Regulatory Disunion: Divergent Approaches to Climate-Related Financial Risks

By Hana V. Vizcarra

The fires burning throughout the western US and unprecedented number of named storms forming in the Atlantic highlight the urgency of insistent calls by investors and others for the private sector to better incorporate climate change risks into financial disclosures and strategic planning.[1] These topics have gained prominence in the last five years as high profile individuals like Larry Fink and Mark Carney and groups like the FSB's Task Force on Climate-Related Disclosures raised the alarm, provided structure for discussions, and found ways to achieve agreement on general frameworks. More recently, the conceptual discussion around disclosures has moved to active advocacy for new regulatory approaches. Yet, in the US, our financial regulatory bodies appear to be of two minds about directly addressing climate change risks. The Securities and Exchange Commission (SEC) has so far resisted calls to incorporate explicit disclosure obligations into its regulations, and the Department of Labor's Employee Benefits Security Administration has proposed a new rule that demonstrates substantial skepticism of environmental, social, and governance factors' connection to financial outcomes in investing. In contrast, the Commodities Future Trading Commission and Federal Reserve are actively exploring climate-related impacts on the financial system. This article outlines these divergent approaches and how they are likely to impact the state of the law.

SEC: A hands off approach

Existing regulatory guidance from the SEC does not fully address the rapidly changing climate discussion, its importance to investors, and the certainty of climate-related impacts. Yet, the Commission has been reluctant to move forward with considering new regulations or guidance specific to climate change-related disclosures. However, it faces increasing pressure from investors, lawmakers, other financial regulators, advocacy organizations, and even its own advisory committees to take action.

The SEC released guidance on the materiality of climate-related information in 2010, after investors, environmental groups, and the New York attorney general petitioned the commission.[2] The release also

[1] Leslie Hook, *Wildfires, hurricanes and vanishing sea ice: the climate crisis is here*, FINANCIAL TIMES (Sept. 17, 2020), https://www.ft.com/content/6a6bab93-21fc-4bd6-b309-86e394e3869b.
[2] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6295 (Feb. 8, 2010); *see also* Hana V. Vizcarra, *Climate-Related Disclosure and Litigation Risk in the Oil & Gas Industry: Will State Attorneys General Investigations Impede the Drive for More Expansive Disclosures*, 43 Vt. L. Rev. 733, 754-56 (discussing in detail the contents of the 2010 guidance and the lack of additional clarity it provides for determining materiality of climate-related information), *available at* http://eelp.law.harvard.edu/wp-content/uploads/VLR_Bk4_Vizcarra.pdf.

followed a series of investigations into power company disclosures by the New York AG, leading to settlements that required disclosure of certain climate-related information in companies' SEC filings.[3] But the 2010 guidance largely sidestepped the question of how companies should handle climate-related information in materiality analyses. The commission listed examples of information that could be material but did not fully explain what it expected of corporate management. It emphasized that firms should limit disclosure to financially material information, but not limit the information considered in making that determination. The SEC also failed to follow the guidance with substantive enforcement efforts. Reviews of corporate disclosures in the following years reveal little significant change.[4] A 2018 GAO study found that the SEC often lacks access to the information companies use to determine whether to disclose climate-related risks.[5] Additionally, the GAO report highlighted that climate-related disclosures vary in format and specificity while often using boilerplate language.[6] An effort to go behind the disclosures and evaluate how companies made their materiality determinations could more precisely defined when climate-related information is material and encouraged more substantive corporate evaluations.

The SEC again opened a door to new guidance or regulation on climate-related and ESG issues in a 2016 concept release that specifically requested comment on whether to require additional disclosures specific to climate change and whether additional guidance was needed.[7] The Concept Release recognized the potential for a shift in what boards should consider when making materiality determinations as investor expectations change.[8] Despite receiving comments supportive of new guidance on the materiality of climate change and other ESG issues, the agency has not moved forward with new climate-information-specific rules or guidance, leaving companies and investors to spar over how expansive climate-related disclosures should be, and on what topics and in what form.

Adding to pressure from advocates and investors, academics have proposed various approaches to revising SEC disclosure requirements to expand discussion of sustainability issues, including climate. In 2016, Robert Eccles and Timothy Youmans suggested in the *Journal of Applied Corporate Finance* requiring a

---

[3] *See* Vizcarra, *supra* note 2, at 759-72 (tracking the evolution of attorney general engagement in corporate climate disclosure in Part IV).
[4] *See* Vizcarra, *supra* note 2, at 756 (citing Jim Coburn & Jackie Cook, Ceres, Cool Response: The SEC & Corporate Climate Change Reporting 4 (2014), https://www.ceres.org/sites/default/files/reports/2017-03/Ceres_SECguidance-append_020414_web.pdf (reviewing disclosures and finding little discussion of specific material information or quantification of climate impacts in the first few years after the 2010 guidance was issued)).
[5] U.S. Gov't Accountability Off., GAO-18-188, *SEC Has Taken Steps to Clarify Disclosure Requirements* at 17-18 (2018).
[6] *Id.* at 18-20.
[7] Business and Financial Disclosure Required by Regulation S-K, Concept Release, 81 Fed. Reg. 23916 (Apr. 22, 2016).
[8] *Id.* at 23971 ("The role of sustainability and public policy information in investors' voting and investment decisions may be evolving as some investors are increasingly engaging on certain ESG matters . . . .").

statement of significant audiences and materiality to better define what ESG issues boards consider material and the specific stakeholders to which they relate.[9] Last year, Jill Fisch proposed in the *Georgetown Law Journal* creating a new sustainability, disclosure, and analysis section of SEC filings, modeled after the management discussion and analysis section.[10] Her idea was that companies could then identify and explain their choice of the three sustainability issues most significant to their operations. Also last year, Dan Esty and Quentin Karpilow suggested a three-tiered mandatory ESG reporting regime in the Y*ale Journal on Regulation.*[11] These proposals would likely require additional SEC guidance on their applicability to climate-related topics. An October 2018 rule-making petition authored by Professors Cynthia Williams and Jill Fisch (and signed by investors reporting over $5 trillion in assets under management) asks the SEC "develop a comprehensive framework for clearer, more consistent, more complete, and more easily comparable" ESG disclosures.[12] Williams & Fisch argue that "without consistent, comparable, reliable, and complete [ESG] information, capital markets are constrained in promoting allocational efficiency as many industries embark on the transition to a low-carbon economy."[13] They also argue that it would promote competitiveness of American capital markets and bring order to the "irregular universe of ESG disclosures."[14]

The Commission's advisory committees are coming around to the view that the SEC must act. Last May, a subcommittee of the Commission's Investor Advisory Committee recommended the SEC update reporting requirements to include "material, decision-useful ESG factors" and specifically referenced climate-related information.[15] The SEC's Asset Management Advisory Committee has created a subcommittee to consider ESG issues, including climate, and released an update on its progress in September 2020.[16]

---

[9] Robert Eccles & Tim Youmans, *Materiality in Corporate Governance: The Statement of Significant Audiences and Materiality*, 28 J. Applied Corp. Fin. 39 (2016) (discussing investor appetite for reporting material ESG information, how such reporting fits within directors' fiduciary duties, and the role of the director in determining the materiality of ESG information; also proposing a statement of significant audiences and materiality to help provide a clearer view of what is considered "material" by a company's board).
[10] Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L.J. 923 (2019) (arguing for incorporating sustainability information into U.S. Securities and Exchange Commission (SEC)-mandated disclosures).
[11] Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 Yale J. on Reg. 625 (2019) (proposing a three-tiered mandatory ESG reporting regime and discussing how materiality should be considered, including some discussion of climate-related reporting).
[12] Cynthia A. Williams & Jill E. Fisch, *Petition for a rulemaking on environmental, social, and governance (ESG) disclosure*, Securities and Exchange Commission (October 1, 2018) [*hereinafter* WILLIAMS & FISCH]
[13] *Id.* at 4.
[14] *Id.* at 5-6.
[15] Recommendation of Investor-as-Owner Subcommittee Related to ESG Disclosure, May 14, 2020, https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf.
[16] Update on progress in ESG Subcommittee, Presentation by SEC Asset Management Advisory Committee, Sept. 16, 2020, *available at* https://www.sec.gov/files/update-from-esg-subcommittee-09162020.pdf

Recent statements by several SEC commissioners have pushed back on calls for new guidance or requirements, focusing on the "amorphous nature" of ESG. Three of the four current SEC commissioners have expressed skepticism about furthering ESG investing practices.[17] Relying on the "principle based" nature of disclosure law to emphasize that ESG or climate change-specific disclosure requirements are unnecessary because companies already have an obligation to disclose material information once it becomes material, whether it is climate-related or not.[18] This position largely misses the point that companies need help determining how to properly disclose risks that are rapidly becoming financially material but are distinct from the types of information they have typically worked into their analyses. They also look to regulators to help bring order to a wide-ranging field of voluntary reporting frameworks.

Commissioner Elad Roisman has claimed "corporate governance stands by itself and rarely has a direct relationship to environmental or social issues"[19] and hinted that requiring ESG disclosures may be beyond the SEC's legal authority, arguing the Commission cannot require disclosures beyond what a reasonable investor would consider important in making an investment or voting decision.[20] However, evidence is growing that at least with regard to climate-related information the reasonable investor does consider such

---

[17] On July 21st, the Senate Committee on Banking, Housing, and Urban Affairs held a nomination hearing for a fifth Commissioner, Caroline Crenshaw. During this hearing, the Senate also considered the re-nomination of current Commissioner Hester Pierce. UNITED STATES SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, *Nomination Hearing* (July 21, 2020) https://www.banking.senate.gov/hearings/07/10/2020/nomination-hearing.

[18] COMMISSIONER HESTER PIERCE, *Scarlet Letters: Remarks before the American Enterprise Institute* (June 18, 2019) ("research has found that "firms in the top quintile of performance on financially material ESG issues significantly outperformed those in the bottom quintile." Why, then, must the word "ESG" must be used at all? Of course, firms in the top quintile of performance on financially material issues outperform those on the bottom. If ESG disclosures mean disclosing what is financially material, there is little controversy."; COMMISSIONER ELAD L. ROISMAN, *Keynote Speech at the Society for Corporate Governance* (July 7, 2020).) ("proponent of the SEC's principles-based materiality standard now more than ever . . . Our principles-based framework *requires* disclosure of all material information (including with respect to environmental factors), but it *allows* each individual company to tailor that information so that it is useful to their investors. This benefits investors because it highlights for them what they need to know to make informed decisions. In addition, important information is not lost in a sea of inapplicable information. For the avoidance of doubt, ESG issues can be material to companies and necessitate disclosure. In fact, I can think of many scenarios where it would be. For instance, if a company decided to take a public stance on a certain social or political issue, there may be a risk that it could lose a substantial percentage of its customers who disagree with that stance, resulting in a material adverse financial effect. That may be a risk the company is willing to take, but it may also have to disclose that to investors.")

[19] COMMISSIONER ELAD L. ROISMAN, *Keynote Speech at the Society for Corporate Governance* (July 7, 2020) ("In my mind, corporate governance stands by itself and rarely has a direct relationship to environmental or social issues. Best practices in corporate governance are usually the result of many years of private ordering experimentation and experience. Also, governance reform focuses on the company itself and what is best for its optimal operation as well as its shareholders. The same is not necessarily true of "E" or "S." Those matters tend to be more society, or stakeholder, focused. For example: How is the company "doing its part" to combat climate change or address global and political matters?")

[20] *Id.* (" Let me be specific. If I were to use the securities laws to pursue my own environmental and social vision for the world, I would be subordinating the SEC's mission to my personally held objectives. In other words, I would be acting *outside* the scope of my responsibility and authority. Imagine the unintended consequences that could flow from such an abuse of power.")

disclosures material.[21] Commissioner Hester M. Pierce has described ESG as a “modern scarlet letter,” i.e. a “labeling based on incomplete information, public shaming, and shunning wrapped in moral rhetoric preached with cold-hearted, self-righteous oblivion to the consequences, which ultimately fall on real people.”[22]

Additional guidance may be all that is needed from the SEC to help issuers navigate the demands of investors and think through how to approach materiality evaluations for climate-related information. The Director of SEC’s Division of Corporate Finance argued last year that stepping in with “prescriptive sustainability disclosure requirements” would have “stymied” the “marketplace evolution of sustainability disclosures.”[23] But the marketplace has evolved rapidly with regard to climate-related information. Even with this rapid evolution it is clear that there remains substantial concern among issuers about when and what climate-related information is material and among investors about whether they are really getting a full picture of material information from current corporate disclosures, whether voluntary or in SEC reporting.

Commissioner Allison Lee has expressed a different view than her colleagues, noting that the broad, principles-based “materiality” standard has not produced sufficient disclosures to ensure that investors are getting comparable and reliable information.[24] In a recent piece in the New York Times, she writes:[25]

> There is a misconception that securities laws already operate to produce enough climate risk information through existing broad requirements to disclose important or “material” information. If not, the argument goes, the S.E.C. will come after them.
>
> As a former S.E.C. enforcement lawyer who spent over a decade spotting failed and misleading disclosures, I can attest that enforcement of broad-based materiality requirements does not work with this kind of near-magical efficiency.

[21] *See* Hana V. Vizcarra, *The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures*, 50 Environmental Law Reporter 2-2020, 10106-10114 (discussing the shift in views among investor about the importance of climate-related information and how they are incorporating such information into their decisionmaking processes, likely shifting the definition of what is material information under US securities law in the process), https://eelp.law.harvard.edu/2020/01/the-reasonable-investor-and-climate-related-information-changing-expectations-for-financial-disclosures/.

[22] Commissioner Hester Pierce, *Scarlet Letters: Remarks before the American Enterprise Institute* (June 18, 2019).

[23] William Hinman, “Applying a Principles-Based Approach to Disclosing Complex, Uncertain and Evolving Risks,” Remarks at the 18th Annual Institute on Securities Regulation in Europe
London, England, (March 15, 2019) (“The marketplace evolution of sustainability disclosures is ongoing – companies certainly provide more sustainability information than they did ten years ago – and allowing this evolution to continue should provide market participants with a continued opportunity to sort out the types of information they find useful. Had we leapt into action and issued prescriptive sustainability disclosure requirements when people first began calling for them, I believe we would have stymied that evolution and stifled efforts to develop useful disclosure frameworks.”), *available at* https://www.sec.gov/news/speech/hinman-applying-principles-based-approach-disclosure-031519.

[24] Commissioner Allison Lee, *“Modernizing” Regulation S-K: Ignoring the Elephant in the Room* (Jan. 30, 2020).

[25] Allison Lee, *Big Business’s Undisclosed Climate Crisis Plans* (Opinion), The New York Times (Sept. 27, 2020), https://www.nytimes.com/2020/09/27/opinion/climate-change-us-companies.html.

Encouraging consistency in disclosure practices could help investors manage a portfolio's exposure to the climate crisis in the medium-to long-term.[26] As Commissioner Lee notes, "[d]ealing with and adapting to the coming calamities means we must price climate risk accurately and drive investment toward an orderly, sustainable transition to green portfolios — rather than panicked scrambles and stock sell-offs as we see more and more climate disasters."[27]

Despite no movement on guidance specifically addressing climate-related disclosures, the SEC has moved forward with increasing the monetary threshold for requiring disclosure of environmental penalties[28] and making it more challenging for shareholder proposals to reach a vote.[29] By refusing to engage in discussions about the materiality of some of the more prominent topics within the scope of ESG, like climate change, the Commission avoids considering the harder questions of whether or when these topics become material and whether the SEC needs to step in to help guide those determinations. Discussing ESG as a whole rather than considering materiality of specific topics within it is not a particularly useful discussion under the US securities law framework for disclosures. By failing to provide additional guidance, the SEC leaves corporate managers with a murky view of how they should consider climate-related information and without guidance as to how best to navigate differing opinions from investors and advocacy organizations.

Voluntary standards organizations are taking it upon themselves to try and provide some clarity for issuers with a recently announced effort to align their various separate standards,[30] but SEC guidance would more quickly encourage alignment among practices across issuers. Concerns over using non-GAAP accounting methods[31] should fall away as accounting firms work to account for the growing materiality of climate-

[26] *See, e.g.* Task Force on Climate-Related Financial Disclosures, Phase I Report of the Task Force on Climate-Related Financial Disclosures (2016) ("[U]sers of climate-related financial disclosure commonly identify inconsistencies in disclosure practices, a lack of context for information, and uncomparable reporting as major obstacles to incorporating climate-related risks as a consideration in the investment, credit, and underwriting decisions over the medium and long term."); *see also* COMMISSIONER ALLISON LEE, *Remarks before the Investment Adviser Association Compliance Conference 2020* (March 5, 2020) ("The lack of consistent, reliable, and comparable disclosure in this area undermines investors' and investment professionals' ability to evaluate the relevant risks when making investment decisions, and thus undermines efficient capital allocation").
[27] Lee, *supra note 28.*
[28] SEC, Modernization of Regulation S-K Items 101, 103, and 105, Final Rule, https://www.sec.gov/rules/final/2020/33-10825.pdf.
[29] Martin Levy, *SEC's Proposed Amendment to Rule 14a-8 May Make Life More Difficult for Climate Investors*, Harv. Envtl. & Energy L. Program (June 22, 2020), https://eelp.law.harvard.edu/2020/06/secs-proposed-amendment-to-rule-14a-8-may-make-life-more-difficult-for-climate-investors/.
[30] Statement of Intent to Work Together Towards Comprehensive Corporate Reporting by CDP, CDSB, GRI, IR, and SASB, Sept. 2020, available at https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf.
[31] *See* Chair Mary Jo White, Keynote Address at the 2015 AICPA National Conference: "Maintaining High-Quality, Reliable Financial Reporting: A Shared and Weighty Responsibility," Dec. 9, 2015, available at http://www.sec.gov/news/speech/keynote-2015-aicpa-white.html; U.S. Securities and Exchange Commission, Non-GAAP Financial Measures, Oct. 17, 2017, available at https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm.

change and other ESG information. The Big Four accounting firms are providing guidance on how to report metrics associated with such issues and working towards better quality assurance of reports.[32]

DOL EBSA: Reacting to presidential policy shifts

While the SEC resists action on climate-related disclosures, the Department of Labor (DOL) has moved to create barriers to ESG-focused funds and voting. President Trump issued a directive to the DOL in 2019 to review data on Employee Retirement Income Security Act plans, identify trends in investments in the energy sector, and review guidance on fiduciary responsibilities for proxy voting.[33] In June, EBSA released proposed amendments to the investment duties regulation under ERISA.[34] The proposal discourages considering ESG factors in ERISA-covered plans, emphasizing financial outcomes above all else, and restricts the ability of fiduciaries to offer ESG-themed funds as default options. It also departs from previous guidance by requiring potentially burdensome documentation of equal economic returns and risks for investment choices. The onerous requirements could severely restrict fiduciaries of ERISA plans from having a voice in overseeing corporate decisionmaking around climate change preparedness and planning and other ESG topics. As Prof. Ann Lipton notes, it "may functionally disenfranchise ERISA fiduciaries."[35]

While the justification requirements will certainly impact what influence private pension funds will have in corporate boardrooms, it will not stop climate change related information from becoming material to these companies. This rule has the power to disrupt impact investor's efforts and the ability of the individual retiree to make an impact with their choices. The proposal explicitly recognizes the potential financial materiality of ESG factors while making it very challenging for ERISA plan fiduciaries to act on that materiality. While troubling, this rule will not prevent climate change from becoming a material issue for disclosure purposes. EBSA's skepticism that such investments can have equal or better financial outcomes and focus on documentation only increases the importance of disclosure that better details financial aspects of climate-related risks and opportunities.

[32] Avery Ellfeldt, "Major accounting firms urge companies to disclose risks," E&E NEWS (Sept. 23, 2020), *available at* https://www.eenews.net/stories/1063714423; Gillian Tett, "Big Four accounting firms unveil ESG reporting standards," FINANCIAL TIMES (Sept. 22, 2020), *available at* https://www.ft.com/content/16644cb2-f0c1-4b32-b44c-647eb0ab938d.

[33] Hana Vizcarra, *Energy EOs In Depth: Infrastructure EO Section 5, More Bluster than Substance?*, Harv. Envtl. & Energy L. Program (April 30, 2020), https://eelp.law.harvard.edu/2019/04/energy-eos-in-depth-infrastructure-eo-section-5-more-bluster-than-substance/.

[34] Proposed Rule: Financial Factors in Selecting Plan Investments, 85 Fed. Reg 39113 (June 30, 2020), https://www.federalregister.gov/documents/2020/06/30/2020-13705/financial-factors-in-selecting-plan-investments.

[35] Ann Lipton, *I Just Read the Department of Labor's New ERISA Voting Proposals and Boy Are My Fingers Tired (from typing)*, Business Law Prof Blog, https://lawprofessors.typepad.com/business_law/2020/09/i-just-read-the-department-of-labors-new-erisa-voting-proposals-and-boy-are-my-fingers-tired-from-ty.html.

The Federal Reserve and CFTC: Taking climate change seriously

Concern over climate change risk goes beyond investors and firm-level corporate disclosure. Banks are revising lending policies to limit lending in certain extractive industries. They are also increasingly disclosing their own exposures to climate-related risks, with reports guided by TCFD on climate-related risks in their assets and estimates of the environmental and climate impacts of their lending practices. Financial and bank regulators, with substantial independence from the White House, are considering whether climate change poses systemic risks to the financial system. While U.S. regulators are generally behind their European counterparts in grappling with how to address climate risks in their supervisory and regulatory capacities, they are not ignoring the issue.

The CFTC's Market Risk Advisory Committee commissioned a report on climate-related systemic risk that was released in September.[36] The subcommittee responsible for the report was given a broad mandate – to evaluate climate-related risk across the US financial system and markets. They were not limited to the jurisdiction of the CFTC. The report identifies and examines climate-related risks and provides specific recommendations for addressing them. The recommendations range from establishing an economy-wide price on carbon to having federal financial regulatory agencies incorporate climate-related risks into their mandates, monitoring, and oversight functions. The report recommends that FSOC research the financial implications of climate-related risks, including sub-systemic shocks to markets, and that CFTC research how the risks impact markets and market participants under its oversight. It asks US regulators to join international groups designed to address these risks, encourages financial supervisors to require that financial firms address climate-related risks through their risk management frameworks and pilot climate risk stress testing. It asks state insurance regulators to require insurers assess, address, and disclose climate risks to their underwriting activity and investment portfolios and focuses on how financial regulators can help improve disclosure as well as standardize classification systems. The report says material climate risks must be disclosed under existing law but financial regulators should clarify the definition of materiality for disclosing medium- and long-term climate risks both quantitatively and qualitatively, including by reviewing and updating SEC's 2010 climate risk guidance. It also recommends that regulators review and clarify the law regarding the using climate-related factors in investment decisions for retirement and pension plans under ERISA and non-ERISA fiduciary duties. The report includes additional specific

[36] MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM, Report of the Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission (Sept. 2020), available at https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf.

recommendations, reviews the research on climate-related risks to our financial system, and provides possible paths forward for addressing them.

Federal Reserve Chair Jerome Powell said in January that the Fed has a role to play "to ensure that the financial system is resilient and robust against the risks of climate change" and is working to understand how to do so. Powell has indicated a willingness to join the Network of Central Banks and Supervisors for Greening the Financial System and has sent representatives to participate in its meetings. The Federal Reserve Bank of San Francisco hosted a conference on climate change in 2019, commissioning a series of papers. The executive vice president of the Federal Reserve Bank of New York, Kevin Stiroh, delivered remarks on climate change and risk management in bank supervision at an event at Harvard Business School earlier this year. Stiroh is serving as the co-chair of the Basel Committee on Banking Supervision's high level Task Force on Climate-related Financial Risks and has said that the Federal Reserve is devoting "a lot of resources" to climate change risk research. The Fed is closely following central banks and regulators in other countries who are developing stress testing and additional disclosure requirements.

Disclosure requirements will evolve even without decisive US regulatory action

Even without significant regulatory changes, expectations for corporate disclosures are changing and along with those expectations, legal obligations.[37] The definition of *material* information in U.S. securities law guides a company's financial reporting to the SEC and communications with its shareholders and other stakeholders. Improper reporting (e.g., reporting false or misleading information or omitting material information) can lead to legal liabilities. Because the investor sits at the center of the definition of material information – that is, information a *reasonable investor* is substantially likely to view as significantly altering the total mix of information available to him – significant, verifiable shifts in how investors view and use certain information ultimately influence what must be disclosed.[38] When it comes to climate-related information, the demands of the investor have shifted significantly in the last five years. This shift will continue to move more climate-related information into the *material* category for disclosure purposes

[37] *See* Vizcarra, *supra* note 21 (describing how the expectations of the "reasonable investor" for climate-related disclosures are shifting).

[38] The Supreme Court defined material information in the 1970s and that definition has been incorporated into the relevant regulations as well. *See* Vizcarra, *supra* note 5, at 750 (citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976), and noting SEC adjusted its definition to align with the Supreme Court in Rule 12b-2, which defines "material" as limiting the disclosure required to "those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered." 17 C.F.R. §240.12b-2 (2019) (also citing Business and Financial Disclosure Required by Regulation S-K, Concept Release, 81 Fed. Reg. 23916, 23925 (Apr. 22, 2016) (explaining that SEC changed the definition of materiality used in Rule 12b-2 in 1982 to that adopted by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*)).

whether or not new regulations specifically addressing this type of information appear.[39] If the SEC does not provide additional guidance on how to disclose climate-related information,[40] the guideposts may be set by courts and the process much less efficient for the market.[41]

Changing risk management requirements for the financial sector could also increase pressure on public companies to disclose more climate-related information even absent action by the SEC. As financial regulators encourage or require banks, insurers, and other financial entities to address climate change risks in their portfolios, it will result in additional pressure on companies to share their climate related risks and strategies in order to gain access to financing or insurance products. Lenders have already begun to announce policy shifts regarding what types of extractive industry projects they will finance. Similarly, accounting standards guidelines are beginning to adjust to incorporate new guidance around climate-related information.[42] This will begin to influence corporate practices for developing financial disclosures as well.

Corporate issuers should review and reconsider past practices for developing their mandatory disclosures to the SEC and voluntary reporting to ensure that adequate consideration is given to climate-related issues. They should consider whether they are reporting in line with evolving guidance from non-regulatory entities currently trying to fill the void left by US regulatory bodies (particularly those that are designed to follow the US securities law definition of framework for what they recommend reporting) and put information developed for voluntary reporting formats through the same rigorous review as that included in SEC filings. As investors' use of climate-related information evolves and reporting becomes more sophisticated, what was once considered solely a voluntary reporting obligation will move to mandatory as its materiality develops. Companies will need to reevaluate such information from year to year as the *materiality* of climate change related risks and opportunities changes rapidly.

[39] *See* Vizcarra, *supra* note 21.
[40] *Id.* (discussing how courts could respond to these shifting expectations).
[41] For a discussion of the recent New York v. ExxonMobil case considering the materiality of certain kinds of climate information and whether some of the company's disclosures were misleading to investors, see Hana Vizcarra, *Understanding the New York v. Exxon Decision*, Harv. Envtl. & Energy L. Program, Dec. 12, 2019, https://eelp.law.harvard.edu/2019/12/understanding-the-new-york-v-exxon-decision/.
[42] Alastair March, *Investors Call for Climate Disclosures in Company Accounts*, BLOOMBERG NEWS (Sept. 16, 2020) (reporting on new calls from investors for companies to report in line with new guidance from the International Accounting Standards Board's new guidance on incorporating climate-related risk into financial statements).