the SEC regulates corporate disclosure.¹⁶ The office dictates, “[Public corporations] with more than \$10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports.”¹⁷

The Securities Exchange Act of 1934 reads: “It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary . . . in connection with . . . any solicitation of security holders in opposition to or in favor of any such offer,

¹³ See 17 C.F.R. § 229.101.

¹⁴ See 15 U.S.C. § 77(a) (1934); see also 15 U.S.C. § 78(a) (1934).

¹⁵ SEC, *What We Do*, <https://www.sec.gov/about/whatwedo.shtml> [<https://perma.cc/9J8X-ZJ5H>] (last modified June 10, 2013).

¹⁶ *Id.*

¹⁷ SEC, *The Laws That Govern The Securities Industry*, <https://www.sec.gov/answers/about-lawsshtml.html> [<https://perma.cc/9J8X-ZJ5H>] (last modified Oct. 1, 2013).

request, or invitation.”¹⁸ The SEC may create rules and regulations to enforce this act.¹⁹

The SEC promulgated Regulation S-K to require corporations to disclose specific information to the federal government.²⁰ Initially, the SEC held two disclosure regimes under the two authorization statutes passed during the Great Depression, and Regulation S-K harmonized disclosure requirements into one location.²¹ This single, integrated disclosure system went into effect in 1977.²²

B. Current Regulation S-K Enforcement

The first Regulation S-K only required two disclosures: a description of the business and a description of properties.²³ Over the years, Regulation S-K grew to contain twenty-seven disclosure requirements.²⁴ Regarding the goal of Regulation S-K, the SEC writes, “[T]he Commission may exercise its rulemaking authority to prescribe additional information or may permit prescribed information to be omitted as it deems necessary or appropriate in the public interest or for the protection of investors.”²⁵ These disclosures must be placed on the form known as Regulation S-X.²⁶

The SEC views the disclosure requirements as a balancing test.²⁷ On one hand, the SEC designed Regulation S-K to reduce information asymmetry, allowing investors to make voting decisions with more accurate share prices, less fraud, and a better understanding of the corporation as a whole.²⁸ On the other hand, the SEC writes, “There is also a possibility that high levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities.”²⁹ Disclosure should attempt to not shift too far toward either extreme.³⁰

¹⁸ Securities Exchange Act of 1934, Pub. L. No. 112-158, § 14(e) (1934) (as amended 2012).

¹⁹ *Id.*

²⁰ See 17 C.F.R. § 229.101.

²¹ See Business and Financial Disclosure Required by Regulation S-K, *supra* note 9, at 10.

²² *Id.* at 12.

²³ *Id.*

²⁴ *Id.* at 13.

²⁵ *Id.*

²⁶ Application of Regulation S-X, 17 C.F.R. § 210.1-01(2011).

²⁷ See Business and Financial Disclosure Required by Regulation S-K, *supra* note 9, at 13–15.

²⁸ *Id.* at 13–14.

²⁹ *Id.* at 14.

³⁰ *Id.* at 15.

The SEC may use four sections of Regulation S-K for potential environmental law reform.³¹ First, Item 101 of Regulation S-K requires the description of the corporation's business.³² Requirements under business disclosures include material changes in employment, assets on hand, acquisitions, corporate restructuring, and the narrative of a business, including trademarks, patents, and raw materials.³³ The regulation also states: "Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment."³⁴ Smaller companies must also report requirements of compliance with environmental laws.³⁵

Second, Item 103 requires any pending lawsuits or routine litigation incidental to the business to be reported.³⁶ Litigation involving environmental law is not considered routine unless the proceeding is material to the business, the lawsuit exceeds 10% of current assets of the registrant, or sanctions more than \$100,000 are placed on the corporation.³⁷ Otherwise, the lawsuits need not be reported for environmental purposes.³⁸

Third, Item 503 requires risk factors to be disclosed.³⁹ Risk factors include a lack of an operating history, lack of profitable operations in recent periods, financial positions, business or proposed business, and securities markets, among others.⁴⁰ Item 503 does not specifically address adhering to environmental regulations.⁴¹

Finally, Item 303 requires a management's discussion and analysis of financial conditions and results of operations.⁴² This section requires the reporting of contractual obligations, including long-term debt obligations, capital lease obligations, operating leases, and purchasing

³¹ See COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, *supra* note 8, at 12–13, 15.

³² 17 C.F.R. § 229.101.

³³ *Id.*

³⁴ See *id.* § 229.101(c)(xii).

³⁵ See *id.* § 229.101(h)(xi).

³⁶ See *id.* 17 C.F.R. § 229.103 (2011).

³⁷ See *id.* § 229.103(5) Instruction 5 to Item 103.

³⁸ *Id.*

³⁹ See 17 C.F.R. § 229.503 (2011).

⁴⁰ See *id.* § 229.503(c)(1)–(5).

⁴¹ *Id.*

⁴² See 17 C.F.R. § 229.303 (2011).

operations.⁴³ Corporations must disclose material changes in operations.⁴⁴ Similar to Item 503, Item 303 mentions nothing explicitly regarding environmental laws or regulations.⁴⁵

C. The Disclosure of Greenhouse Gases Debate

In 2010, the SEC published guidance documents regarding disclosure requirements for climate change.⁴⁶ The SEC wrote, “For some companies, the regulatory, legislative and other developments . . . [climate change] could have a significant effect on operating and financial decisions[.]”⁴⁷ Corporations may eventually need to consider physical changes in the land, pending legislation, risk factors such as increased costs, and international accords while adhering to Regulation S-K.⁴⁸

Corporations may be required to disclose greenhouse gases based on Item 101, Item 103, Item 303, and Item 503 of Regulation S-K.⁴⁹ The SEC clarified:

This interpretive release is intended to remind companies of their obligations under existing federal securities laws and regulations to consider climate change and its consequences as they prepare disclosure documents to be filed with us and provided to investors. We will monitor the impact of this interpretive release on company filings as part of our ongoing disclosure review program.⁵⁰

Initially viewed as strengthening corporate disclosure laws, the 2010 documents received little attention from the SEC, leading many environmental groups to criticize a lack of enforcement of the climate change disclosure regime.⁵¹ Regarding the 2010 guidelines, the SEC reduced its comment letters to large corporations from forty-nine in 2011 to zero in 2013.⁵² One commenter noted, “[T]he S.E.C. had taken its eye off the ball.”⁵³

⁴³ *Id.* § 229.303(a)(5).

⁴⁴ *Id.* § 229.303(b)(1)–(2).

⁴⁵ *See generally id.* § 229.303.

⁴⁶ *See generally* COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, *supra* note 8.

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* at 5–6, 24–26.

⁴⁹ *Id.* at 22.

⁵⁰ *Id.* at 27.

⁵¹ Gelles, *supra* note 12.

⁵² *Id.*

⁵³ *Id.*

In 2015, thirty-five members of Congress wrote SEC chair Mary Jo White a letter desiring enforcement and clarification.⁵⁴ The letter demands the SEC clarify its position on the guidance documents by asking questions about compliance, enforcement, and communication with large corporations about disclosures.⁵⁵ In addition, a coalition of sixty-two institutional investors also wrote a letter to the SEC chair in 2015 and called for stricter enforcement rules for disclosure.⁵⁶ The coalition hoped the SEC would improve its reporting on carbon asset risks in an effort to curb greenhouse gas emissions.⁵⁷

As a response to this inaction on the guidance documents, a debate grew nationally regarding the SEC's role in greenhouse gas emissions. In 2016, three former secretaries of the United States Treasury wrote a letter to the SEC advocating, "[W]e recommend that the Commission now move to promote and enforce mandatory and meaningful disclosures of the material effects of climate change on issuers, and also that the SEC work to provide more industry-specific guidance on how to account for climate risk."⁵⁸

Toward the other extreme, the R Street organization opposes any further regulations.⁵⁹ The group stresses required disclosures relating to greenhouse gas emissions are immaterial for a reasonable investor to know before voting.⁶⁰ In 2016, they concluded, "Here, the [Obama] White House doesn't even pretend that this is in any way about protecting investors. At best, requiring companies to disclose immaterial risks amounts to pointless paperwork. At worst, it paints a target on some companies' backs[.]"⁶¹

The United States Chamber of Commerce takes the approach that increasing disclosures leads to information overload for investors.⁶² The

⁵⁴ See generally Letter from 35 Members of Congress to Mary Jo White, SEC Chair (Oct. 29, 2015), <https://cartwright.house.gov/sites/cartwright.house.gov/files/SEC%20Climate%20Letter%20October%202015.pdf> [<https://perma.cc/53BP-7T7X>].

⁵⁵ *Id.*

⁵⁶ See generally Letter, Inadequate Carbon Asset Risk Disclosure by Oil and Gas Companies, to Mary Jo White, SEC Chair (Apr. 17, 2015), <https://www.sec.gov/comments/s7-06-16/s70616-214.pdf> [<https://perma.cc/FB8D-WGPU>].

⁵⁷ *Id.*

⁵⁸ Paulson, Rubin & Shultz, *supra* note 5.

⁵⁹ R.J. Lehmann, *White House overreaches with SEC climate disclosure plan*, R STREET INST. (Aug. 18, 2016) (emphasis omitted), <http://www.rstreet.org/2016/08/18/white-house-overreaches-with-sec-climate-disclosure-plan/> [<https://perma.cc/9BEQ-JGNZ>].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² U.S. CHAMBER OF COMMERCE, CORPORATE DISCLOSURE EFFECTIVENESS: ENSURING A BALANCED SYSTEM THAT INFORMS AND PROTECTS INVESTORS AND FACILITATES CAPITAL

Regulation S-K process should be leaner and simpler in order to not confuse investors.⁶³ They conclude, “While it is appropriate for disclosure requirements to evolve, it also is important that they do so in a manner that retains the focus on information that is important to a reasonable investor’s ability to understand and evaluate a business.”⁶⁴

The Business Roundtable offers a similar argument, believing information overload is detrimental to investors.⁶⁵ Corporations addressing societal issues with disclosure regimes are immaterial and speculative at best toward achieving desired ends.⁶⁶ They cite a rule procured by the Dodd-Frank Act regarding conflict diamonds that required corporations who may have had slight traces of diamonds mined from the Democratic Republic of Congo to disclose.⁶⁷ Ultimately, this rule cost corporations \$3–4 billion dollars to implement and deterred corporations from extracting from mines led by non-warlord groups in the country.⁶⁸ Placing a “scarlet letter” on the region, the Business Roundtable writes, “Despite good intentions, evidence is mounting that the conflict minerals rule is actually exacerbating the problem in the DRC.”⁶⁹ Similarly, while the SEC may have good intentions for requiring corporations to disclose greenhouse gases, compliance issues and negative externalities could lead to crippling economic effects.

In response, the SEC in 2016 issued a concept release requesting corporations to comment on disclosure regimes for emissions of greenhouse gases.⁷⁰ The questions asked were as follows: whether current climate change–related disclosures are insufficient, whether existing disclosure requirements are adequate to elicit the information that would permit investors to evaluate material climate change risk, and additional

FORMATION 4 (Aug. 5, 2014), https://www.uschamber.com/sites/default/files/021053_ccmc_disclosure.pdf [<https://perma.cc/ER6Z-V54C>].

⁶³ *Id.*

⁶⁴ *Id.* at 24.

⁶⁵ BUSINESS ROUNDTABLE, *THE MATERIALITY STANDARD FOR PUBLIC COMPANY DISCLOSURE: MAINTAIN WHAT WORKS* 8 (Oct. 2015), <http://businessroundtable.org/sites/default/files/reports/Materiality%20White%20Paper%20FINAL%2009-29-15.pdf> [<https://perma.cc/VB3L-KA66>].

⁶⁶ *Id.*

⁶⁷ *Id.* at 8–9.

⁶⁸ *Id.*

⁶⁹ *Id.* at 9.

⁷⁰ Clare Condon, *SEC Aims to Change Climate Risk Disclosure Rules*, EHS DAILY ADVISOR (May 25, 2016), <http://ehsdailyadvisor.blr.com/2016/05/sec-aims-to-change-climate-risk-disclosure-rules/> [<https://perma.cc/Z6HZ-RCYF>].

disclosure requirements or guidance that would be appropriate to elicit that information.⁷¹

The SEC has yet to take action on these comments, and responses could be used to propose a new rule under the Administrative Procedure Act or create a new disclosure regime.⁷² While uncertain about what an exact rule may be, business community leaders will no doubt raise the issue in court. Determining whether or not greenhouse gas emissions are considered material for investors will be critical for the survival of a rule or disclosure regime.⁷³

II. REGULATION S-K AND THE COURTS

The following section will focus on the Supreme Court's interpretation of "materiality" as a fact-inquiry test. Recent proposals for Regulation S-K regarding materiality of greenhouse gas emissions will be discussed under this framework. While environmentalists present a strong argument for "materiality," courts remain reluctant to allow agency deference in environmental law cases.

A. *What is Materiality?*

At the center of this debate is the meaning of the word material throughout Regulation S-K. Three major rules exist regarding materiality for SEC disclosures. Securities Act Rule 408 requires material information be included in a registrant statement.⁷⁴ Regarding the express content of these statements, the rule reads, "[T]here shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading."⁷⁵ Exchange Act Rule 12b-20 echoes Rule 408.⁷⁶ Lastly, Rule 10b-5 expands the sentiment of the previous two rules by making it unlawful to disclose misleading or untrue statements that

⁷¹ *Id.*

⁷² See Tyler Gellasch, *Towards a Sustainable Economy: A Review of Comments to the SEC's Disclosure Effectiveness Concept Release 14* (Sept. 2016), <https://www.citizen.org/sites/default/files/sustainableeconomyreport.pdf> [<https://perma.cc/Q4Z8-W8KH>].

⁷³ See *id.* at 19–20.

⁷⁴ 17 C.F.R. § 230.408(a) (2011).

⁷⁵ *Id.*

⁷⁶ See 17 C.F.R. § 240.12b-20 (2011).

are material.⁷⁷ Despite raising the importance of materiality, the SEC failed to define “material.”⁷⁸

The Supreme Court shed light on the definition of “material” in cases over the past few decades. In the *TSC Industries, Inc.* case, the Supreme Court, hearing an insider trading case, clarified, “An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”⁷⁹ Proof of shareholder opinion is not required to prove materiality, rather “the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”⁸⁰ The Supreme Court rejected a circuit court materiality test which required all facts of importance be disclosed.⁸¹ Rather, the test should focus on the significance of a fact and not a comprehensive list of all facts.⁸²

A decade later, the Supreme Court addressed materiality in the *Basic* case, reaffirming the standard set forth in *TSC Industries*.⁸³ This case focused on mergers, and the Court ruled the test covers all SEC materiality requirements.⁸⁴ In its decision, the Court stated, “Whether merger discussions in any particular case are material therefore depends on the facts.”⁸⁵ The test should be viewed as a fact-specific inquiry.⁸⁶

The Supreme Court last revisited materiality in 2011.⁸⁷ In a unanimous decision, Justice Sotomayor wrote that a pharmaceutical company “failed to disclose reports of a possible link between [its] leading product, a cold remedy, and loss of smell, rendering statements made by Matrixx misleading.”⁸⁸ Furthermore, the Court expressed, “[M]ateriality of adverse event reports cannot be reduced to a bright-line rule. Although in many cases reasonable investors would not consider reports of adverse events to be material information, respondents have alleged facts plausibly suggesting that reasonable investors would have viewed these particular

⁷⁷ *Id.* § 240.10b-5(b).

⁷⁸ *Id.*

⁷⁹ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

⁸⁰ *Id.*

⁸¹ *Id.* at 445.

⁸² *Id.*

⁸³ *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

⁸⁴ *Id.*

⁸⁵ *Id.* at 239.

⁸⁶ *Id.* at 240.

⁸⁷ *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011).

⁸⁸ *Id.* at 30.

reports as material.”⁸⁹ This opinion appears to broaden the definition of materiality, allowing for flexibility and case-by-case inquiries.

The Supreme Court decisions suggest materiality should not be considered all inclusive. Rather, the test should be an inquiry of significant facts that may influence investors. This standard should filter out irrelevant information.⁹⁰ The Business Roundtable cites 100 times the SEC failed to include societal issues as material, arguing, “[I]t is impossible to provide every item of information that might be of interest to some investor in making investment and voting decisions.”⁹¹ Materiality standards evolve over time but should not address specific societal concerns if not of importance to investors.⁹²

B. Greenhouse Gases and Materiality

As noted above, four sections of Regulation S-K may address climate change.⁹³ Those four items are the description of both business and legal proceedings, risk factors for investors, and management analysis.⁹⁴ The SEC believes the following issues may trigger disclosure (pending legislation and regulations), physical changes to the environment, risk factors, and adhering to international accords.⁹⁵ While a rule promulgated by the 2010 guidelines may allow for investors to become more aware of climate change, the SEC should limit the scope of materiality due to the potential for information overload and immateriality concerns.

First, the SEC contends greenhouse gas emissions should be considered as part of a business description under Item 101 of Regulation S-K.⁹⁶ Item 101 requires businesses to disclose and comply with current environmental laws regarding the discharge of emissions into the atmosphere.⁹⁷ The 2010 guidelines suggest that legislation such as “cap-and-trade” should also be taken into consideration as part of a business description because such legislation could lead to increased costs and

⁸⁹ *Id.* at 30–31.

⁹⁰ BUSINESS ROUNDTABLE, *supra* note 65, at 5.

⁹¹ *Id.* at 5–6 (quoting Securities Act Release No. 5627 at 7) (Oct. 14, 1975).

⁹² *Id.* at 7–8.

⁹³ COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, *supra* note 8, at 1–2.

⁹⁴ *Id.*

⁹⁵ *Id.* at 22.

⁹⁶ *Id.*

⁹⁷ 17 C.F.R. § 229.101(c)(1)(xii).

reduced profits.⁹⁸ While the “cap-and-trade” concern may have been a federal issue in 2010, no such legislation has been brought to a vote in either branch of Congress in the seven years following the issuance of the guidance documents.⁹⁹

Current language of Item 101 also requires compliance with laws regarding emissions but not disclosing a quantifiable amount of actual emissions.¹⁰⁰ Environmentalists hold a strong argument for physical changes in the land being considered material in business descriptions; however, business leaders would probably counter-argue such information is speculative and leads to information overload, voiding it as immaterial.¹⁰¹ The Supreme Court in the *Basic* and *Matrixx* decisions also stated materiality should be fact-specific to organizations and should not be all inclusive.¹⁰² Not all businesses would be impacted by changing lands. While there may be some flexibility and strong arguments on both sides, disclosing under Item 101 leans more toward societal concerns potentially leading to negative externalities.¹⁰³

Second, the SEC’s legal proceedings requirement probably does not apply. The SEC requires public corporations to disclose all legal proceedings and investigations involving the company.¹⁰⁴ The disclosure of greenhouse gas emissions is not inherently litigious. A lawsuit against a public company regarding pollution would be disclosed regardless, and further requiring carbon dioxide emissions to be disclosed for legal purposes would be both superfluous and not within the scope of the litigation requirement.¹⁰⁵

Third, Regulation S-K requires risk factors regarding the organization’s operating history, profitable operations, financial position, proposed business, and involvement in equitable markets.¹⁰⁶ While Item 503 does

⁹⁸ COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, *supra* note 8, at 23–24.

⁹⁹ CTR. FOR CLIMATE AND ENERGY SOL., *Congress Climate History*, <https://www.c2es.org/content/congress-climate-history> [<https://perma.cc/Y49B-9H8P>]; Erica Martinson, *In States, Cap and Trade Lives On*, POLITICO (May 27, 2014, 11:32 PM), <http://www.politico.com/story/2014/05/cap-and-trade-states-107135> [<https://perma.cc/G23K-DKM7>].

¹⁰⁰ 17 C.F.R. § 229.101(c)(1).

¹⁰¹ BUSINESS ROUNDTABLE, *supra* note 65, at 8.

¹⁰² *See* *Matrixx Initiatives, Inc.*, 563 U.S. at 30; *see also* *Basic Inc. v. Levinson*, 485 U.S. at 236.

¹⁰³ *See, e.g.*, BUSINESS ROUNDTABLE, *supra* note 65, at 8–9 (stating that while the conflict minerals provision of the Dodd-Frank Act may have been rooted in good intentions, its execution created unnecessary costs and problems).

¹⁰⁴ *See* 17 C.F.R. § 229.103.

¹⁰⁵ *See id.*

¹⁰⁶ *See id.* § 229.503.

not specifically mention environmental law, the SEC guidelines state, “Registrants should consider specific risks they face as a result of climate change legislation or regulation and avoid generic risk factor disclosure that could apply to any company.”¹⁰⁷ The SEC cites pending legislation in federal and state governments as examples.¹⁰⁸

The terms for risk factors described by the SEC are vague and highly speculative, leading to information overload for investors. Currently, no federal climate law is “pending.” In addition, allowing state “pending legislation” to dictate federal SEC disclosure rules would lead to confusion, as different states have different environmental laws. Following international accords may hold merit for risk factors; however, the Supreme Court demonstrated “materiality” is a fact-based inquiry, and business leaders remain concerned that societal top-down approaches may spur additional problems.¹⁰⁹ The SEC needs to be more concrete on this issue in order to avoid investor and corporate confusion.

Lastly, the SEC requires corporate disclosures for “Management’s Discussion and Analysis of Financial Condition and Results of Operations” (“MD&A”).¹¹⁰ The MD&A requirements intend to satisfy three principal objectives:

[1] to provide a narrative explanation of a registrant’s financial statements that enables investors to see the registrant through the eyes of management; [2] to enhance the overall financial disclosure and provide the context within which financial information should be analyzed; and [3] to provide information about the quality of, and potential variability of, a registrant’s earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance.¹¹¹

As published in the 2010 guidelines, corporations should first determine whether pending legislation or regulations are “reasonably likely” to be

¹⁰⁷ COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, *supra* note 8, at 22.

¹⁰⁸ *See id.* at 3.

¹⁰⁹ *See* Basic Inc., v. Levinson, 485 U.S. at 232; *see also* BUSINESS ROUNDTABLE, *supra* note 65, at 8.

¹¹⁰ 17 C.F.R. § 229.303.

¹¹¹ COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, *supra* note 8, at 15.

enacted, and if so, whether such legislation or regulations have a material effect on the operation of the business.¹¹²

The test is too broad under the SEC's definition of materiality, which focuses on whether a reasonable investor would be concerned with a lack of facts disclosed.¹¹³ The test gives too much deference to corporate boards. A corporation could hypothetically state that "legislation requiring a disclosure of greenhouse gas emissions may be reasonably likely to pass Congress in the next 10 years, but such disclosures will not influence operations."¹¹⁴ Similar to the risk factors test, the SEC needs to focus more on fact-based inquiries as opposed to introducing a blanket rule in order to survive judicial scrutiny.

C. *The Courts and Agency Deference*

Materiality laws have been described as "quirky" and "murky" at best.¹¹⁵ Although intended to present a clear fact based test, the current definition allows for ambiguities.¹¹⁶ While not addressing greenhouse gas disclosures for nearly six years, the SEC seemed interested in pursuing stricter regulations in 2016 on this issue.¹¹⁷ New rules may come from the agency.¹¹⁸

As noted above, the revisions to the four items of Regulation S-K for greenhouse gas disclosure may clash with the Supreme Court's interpretation of materiality. Because firm arguments exist on both sides of the debate, the Supreme Court will ultimately decide if reporting greenhouse gas emissions are material to corporate disclosure. Recently, both upper and lower courts failed to give agencies deference on environmental issues.¹¹⁹

In the 2015 case *Michigan v. EPA*, the Supreme Court issued an injunction on a promulgated rule designed by the Environmental Protection Agency ("EPA") to control air pollution from stationary and moving sources.¹²⁰ The EPA did not take costs into consideration when drafting

¹¹² *Id.* at 23.

¹¹³ *See Basic Inc.*, 485 U.S. at 232.

¹¹⁴ *See id.*

¹¹⁵ Solomon, *supra* note 1.

¹¹⁶ *Id.*

¹¹⁷ Condon, *supra* note 70.

¹¹⁸ *See id.*

¹¹⁹ *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699 (2015); *North Dakota v. EPA*, No. 3:15-cv-59, 2015 WL 7422349 (D.N.D. 2015).

¹²⁰ *See Michigan v. EPA*, 135 S. Ct. at 2704.

the rule, and a regulatory report indicated the it could result in upwards of \$90 billion per year in compliance costs.¹²¹

In this case, the Court applied *Chevron* deference.¹²² *Chevron* deference is twofold.¹²³ First, the courts must determine whether the statute is ambiguous.¹²⁴ If ambiguous, the courts determine whether the agency acted reasonably within its authorization in implementing the rule.¹²⁵ Passing the first prong of the test, the environmental rule failed the “reasonable” test;¹²⁶ the Court concluded, “Our reasoning so far establishes that it was unreasonable for EPA to read [the enabling statute] to mean that cost is irrelevant to the initial decision to regulate power plants. The Agency must consider cost”¹²⁷ The injunction effectively kills the rule unless the EPA considers the cost of compliance.¹²⁸

In 2015, a North Dakota federal district court issued an injunction on the Waters of the United States (“WOTUS”) rule procured by the EPA.¹²⁹ The judge held that the agency rule, designed to nationalize the country’s waterways and water sources, most likely failed the arbitrary and capricious standard.¹³⁰ The Administrative Procedure Act allows for the courts to set aside any agency action viewed to be arbitrary and capricious.¹³¹ In a separate lawsuit, the Sixth Circuit agreed with the reasoning of the North Dakota judge and issued a nationwide injunction, halting the rule’s implementation indefinitely.¹³² The rule currently awaits Supreme Court review.¹³³

However, once WOTUS reaches the Supreme Court, it may have the same fate as the Clean Power Plan, which the Supreme Court stayed

¹²¹ *Id.* at 2706.

¹²² *Id.* at 3706–07.

¹²³ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1974).

¹²⁴ *Id.* at 842–43.

¹²⁵ *Id.*

¹²⁶ *Michigan v. EPA*, 135 S. Ct. at 2711.

¹²⁷ *Id.*

¹²⁸ Jonathan H. Adler, *Supreme Court smacks EPA for ignoring costs, but mercury rule likely to persevere*, WASH. POST (June 30, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/30/supreme-court-smacks-epa-for-ignoring-costs-but-mercury-rule-likely-to-persevere/?utm_term=.760f85cd46cf [<https://perma.cc/5GYJ-QJAR>].

¹²⁹ *North Dakota v. EPA*, 2015 WL 7422349, at *1, *12 (D.N.D. 2015).

¹³⁰ *Id.* at *12.

¹³¹ Administrative Procedure Act, 5 U.S.C. § 706 (1966).

¹³² *In re EPA and Dep’t of Def. Final Rule*, 803 F.3d 804, 809 (6th Cir. 2015).

¹³³ Katie Bennett Hobson & Danny G. Worrell, *Sixth Circuit Grants Motion to Pause WOTUS Litigation Pending Supreme Court Review*, LEXOLOGY (Jan. 27, 2017), <http://www.lexology.com/library/detail.aspx?g=bec251e0-ed56-4982-8fb5-d483ade460f5> [<https://perma.cc/5GYT-D8VN>].

in early 2016.¹³⁴ Although the Court did not release a full opinion mentioning agency deference, five justices told the EPA to halt implementation of the rule.¹³⁵ The rule, designed to cut back significant amounts of carbon dioxide emissions from power plants, faced great animosity from Republican state attorneys general and ultimately received enough skepticism from five Supreme Court justices to merit a stay until the lower appeals court reviewed it.¹³⁶ President Trump now intends to abolish the rule altogether before the appeals court can review it.¹³⁷ Regardless of President Trump's actions, the courts struck down a third major environmental rule intended to combat climate change.¹³⁸ While the EPA procured these rules as opposed to the SEC, the courts continue to show reluctance in allowing agency deference on environmental issues. The Court may be even more reluctant to allow for an inherently business orientated agency to promulgate rules based on climate change.

In addition to the recent cases, the Court should continue to tilt toward a conservative viewpoint of deregulation and less agency deference.¹³⁹ Earlier in 2017, President Trump announced Neil Gorsuch will replace the late Antonin Scalia on the Supreme Court.¹⁴⁰ Regarding Justice Gorsuch's stance on allowing agencies more influence in the rulemaking process, one commentator writes, "Gorsuch worries that too much deference to regulatory agencies can make the regulatory process arbitrary and undemocratic. The Founders wanted Congress, not the executive branch, to make the laws, he believes, and *Chevron* deference flies in the face of that principle."¹⁴¹

¹³⁴ *West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016) (order granting preliminary injunction).

¹³⁵ *Id.*

¹³⁶ Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), <https://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html> [https://web.archive.org/web/*/https://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html].

¹³⁷ See Brad Plumer, *I asked legal experts how Trump could kill Obama's Clean Power Plan. Here's what they said.*, VOX (Mar. 28, 2017), <http://www.vox.com/energy-and-environment/2017/2/23/14691438/trump-repeal-clean-power-plan> [<https://perma.cc/7NXG-2W68>].

¹³⁸ See *West Virginia v. EPA*, 136 S. Ct. 1000.

¹³⁹ See *Trump Picks Neil Gorsuch as Nominee for Supreme Court*, BBC (Feb. 1, 2017), <http://www.bbc.com/news/world-us-canada-38813137> [<https://perma.cc/8ZP2-LHT6>].

¹⁴⁰ *Id.*

¹⁴¹ Timothy B. Lee, *How Neil Gorsuch could rein in regulators like the EPA and the FCC*, VOX (Mar. 20, 2017), <http://www.vox.com/new-money/2017/2/2/14473728/neil-gorsuch-chevron-deference> [<https://perma.cc/75DE-X7UT>].

Should the SEC enforce a disclosure regime or draft a new rule regarding the emissions of greenhouse gases, a plaintiff or state attorney general would most likely challenge it, similar to the WOTUS and Clean Power Plan suits,¹⁴² in a district court that favors less restrictive environmental policies. An injunction would be granted and appealed to the Supreme Court. Given the recent track record for agency deference and the recent confirmation of Neil Gorsuch to the Court, the Supreme Court probably favors less agency deference.

Thus, any rule or disclosure regime promulgated under current law faces serious concern of being struck down as immaterial. The flexibility of current “materiality” law gives judges great deference for deciding whether a rule is “arbitrary and capricious” or fails to follow *Chevron* deference. Given the current ideology of the Supreme Court, litigation could prove fatal for a new rule or disclosure regime created under existing Regulation S-K authority.

III. POTENTIAL ALTERNATIVE POLICY VENUES

A proposed rule based on the 2010 SEC guidelines may not survive judicial scrutiny. Instead of using Regulation S-K for requiring corporations to disclose greenhouse gas emissions, environmentalists may wish to seek other channels of lawmaking to achieve this desired result. The following section will focus on legal or policy actions that could be implemented on a federal or state level, as well as give recommendations for engaging with corporations and investors directly.

A. *Congressional Statute or Amendment*

The first major option would consist of lobbying Congress for a statute. Instead of proposing additional rules or new interpretations to Regulation S-K, an explicit amendment to two authorizing statutes of the SEC requiring corporate disclosure of greenhouse emissions effectively achieves the goal of the 2010 SEC guidelines. The amendment could require corporations to disclose greenhouse gas emissions as material for investors and authorize promulgation of rules to enforce compliance.

The amendment would give the SEC the authority to regulate this area of the law without any ambiguities and to propose rules for future enforcement. Recent litigation for the WOTUS rule and the Clean Power

¹⁴² Liptak & Davenport, *supra* note 136.

Plan demonstrates the shift toward reduced agency deference.¹⁴³ Passing a statute or amendment leaves less room for litigation and allows for a clear path of requiring corporate disclosures.

A Congressional statute brings about sweeping change; yet, such legislation may not be realistic absent political change. Passing climate change legislation is difficult.¹⁴⁴ The closest success for environmental reform came in 2009, when the House of Representatives passed the American Clean Energy and Security Act.¹⁴⁵ “Cap and trade” legislation, which would have created a market for carbon credits per individual and corporate users, appeared to have momentum under the Democratic, filibuster-proof majority in the Senate and a Democratic president.¹⁴⁶

Nevertheless, the bill never reached the Senate floor for a vote.¹⁴⁷ Likewise, a potential statute for SEC regulations would face a more fierce uphill battle in Congress today. As opposed to a supermajority held in 2010, the Democratic Party does not hold a majority in either chamber of Congress.¹⁴⁸ While a statute or an amendment would be the easiest way to enforce corporate disclosure, the political winds do not favor this option for the immediate future as Donald Trump begins his presidency. The president favors deregulation, and such a bill may not even receive a committee vote in the House of Representatives or Senate.¹⁴⁹

B. *State Government Lobbying*

Alternatively, environmentalists could lobby state governments. Congressional action is preferable, but given the federal political landscape, state involvement may result in incremental changes, as more liberal states may be willing to pass stricter corporate laws.

¹⁴³ See *In re EPA and Dep't of Def. Final Rule*, 803 F.3d at 809; see also *West Virginia v. EPA*, 136 S. Ct. at 1000.

¹⁴⁴ Stephen Power, *Senate Halts Effort to Cap CO2 Emissions*, WALL ST. J. (July 23, 2010), <https://www.wsj.com/articles/SB10001424052748703467304575383373600358634> [<https://perma.cc/JGD6-LGVV>].

¹⁴⁵ American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

¹⁴⁶ John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES (June 26, 2009), http://www.nytimes.com/2009/06/27/us/politics/27climate.html?_r=0 [<https://perma.cc/7A2H-ERGN>].

¹⁴⁷ Power, *supra* note 144.

¹⁴⁸ See Eric Bradner, *Republicans keep control of Congress*, CNN (Nov. 19, 2016, 3:08 AM), <http://www.cnn.com/2016/11/08/politics/congress-balance-of-power-2016-election/index.html> [<https://perma.cc/47TJ-VSCG>].

¹⁴⁹ Plumer, *supra* note 137.

While Democrats will be the most likely to favor this policy initiative, only six states have pure Democratic control of both the legislature and the office of governor.¹⁵⁰ The other forty-four states have a Republican check in either a legislative body, the executive, or both.¹⁵¹ Similar to issues with changes in power at the federal level, state reform may also be challenging.

Still, states such as California could pass a statute that serves as an experimental model for all states in the future. In 2009, then Attorney General of New York Andrew Cuomo called for corporations in his state to disclose based on risk factors.¹⁵² Such a program could be used as a framework for a national statute in a few years. Incremental change would be incredibly slow on the state level, yet it appears to be a better approach than lobbying Congress.

C. *Engaging Corporations Directly*

Instead of pursuing legal routes, environmental groups could convince corporations to disclose greenhouse gas emissions. Despite a lack of legal requirements through the SEC, large public corporations such as Coca-Cola and American Airlines intend to become more sustainable.¹⁵³ Nonmandatory disclosures could bring about a desirable outcome without facing corporate backlash or litigation in the courts.

Corporate social responsibility is generally defined as “a company’s sense of responsibility towards the community and environment (both ecological and social) in which it operates.”¹⁵⁴ Corporations can engage in

¹⁵⁰ Stephen Wolf, *Republicans now dominate state government, with 32 legislatures and 33 governors*, DAILY KOS (Nov. 14, 2016, 1:09 PM), <http://www.dailykos.com/story/2016/11/14/1598918/-Republicans-now-dominate-state-government-with-32-legislatures-and-33-governors> [<https://perma.cc/PLM7-9RWK>].

¹⁵¹ *Id.*

¹⁵² OFF. OF N.Y. ATT’Y GEN., STATEMENT FROM THE NEW YORK STATE ATTORNEY GENERAL ANDREW M. CUOMO ON THE SEC’S ACTION REGARDING THE DISCOURSE OF FINANCIAL RISKS RELATED TO CLIMATE CHANGE (Jan. 27, 2010), <https://ag.ny.gov/press-release/statement-new-york-state-attorney-general-andrew-m-cuomo-secs-action-regarding> [<https://perma.cc/KAZ7-7MAL>].

¹⁵³ AMERICAN AIRLINES, *Setting the bar for sustainability* (2014), <https://www.aa.com/i18n/aboutUs/corporateResponsibility/environment.jsp> [<https://perma.cc/4PWW-CTGS>]; COCA-COLA CO., *Sustainability Update: Energy Efficiency and Climate*, <http://www.coca-colacompany.com/our-company/sustainability-update-energy-efficiency-and-climate-protection> [<https://perma.cc/8AT4-7RX3>].

¹⁵⁴ BUSINESS DICTIONARY, *corporate social responsibility*, <http://www.businessdictionary.com/definition/corporate-social-responsibility.html> [<https://perma.cc/8M6Q-WPXB>].

social responsibility “(1) through their waste and pollution reduction processes, (2) by contributing educational and social programs, and (3) by earning adequate returns on the employed resources.”¹⁵⁵

Typically, a corporation will embark on these types of campaigns to bring about social change and as a way of branding.¹⁵⁶ Earlier cases involving corporate social responsibility included donations to schools.¹⁵⁷ So long as a corporation can phrase a responsibility as a way to enhance their business model, courts will generally deem corporate social acts legal.¹⁵⁸

Environmental groups may wish to pursue corporate social responsibility options with large corporations. Environmental groups have been successful in driving the sustainability movement among large corporations.¹⁵⁹ For example, American Airlines, a large producer of carbon dioxide emissions, included in their business model, “By proactively addressing environmental imperatives, we can chart a course for success in what is increasingly a resource-constrained world. Our efforts—in the air and on the ground—to operate more sustainably are also in line with the expectations of our employees, customers and shareholders.”¹⁶⁰ Being “constantly on the lookout for innovative ways to reduce both costs and emission,” American Airlines intends to reduce its carbon footprint by 2,100 metric tons of carbon dioxide, while saving the corporation \$650,000 annually.¹⁶¹ American Airlines also intends to be carbon neutral in growth by 2020.¹⁶²

Other large corporations such as Coca-Cola and NASCAR continue to implement similar plans.¹⁶³ Since 2006, Coca-Cola reduced its carbon footprint from 863.5 to 776.7 total metric tons of greenhouse gas emissions.¹⁶⁴ Since 2008, NASCAR planted nearly 400,000 trees and used

¹⁵⁵ *Id.*

¹⁵⁶ Brian Hughes, *Why Corporate Social Responsibility is Essential for Brand Strategy*, HUFFINGTON POST (Feb. 22, 2016), http://www.huffingtonpost.com/brian-hughes/why-corporate-social-resp_b_9282246.html [https://perma.cc/C6FJ-SM3L].

¹⁵⁷ See *AP Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953).

¹⁵⁸ See *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968).

¹⁵⁹ SUSTAINABILITY DEGREES, *The 14 Most Influential Sustainability NGOs* (July 1, 2014), <http://www.sustainabilitydegrees.com/blog/most-influential-sustainability-ngos/> [https://perma.cc/B7G5-WQ6A].

¹⁶⁰ AMERICAN AIRLINES, *supra* note 153.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ COCA-COLA CO., *supra* note 153; NASCAR, *NASCAR Green—An Industry Effort*, <http://green.nascar.com/nascar-green-an-industry-effort/> [https://perma.cc/ZEQ7-6KZ8] (last visited Nov. 12, 2017).

¹⁶⁴ COCA-COLA CO., *supra* note 153.

200,000 gallons of recycled oil.¹⁶⁵ These social changes came to these companies without the need for a statute or Regulation S-K. Regardless of political climate, this route probably is the more realistic and efficient method in furtherance of the goal of reducing greenhouse gases.

Furthermore, some corporations have started to disclose greenhouse gas emissions.¹⁶⁶ Global 500 companies collectively contribute approximately ten percent of greenhouse gas emissions and have already publically disclosed.¹⁶⁷ The Director of Sustainability at Thomson Reuters states:

[T]here's an urgency to curb greenhouse gas emissions worldwide so we can reduce the impact of climate change . . . While we hope this report accelerates the discussion related to GHG reductions among the Global 500, it's important to remember that as global consumers of industry, we all play a part in this conversation.¹⁶⁸

Nevertheless, up to ninety percent of greenhouse gas emissions continue to remain unreported.¹⁶⁹

Instead of lobbying Congress, environmental activists may face better policy changes by directly interacting with the corporations themselves. These groups, such as Ceres, continue to make significant advancements in the sustainability movement.¹⁷⁰ If environmental groups wish to have corporations disclose greenhouse gas emissions, the proposals need to be framed as a way of better branding, raising profits, and serving the community as a community leader.¹⁷¹

At least ten percent of corporations disclose on a voluntary basis.¹⁷² Now, environmental groups need to start lobbying large corporations on the same scale as American Airlines and Coca-Cola to commit to making greenhouse gas disclosure plans. In doing so, a new corporate norm of disclosing greenhouse gas emissions may occur without a single revision to Regulation S-K.

¹⁶⁵ NASCAR, *supra* note 163.

¹⁶⁶ THOMSON REUTERS, *Thomson Reuters Releases Greenhouse Gas Emissions Data On Global 500 Companies* (Dec. 22, 2014), <http://thomsonreuters.com/en/press-releases/2014/thomson-reuters-releases-greenhouse-gas-emissions-data-on-global-500-companies.html> [<https://perma.cc/V5X9-A3WZ>].

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ SUSTAINABILITY DEGREES, *supra* note 159.

¹⁷¹ *See* Hughes, *supra* note 156.

¹⁷² THOMSON REUTERS, *supra* note 166.

D. *Investor Attitudes and the Political Process*

At the end of the day, investors care primarily about making money.¹⁷³ When becoming an investor, an individual decides to purchase a share of stock hoping the value will increase and turn a profit.¹⁷⁴ Even if public corporations are required to disclose greenhouse gas emissions, stockholders or potential investors may not simply care about such impact.¹⁷⁵ While impact investing may be a trend in the future, tradition dictates that stockholders care only about financial returns.¹⁷⁶

For example, British Petroleum's stock reached near \$60 per share in March 2010.¹⁷⁷ The stock price took a deep hit after the B.P. Deep Water Horizon crisis and never recovered.¹⁷⁸ Six years later, the stock trades for \$33 per share.¹⁷⁹ Alternatively, the stock of Exxon Mobile rose \$26 per share during that time period.¹⁸⁰ The Deep Water Horizon crisis led to intense public scrutiny in the media; nevertheless, investors continued to purchase stock in oil reserves despite the risk of another pollution occurring down the line.¹⁸¹

While only one case study, this behavior demonstrates that environmental issues may not exist at the forefront of an investor's mind when deciding to purchase stock. If a crisis happens with one company, then an investor could purchase stock from a competitor in the same field. As environmental investment consultant Rory Sullivan suggests, reporting greenhouse gas emissions may not be enough.¹⁸² He states, "Companies have been quick to make changes that can be justified in

¹⁷³ Ed Sappin, *To Make Investors Care About the Environment Show Them The Money!*, ENTREPRENEUR (June 1, 2016), <https://www.entrepreneur.com/article/274618> [<https://perma.cc/SN2X-S5B8>].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ YAHOO FINANCE, *British Petroleum Stock Prices*, <https://finance.yahoo.com/quote/bp?ltr=1> [<https://perma.cc/3HFS-YMZD>] (last visited Nov. 12, 2017).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ YAHOO FINANCE, *Exxon Mobile Corporation Stock Prices*, <https://finance.yahoo.com/quote/XOM?ltr=1> [<https://perma.cc/K6NK-72SZ>] (last visited Nov. 12, 2017).

¹⁸¹ Scott Gamm, *BP Stock Bruised but Cheap Five Years After Deep Horizon Spill*, THE STREET (Apr. 20, 2015), <https://www.thestreet.com/story/13115781/1/bp-stock-bruised-but-cheap-five-years-after-deep-horizon-oil-spill.html> [<https://perma.cc/J87H-H2GV>].

¹⁸² Julia Rosen, *More companies are tracking carbon emissions—is it helping?*, GREENBIZ (Apr. 6, 2016), <https://www.greenbiz.com/article/more-companies-are-tracking-carbon-emissions-it-helping> [<https://perma.cc/WN8A-KTYD>].

traditional cost-benefit terms . . . However, in the absence of other pressure for action, that only takes you a certain part of the way.”¹⁸³

Mr. Sullivan’s point suggests that political pressure ultimately needs to be the course of action. Incremental changes could be made in the markets, but a top-down approach may only come from political action. Some corporations disclose, but a vast majority do not.¹⁸⁴ If such an approach is desired, environmentalists should look toward the political process.

Jay Clayton, President Trump’s choice to head the Securities and Exchange Commission (“SEC”), may be sympathetic toward environmental causes.¹⁸⁵ As an attorney at Sullivan & Cromwell, his name is listed in a memo from attorneys at the firm encouraging clients to disclose greenhouse gas emissions to the SEC.¹⁸⁶ The memo expressly mentions that it may be within the best interest of corporations to start preparing Regulation S-K disclosure forms with greenhouse gas emissions.¹⁸⁷

While Mr. Clayton’s views may be favorable toward disclosure, President Trump’s vision may take a different approach, as climate change appears to not be a top priority for his administration.¹⁸⁸ Though his campaign platform did not explicitly state that he will deregulate the SEC for environmental issues, President Trump stated:

We will get the bureaucracy out of the way of innovation, so we can pursue all forms of energy The government should not pick winners and losers. Instead, it should remove obstacles to exploration. Any market has ups and downs, but lifting these draconian barriers will ensure that we are no longer at the mercy of global markets.¹⁸⁹

¹⁸³ *Id.*

¹⁸⁴ See THOMSON REUTERS, *supra* note 166.

¹⁸⁵ Francine McKenna, *Trump’s SEC pick pushed clients to say more about climate-change risks*, MARKETWATCH (Jan. 5, 2017), <http://www.marketwatch.com/story/trumps-sec-pick-pushed-clients-to-say-more-about-climate-change-risks-2017-01-05> [<https://perma.cc/MY2U-PUB2>].

¹⁸⁶ *Id.*

¹⁸⁷ SULLIVAN & CROMWELL LLP, GUIDANCE ON DISCLOSURE REQUIREMENTS (Feb. 5, 2015), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Guidance_on_Disclosure_Requirements.pdf [<https://perma.cc/8YRK-LDKD>].

¹⁸⁸ Ashley Parker, *Trump signals changing priorities, revises White House website to remove climate change*, CHICAGO TRIBUNE, Jan. 20, 2017, <http://www.chicagotribune.com/news/nationworld/ct-trump-white-house-website-20170120-story.html> [<https://perma.cc/VE3R-LR7C>].

¹⁸⁹ Sarah Keller, *Debate Preview: What to Expect from Clinton and Trump on Energy*,

In keeping with this campaign promise, President Trump signed an executive order in January 2017 issuing that “it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”¹⁹⁰ In addition, President Trump signed executive orders allowing for the construction of the Keystone XL Pipeline and Dakota Access pipeline.¹⁹¹ Congress recently repealed the Stream Protection Rule, a regulation designed to protect waterways from coal runoff.¹⁹² President Trump also intends to scrap both the Clean Power Plan and WOTUS.¹⁹³ These actions suggest President Trump, committed to reducing the size of government, will not take action on SEC regulations for corporate greenhouse gas disclosure.

Due to political roadblocks and investor indifference, the path ahead may be challenging for environmentalists if the goal is for corporate disclosure. These groups could become more engaged in the political process and work to elect climate change candidates at the federal and state level, or find ways to change investor attitudes or corporate norms. However, public opinion might not be strong enough to allow such changes in political culture.

Environmentalist organizations and lobbyists may be well served to engage in political grassroots by attempting to shift public and political opinions. At the end of the day, environmentalists wish to reduce the amount of greenhouse gases in the atmosphere, and any incremental changes in public opinion, whether through marketing or advertising, may be an effective solution to fulfilling that goal.

ABOVE THE FOLD (Sep. 23, 2016, 11:00 AM), <https://www.uschamber.com/above-the-fold/debate-preview-what-expect-clinton-and-trump-energy> [<https://web.archive.org/web/20161208040227/https://www.uschamber.com/above-the-fold/debate-preview-what-expect-clinton-and-trump-energy>].

¹⁹⁰ Exec. Order No 13771, 82 Fed. Reg. 9339 (Jan. 20, 2017).

¹⁹¹ WHITE HOUSE OFFICE OF THE PRESS SECRETARY, *President Trump Takes Action to Expedite Priority Energy and Infrastructure Projects* (Jan. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/24/president-trump-takes-action-expedite-priority-energy-and-infrastructure> [<https://perma.cc/J6KL-LRLH>].

¹⁹² Reuters, *Coal Miners Rejoice After Senate Votes to Repeal Stream Protection Rule*, FORTUNE (Feb. 2, 2017), <http://fortune.com/2017/02/02/stream-protection-rule-repeal/> [<https://perma.cc/7MWM-ZAB3>].

¹⁹³ See Plumer, *supra* note 137; see also Jeff Daniels, *Trump executive order seeks to roll back controversial Obama water rules*, CNBC (Feb. 28, 2017), <http://www.cnbc.com/2017/02/28/trump-executive-order-seeks-to-roll-back-controversial-obama-water-rule.html> [<https://perma.cc/7F3X-PYPK>].

CONCLUSION

“Materiality” does not seem as clear as one would think. As much as there may be a debate over whether the eating habits or health of a CEO should be disclosed to investors, a divide also exists among environmentalists and the business community regarding whether greenhouse gases should be considered “material” for disclosure requirements. Case law and current political winds do not favor groups who seek federal regulations for disclosing greenhouse gas emissions. The courts could strike down a rule, the current administration may reject the idea altogether, and Congress does not seem to have the appetite for climate change legislation.

Environmental groups have a strong argument for having a broad definition of “materiality;” however, their goals at this time may be unrealistic. These organizations need to be patient and understand that it might take time to procure legislative or regulatory changes. Whether by directly soliciting corporations or becoming more engaged in the political system, opportunities exist for environmental groups to raise awareness of the issue. While these groups may not get the top-down blanket approach they so desire with a rule promulgated from the 2010 interpretative guidelines concept, incremental steps in their fight against climate change can be accomplished.

Alternatively, environmentalists may need to become creative by looking at other market approaches for reducing greenhouse gases. At the end of the day, the goal of these groups is to ensure fewer greenhouse gases enter the atmosphere. Whether corporate disclosure through Regulation S-K or some other completely different option presents itself, the process in theory would not matter. Regardless, environmental activists may need to become more engaged in the political process long term or seek to change investing attitudes and corporate norms.