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## Entering a New Era in Climate-Related Disclosure and Financial Risk Management in the U.S.

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### Context

Since Mark Carney's Lloyds of London speech on the "tragedy of the horizon" and the formation of the Financial Stability Board's "Task Force on Climate-Related Financial Disclosure" (TCFD) in 2015, mainstream members of the financial sector have come to recognize the need to consider climate-related risks in corporate risk management, disclosure, and investment decisions. Activity in this space has been brisk. The private sector has dramatically improved its understanding of how efforts to transition to a lower carbon economy and the physical consequences of a changing climate will impact the economy and the role that industry plays in mitigating and adapting to climate change. The financial sector is grappling with how to understand and account for such risks in investment, lending, and other financial decision-making and regulators must consider how these risks affect markets and the economy as a whole.

In the context of public company disclosures to investors, the conversation has moved beyond *whether* to disclose to *how* to disclose. Many standard-setting bodies have emerged to demand different types of disclosure, filling a gap left by governments. Meanwhile, uptake of the disclosed information has increased: shareholders and asset managers have improved how they incorporate climate-related information into investment and voting analyses. In addition to qualitative assessments, they are incorporating quantitative information into their analyses from other data sources.

Yet there is still no international or national consensus on the optimal climate risk disclosure regime, nor in the United States is there any federal regulation requiring line-item climate-related financial risk disclosure, or providing guidance to reporting companies on how to assess the materiality of climate-related information.<sup>1</sup> The FSB charged the TCFD in 2015 with investigating the state of disclosures and recommending improvements with the goal of aligning current practices and improving the quality of corporate climate-related disclosures.<sup>2</sup> Since releasing its framework for improving climate-related financial reporting in June 2017, the TCFD has emerged as the leading

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<sup>1</sup> There are a few disclosure requirements in Regulation S-K that can elicit disclosure of climate-related and environmental information: Item 101 Business Description, Item 103 Disclosure of Legal Proceedings, Item 105 Risk Factors, and Item 303 Management Discussion and Analysis (MD&A). However, reporting remains largely based on what the company believes is material to its financial status and does not engender reporting of the kind or extent of information envisioned by the voluntary frameworks and standards organizations. There are no disclosure requirements that specifically request climate-related information.

<sup>2</sup> See [About the Task Force](#), Task Force on Climate-related Financial Disclosures (TCFD) (establishing good alignment between firms and their investors as part of their mission).



framework for disclosures of climate-related information.<sup>3</sup> It outlined a climate-related disclosure approach with four quadrants: governance, strategy, risk management, and metrics and targets.<sup>4</sup> However, it does not provide the detailed guidance needed for companies to confidently integrate such disclosures with mandatory financial reporting in the U.S.<sup>5</sup>

Companies must, as a result, navigate several competing disclosure regimes, established by non-governmental bodies, which are designed for different purposes, operate under different assumptions, and request that companies disclose different information in distinct formats. While there has been some consolidation among existing standards organizations, there are still a multiplicity of players. This state of affairs has created widespread confusion, dissatisfaction, and churn.

Securities regulators have not yet attempted to resolve the corporate disclosure confusion created by the melee of voluntary standards and disclosure efforts by imposing climate-specific mandatory disclosure requirements or updating guidance. Meanwhile, U.S. financial regulators responsible for risks to the financial system have quietly researched the impacts of climate change and begun to talk about what steps to take to address these risks. But they have yet to illuminate a path to requiring climate-related stress testing for financial institutions like those seen in other countries.

During the Trump administration, different federal agencies took distinct approaches, ranging from research and consideration to actively erecting barriers against incorporating climate change concerns into decision-making. But President Biden has committed to taking bold actions on climate change, including in the financial sector and on corporate disclosure requirements, and began acting on these commitments as soon as he took office. With new leadership in the federal government, significant shifts are underway in regulatory direction that will likely change what is required of companies and financial institutions.

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<sup>3</sup> TCFD, [Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures](#) (June 2017) [hereinafter *TCFD Recommendations*].

<sup>4</sup> The TCFD outlined four areas of disclosure: 1) *Governance*—describing the board’s oversight of climate-related risks and opportunities, and management’s role in assessing and managing them, 2) *Strategy*—disclosing climate-related risks and opportunities the company has identified over the short, medium, and long term; describing their impact on businesses, strategy, and financial planning; and assessing the resilience of the organization’s strategy (considering different climate-related scenarios, including a 2 degree Celcius or lower one), 3) *Risk management*—describing how the organization identifies and assess climate-related risks and the process for managing those risks, as well as how such processes are integrated into the organization’s overall risk management, and 4) *Metrics and Targets*—disclosing the metrics used to assess climate-related risks and opportunities, as well as Scope 1, 2, and 3 (if appropriate) GHG emissions and describing the targets used to manage risks, opportunities, and performance. TCFD Recommendations at 17. For more detail on the TCFD’s vision for implementation, see their companion report titled [Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures](#).

<sup>5</sup> The TCFD approach was designed as a “principle-based framework for voluntary disclosure” focused on the financial impacts of material climate-related information. TCFD Recommendations at 2. The TCFD encouraged companies to incorporate as much information as possible into mandatory financial reporting, but acknowledged companies must consider the materiality thresholds applied to such reporting in their home jurisdictions. TCFD Recommendations at 17. For more detail on the TCFD’s vision for implementation, see their companion report titled [Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures](#).



## The SEC's Evolution in Thinking on Disclosure Requirements

The former Director of SEC's Division of Corporate Finance argued in 2019 that enacting "prescriptive sustainability disclosure requirements" ten years ago would have "stymied" the "marketplace evolution of sustainability disclosures."<sup>6</sup> But the marketplace has evolved rapidly with regard to climate-related information since then. A decade ago, investors were just beginning to consider climate-related issues as potentially relevant, and companies lacked the level of information about physical impacts of climate change available to them now. Investors in 2020 are clamoring for more climate-related information from companies and urging more explicit assessments of how companies view the materiality of that information. Ratings organizations and investor advisory firms are incorporating climate change into their work.<sup>7</sup> The voluntary disclosure space has erupted with more detailed, industry-specific assessments of how companies should approach these evaluations, along with services to help them do so.

Along with this rapid evolution in activity comes an evolving standard for what is "material" under U.S. securities law. The U.S. Supreme Court defined "material" information as that which a reasonable investor is substantially likely to view as significantly altering the total mix of information available.<sup>8</sup> Given that the materiality standard, and thus the information a company must disclose, is partially defined by a reasonable investor's views and actions, the information a publicly-traded company

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<sup>6</sup> 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.").

<sup>7</sup> For example, S&P Global Ratings launched an ESG Evaluation program and ESG Risk Atlas that included climate change risks in April 2019, Moody's acquired climate data and risk analysis company Four Twenty Seven, Inc. in July 2019, and MSCI acquired a data analytics company that conducts climate change scenario analysis for investors called Carbon Delta in September 2019 and launched a new ESG tool in November 2019. Don Jergler, *S&P Will Issue 'Environmental, Social and Governance' Evaluations Including on Insurance Sector*, Insurance Journal (April 18, 2019); *Moody's Acquires Majority Stake in Four Twenty Seven, Inc., a Leader in Climate Data and Risk Analysis*, BusinessWire (July 24, 2019); Christopher Flavelle, *Moody's Buys Climate Data Firm, Signaling New Scrutiny of Climate Risks*, New York Times (July 24, 2019); *MSCI to Strengthen Climate Risk Capability with Acquisition of Carbon Delta*, BusinessWire (Sept. 9, 2019); *MSCI ESG Controversies Factsheet*. See also, Billy Nauman and Anna Gross, *Credit rating agencies focus on rising green risks*, Financial Times (Nov. 26, 2019) (noting S&P bought the ESG ratings arm of RobecoSAM and Fitch introduced ESG "relevance scores" in 2019), and Institutional Shareholder Services Inc., Press Release, *ISS Launches Climate Voting Policy*, (March 9, 2020) (announcing a new way for investors to integrate climate factors into their voting decisions). *Sustainalytics and Glass Lewis Team Up on Corporate Governance Data Services Offering*, SUSTAINALYTICS (Oct. 22, 2018); *Data Services: Corporate Governance Data*, SUSTAINALYTICS, (last visited Feb. 5, 2021).

<sup>8</sup> *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976). The 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). See also 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.*).



must include in its disclosures can change over time as investor expectations change, even absent new regulations.<sup>9</sup> The increase in focus on climate change by shareholders and asset managers may already be changing the scope of what companies must disclose in their mandatory filings to the SEC. However, without guidance from the regulator, corporate managers are left to determine for themselves how this evolving standard should impact their disclosures, potentially opening them up to additional litigation risk should they settle on disclosures that do not match the understanding of materiality held by investors.

## Inadequate Requirements and Inaction

Regulation S-K's existing disclosure requirements have proven inadequate at producing disclosures with sufficiently detailed and comparable information to evaluate corporate readiness to manage the climate change uncertainties ahead. The SEC's 2010 climate change guidance provided little help.<sup>10</sup> It recognized the potential for climate-related information to be material but did little to educate companies about how to evaluate such information.<sup>11</sup> The Commission did not follow its guidance with a robust effort to look behind disclosures and evaluate and inform corporate processes for analyzing climate-related information.<sup>12</sup> In a review of disclosures two years later, the SEC noticed little change in climate-related disclosures as a result of the 2010 guidance.<sup>13</sup>

While it is certainly true that material information is material information regardless of what topic it covers, the minimal change in disclosure practices following the 2010 interpretive guidance suggests that companies needed more specific instruction about how to properly evaluate and disclose the range of climate-related information that could be useful for investment purposes.<sup>14</sup>

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<sup>9</sup> See Hana Vizcarra, *The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures*, ENVIRONMENTAL LAW REPORTER, Vol. 50, Issue 2, 10106-10114 (2020) and 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 (2019).

<sup>10</sup> Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6295 (Feb. 8, 2010).

<sup>11</sup> In the 2010 guidance the SEC distinguished between what must be disclosed and what should be considered in the company's process to reach disclosure decisions, emphasizing the latter should be greater than the former. *Id.* at 6294-97 (Feb. 8, 2010) (in disclosing "known trends, events . . . [or] uncertainties" in Item 303 (MD&A disclosure), companies should remember that "[w]hile these materiality determinations may limit what is actually disclosed, they should not limit the information that management considers in making its determinations" and noting that "registrants are expected to consider all relevant information even if that information is not required to be disclosed.").

<sup>12</sup> Commission staff sent a handful of comment letters to companies about their climate-related disclosures (25 letters to 23 companies from 2010 to 2013 out of more than 45,000 comment letters, and 14 letters to 14 companies out of over 41,000 letters issued from 2014 to 2017). U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-188, CLIMATE-RELATED RISKS: SEC HAS TAKEN STEPS TO CLARIFY DISCLOSURE REQUIREMENTS 14 (2018).

<sup>13</sup> *Id.* at 15 (explaining that in the 2012 report to the Senate Committee on Appropriations examining climate-related disclosures after the 2010 guidance, the SEC found no notable changes).

<sup>14</sup> Ceres reviewed SEC filings of S&P 500 companies following the 2010 climate disclosure guidance. Their analysis found that companies did not discuss "company specific material information" nor "quantify[] risks or past impacts." Instead they used "boilerplate language of minimal utility to investors" to "briefly discuss[]" climate change. Jim Coburn & Jackie Cook, CERES, COOL RESPONSE: THE SEC & CORPORATE CLIMATE CHANGE REPORTING 4 (2014).



The TCFD's 2017 recommendations launched a period of growth and consolidation in the climate-related disclosure world. Numerous other groups, many predating the TCFD, are active on climate-related disclosures. Asset managers, pension funds, sovereign wealth funds, and other stakeholders often engage companies on climate-related disclosures through joint efforts by investor groups like [Climate Action 100+](#), [Ceres](#), Principles for Responsible Investment ([UN PRI](#)). Some of the most well-known organizations that have developed reporting guidance include: [CDP](#), [Global Reporting Initiative](#), [International Integrated Reporting Council](#), [The Climate Registry](#), The Sustainable Accounting Standards Board ([SASB](#)),<sup>15</sup> Climate Disclosure Standards Board ([CDSB](#)), and the World Business Council for Sustainable Development ([WBCSD](#)).<sup>16</sup> Additionally, industry organizations have developed reporting guidance specific to their industries.<sup>17</sup> Auditing firms and accounting standards organizations have also begun to develop TCFD-aligned guidance on disclosures.<sup>18</sup>

Rapid evolution in demand, use, and disclosure of climate change information since the 2010 SEC guidance attests to its inadequacies and reinforces the need for more specific SEC action. Asset owners, asset managers, and the standards and ratings organizations that inform them, have not converged on a unified method for disclosures that they believe achieve the goals of the TCFD framework, but that has not stopped them from incorporating climate change information into their work. Shareholders are increasingly committing to voting against management if companies do not take significant action to address climate change risks.<sup>19</sup> Investors also began incorporating into their assessments climate data that went beyond the information disclosed by companies.<sup>20</sup> Contributing

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<sup>15</sup> SASB aligns its guidance with U.S. securities law, designing its industry-specific disclosure recommendations around what could be material under U.S. securities law.

<sup>16</sup> Of these organizations, SASB's industry-specific guides on disclosure most closely track the materiality considerations that drive disclosures in the U.S. BlackRock has asked companies to publish disclosures in line with industry-specific SASB guidelines (or disclose a similar set of data in a way that is relevant to its particular business) as well as disclose climate-related risks in line with the TCFD's recommendations. BlackRock, [Towards a Common Language for Sustainable Investing](#) (Jan. 2020).

<sup>17</sup> For example, API/IPIECA has [sustainability standards](#) that include a module on climate for the oil and gas industry and [EEL and AGA](#) have created a reporting template for electric and gas utilities and EEL has a carbon emissions/electricity mix reporting database.

<sup>18</sup> As an example of the auditing community starting to engage on the topic, the International Auditing and Assurance Standards Board (IAASB) issued a [practice alert](#) on climate disclosure in Oct. 2020. The Partnership for Carbon Accounting Financials (PCAF) developed a [Global GHG Accounting and Reporting Standard](#) for the financial industry. See also, FSB, [Press release, FSB encourages the IFRS Foundation and authorities to use TCFD's recommendations as the basis for climate-related financial risk disclosures](#) (Dec. 21, 2020); Avery Ellfeldt, [Major accounting firms urge companies to disclose risks](#), E&E News (Sept. 23, 2020); Gillian Tett, [Big Four accounting firms unveil ESG reporting standards](#), Financial Times (Sept. 22, 2020).

<sup>19</sup> For example, BlackRock's 2021 stewardship expectations and voting guidelines specifically note that the asset manager will vote against boards who do not adequately disclose or plan for climate change. BlackRock, ["Our 2021 Stewardship Expectations"](#) (2020). The California State Teachers Retirement System (Calstrs) is supporting an effort to elect independent board members to ExxonMobil's board and is planning to accelerate greening of its investments in light of the election of Biden. Svea Herbst-Bayliss and Jennifer Hiller, [Tiny activist investor's arguments against Exxon draw crowd to its side](#), Reuters (Dec. 11, 2020); Josephine Cumbo and Chris Flood, [Calstrs plans green shift after Joe Biden's victory](#), Financial Times (Dec. 5, 2020).

<sup>20</sup> For example, Wellington Management and Woods Hole Research Center launched an initiative in September 2018 to integrate climate science into Wellington's asset management by creating models to analyze climate impacts on global capital markets, and the California Public Employees' Retirement System committed to applying the resulting insights in its portfolio. Press Release, Woods Hole Research Center, [Wellington Management and Woods Hole Research Center Announce Strategic Climate Science Initiative](#) (Sept. 16, 2018).



to the pressures on companies, asset managers and institutional investors are working to improve their own climate-related disclosures.<sup>21</sup> Their own review process can trigger new rounds of requests to firms in which they invest. As a result, companies are struggling to grasp and fulfill the range of disclosure-related needs and interests of a diverse financial community.

Different ideas within the investment and NGO community persist about how to disclose. Some argue for incorporating most information directly into reports filed with the SEC while others find standalone reporting adequate.<sup>22</sup> Some investors want to see climate issues incorporated into long-term risk management, and reflected in company reports;<sup>23</sup> others simply want comparable metrics they can use to complete ESG checklists. This lack of alignment makes it hard for companies to understand what will be considered decision-useful information for the investment community and how it will inform investor decisionmaking.

The investment community has exhibited frustration with the lack of consistency and detail in corporate disclosures on ESG issues and called on policy makers to provide adaptable guidance on materiality of these issues.<sup>24</sup> This applies equally to the subset of ESG issues that can be considered climate-related topics. The numerous voluntary disclosure, ratings, and standards organizations and their varying quality and heterogeneity can be as challenging for investors to interpret and use as for companies to navigate. Some of the most influential existing disclosure organizations have pledged to align their work with the TCFD, cooperate more closely, and even merge.<sup>25</sup> Even with greater

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BlackRock partnered with Rhodium Group to identify how physical climate risks impact financial performance. Rhodium Group, *Clear, Present, and Underpriced: The Physical Risks of Climate Change* (2019).

<sup>21</sup> The TCFD recommendations included recommendations for financial firms. CalPERS and CalSTRS started reporting on climate-related financial risk in their portfolios in 2020. Jennifer Thompson, *California Turns Up the Heat on Climate Change Disclosures*, Financial Times (Sept. 29, 2018).

<sup>22</sup> Huw van Steenis, Opinion, *Defective Data is a Big Problem for Sustainable Investing*, Financial Times (Jan. 21, 2019) (explaining that sustainable investment is now a vital part of successful investment, and that most institutional investors have altered their method of voting or have included ESG standards in the last 12 months, according to the marketing company Edelman).

<sup>23</sup> See, e.g., BlackRock ESG Investment Statement (Aug. 29, 2019) (“At BlackRock, we define ESG integration as the practice of incorporating material environmental, social, and governance (ESG) information into investment decisions in order to enhance risk adjusted returns. Some of our clients call this responsible investing - to us, integrating ESG information, or sustainability considerations, should be part of any robust investment process and means adapting our research and core investment processes to account for additional sources of risk and return that are explained by ESG information.”); Vanguard, Investment Stewardship Annual Report (2017) (“[O]ur position on climate risk is anchored in long-term economic value—not ideology.”).

<sup>24</sup> Barbara Novick, Vice Chairman, BlackRock, *Remarks at the World Economic Forum, Building Sustainable Markets: What Is Needed For A Transformation To A Sustainable Market Place? 1-2* (Sept. 24, 2018) (“encourag[ing] policymakers to provide guidance that recognizes the need to tailor reporting across diverse industries, because relevant ESG factors can vary primarily by industry, and also by geography, and even by specific company. While each framework has its own merits and some industry bodies are trying to address the lack of consistency, policy makers could encourage companies to provide clear and consistent data on material sustainability issues and contribute to greater standardization of reporting frameworks. I emphasize the importance of ‘materiality’ here, which means to focus the reporting on what is relevant for the particular business and its long-term commercial prospects, both in terms of risks and opportunities, and what is relevant for investors to make better investment decisions.”),

<sup>25</sup> SASB, Press Release, *IIRC and SASB announce intent to merge in major step towards simplifying the corporate reporting system*, (Nov. 25, 2020); *Statement of Intent to Work Together Towards Comprehensive Corporate Reporting: Summary of alignment discussions among leading sustainability and integrated reporting*



alignment though, the sheer number of organizations providing advice on voluntary disclosure methods makes useful disclosure more challenging to achieve.

The TCFD has helped to structure the global climate-related disclosure discussion, focusing the work of existing players on a common goal. But as the burgeoning activity in this domain over the last few years shows, the TCFD framework is inadequate for integrating such disclosures into the existing U.S. disclosure regime. Climate-related reporting continues to be uneven both within and across industries, in content and form. The SEC remaining on the sidelines contributes to the current confusion and hinders the integration of material climate-related risks into financial disclosures.

## The Impact of Changing SEC Leadership

President Biden's campaign platform included a commitment to "[r]equiring public companies to disclose climate risks and the greenhouse gas emissions in their operations and supply chains."<sup>26</sup> The President does not have direct control over the SEC's regulatory direction but he will change the makeup and leadership of the commission. SEC Chairman Clayton stepped down at the end of 2020, as is customary when there is a change in administration.<sup>27</sup> President Biden has nominated former CFTC chairman Richard Gensler to serve as SEC chairman. Commissioner Lee was named Acting Chair while Gensler awaits confirmation.<sup>28</sup>

Policy direction is already shifting as a result of the change in leadership. Acting Chair Lee spoke on the importance of regulatory involvement on climate-related and ESG disclosures in early November 2020.<sup>29</sup> Both Acting Chair Lee and Commissioner Crenshaw have pushed back against the idea that the variety of topics encompassed by the environmental, social, and governance (ESG) moniker pose an impediment to developing effective disclosure rules. The three Republican commissioners on the SEC at the end of 2020 expressed such concerns, viewing these issues as "amorphous" and still lacking consensus definitions.<sup>30</sup> However, Commissioner Allison Lee has noted that the broad,

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[organisations CDP, CDSB, GRI, IIRC and SASB](#) (Sept. 2020); GRI and SASB, Press Release, [Promoting Clarity and Compatibility in the Sustainability Landscape](#) (July 13, 2020) (announcing a collaborative work plan).

<sup>26</sup> BIDEN FOR PRESIDENT, *The Biden Plan To Secure Environmental Justice And Equitable Economic Opportunity In A Clean Energy Future* <https://joebiden.com/climate-plan/#>.

<sup>27</sup> Jeff Cox, "Jay Clayton says he will step down early as head of the SEC at the end of 2020," CNBC.com, <https://www.cnbc.com/2020/11/16/jay-clayton-says-he-will-step-down-early-as-head-of-the-sec-at-the-end-of-2020.html>.

<sup>28</sup> Steven T. Dennis and Laura Davison, *Gensler Confirmation Nowhere in Sight as GameStop Tests SEC Role*, BLOOMBERG (Jan. 28, 2021), <https://www.bloomberg.com/news/articles/2021-01-28/gensler-confirmation-nowhere-in-sight-as-gamestop-tests-sec-role>; Peter Dizikes, *MIT Sloan's Gary Gensler to be nominated for chair of Securities and Exchange Commission*, MIT News (Jan. 19, 2021), <https://news.mit.edu/2021/gary-gensler-nominated-chair-sec-0119>.

<sup>29</sup> Commissioner Lee, Keynote Remarks at PLI's 52nd Annual Institute on Securities Regulation, *Playing the Long Game: The Intersection of Climate Change Risk and Financial Regulation* (Nov. 5, 2020), [https://www.sec.gov/news/speech/lee-playing-long-game-110520#\\_ftnref17](https://www.sec.gov/news/speech/lee-playing-long-game-110520#_ftnref17).

<sup>30</sup> Commissioner Hester Pierce, *Scarlet Letters: Remarks before the American Enterprise Institute* (June 18, 2019) ("While ESG advocates can point to studies that certain ESG policies serve companies well, the amorphous nature of such policies makes it hard to generalize. In any case, the research, even on discrete points, is mixed. Other research has highlighted the cost of ESG investment strategies. The ambiguity of ESG makes research inherently difficult."); Commissioner Elad L. Roisman, *Keynote Speech at the Society for Corporate Governance* (July 7, 2020) ("In my experience, there is not consensus on what, exactly, "ESG" means.



principles-based “materiality” standard has not produced sufficient disclosures to ensure that companies are divulging comparable and reliable information to investors.<sup>31</sup> She also highlighted the importance of better climate-related disclosures in avoiding panicked sell-offs, stating: “[W]e 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.”<sup>32</sup> Commissioner Caroline Crenshaw joined Commissioner Lee in criticizing a recent Regulation S-K modernization rule in part because it “fails completely to address climate risk, similar to other recent modernization rulemakings that have failed to deal adequately with this and other critical factors that impact an issuer’s long-term sustainability, such as human capital management.”<sup>33</sup> The two commissioners argue the SEC should “address climate, human capital, and other ESG risks, in a comprehensive fashion with new rulemaking specific to these topics,” and propose creating “an internal task force and ESG Advisory Committee that is dedicated to building upon the recommendations of leading organizations, such as the Task Force on Climate-Related Financial Disclosures, and defining a clear plan to address sustainable investing.”<sup>34</sup>

Acting Chair Lee has created a new position in her office focused on climate change. The new Senior Policy Advisor for Climate and ESG, Satyam Khanna “will advise the agency on environmental, social, and governance matters and advance related new initiatives across its offices and divisions.”<sup>35</sup> This is a strong indicator that there will be a renewed focus on the topic across the Commission. As the SEC renews its focus on climate-related disclosures, it will need to balance prescription with flexibility (i.e. how to encourage more consistent practices and better integration of climate change risks into corporate assessments while still maintaining flexibility as disclosure practices evolve); how best to inform investors while also encouraging better corporate risk management,<sup>36</sup> and grapple with how to incorporate scenario analysis.<sup>37</sup>

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I often wondered how the three concepts of environmental, social, and governance matters got lumped together.”); Chris Flood, *SEC chair warns of risk tied to ESG ratings*, Financial Times (May 28, 2020) (“Jay Clayton, chairman of the Securities and Exchange Commission, said any analysis that combined separate environmental, social and governance metrics into a single ESG rating would be “imprecise”).

<sup>31</sup> Commissioner Allison Lee, “Modernizing” Regulation S-K: Ignoring the Elephant in the Room (Jan. 30, 2020).

<sup>32</sup> Allison Lee, *Big Business’s Undisclosed Climate Crisis Plans* (Opinion), The New York Times (Sept. 27, 2020).

<sup>33</sup> *Joint Statement by Commissioners Lee and Crenshaw on Amendments to Regulation S-K*, Harvard Law Forum on Corporate Governance (Nov. 21, 2020).

<sup>34</sup> *Id.*

<sup>35</sup> SEC Press Release, *Satyam Khanna Named Senior Policy Advisor for Climate and ESG* (Feb. 1, 2021), <https://www.sec.gov/news/press-release/2021-20>.

<sup>36</sup> The TCFD’s 2017 recommendations focus heavily on balancing the need for more detailed and comparable disclosures with the need to encourage better risk assessment, management, and strategic planning practices within reporting organizations. TCFD Recommendations at 17. For more detail on the TCFD’s vision for implementation, see their companion report titled *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures*. See also Margaret Peloso, *An Approach for Investors, Companies*, THE ENVIRONMENTAL LAW FORUM, 27 (Nov./Dec. 2020) (cautioning that a focus on prescriptive requirements could “undercut” corporate risk assessment and expressing particular concern about undermining the benefit of scenario analysis as a “tool for imagination” and to enhance “organizational resilience.”).

<sup>37</sup> Scenario analysis tests the resilience of a company’s strategy. Robust disclosure of scenario analysis exercises is paramount for those urging more expansive climate-related disclosures. Yet, scenario analysis is perhaps the least understood tool for analyzing and disclosing climate-related risks. The TCFD



## The Fed and Other Financial Regulators

In addition to expecting significant new activity at the SEC around climate-related disclosures (and likely other ESG topics), financial regulators charged with managing broader financial system risks show signs of new actions on climate change.

The Federal Reserve<sup>38</sup> has previously indicated that it was internally researching climate change impacts on the financial system but has recently taken public stances on how climate change could impact the health of the U.S. financial system and made changes to their operations to address them. Federal Reserve Chair Jerome Powell stated, in January 2020, 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.<sup>39</sup> In November 2020, the Federal Reserve included climate change in its Financial Stability Report for the first time.<sup>40</sup> On December 15, 2020, the Federal Reserve Board formally joined the Network of Central Banks and Supervisors for Greening the Financial System (NGFS),<sup>41</sup> a network of central banks and supervisory authorities formed in 2017 to share practices on climate-related financial risk management.<sup>42</sup> In January 2021, the Fed announced a new Supervision Climate Committee to be led by Kevin Stiroh, a senior official who has worked closely on climate change and financial risk.<sup>43</sup>

The Federal Reserve Banks within the reserve system are also taking action. The Federal Reserve Bank of San Francisco, for example, hosted a conference on climate change in 2019, publishing a

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recommendations encourage scenario analysis but companies have struggled to conduct it. Various reports have discussed how to incorporate scenario analysis into corporate disclosures. See TCFD, *Technical Supplement | The Use of Scenario Analysis in Disclosure of Climate-Related Risks and Opportunities* (June 2017); TCFD, *Guidance on Scenario Analysis for Non-Financial Companies* (Oct. 2020); MIT, Office of the Vice President for Research, *Climate-Related Financial Disclosures: The Use of Scenarios* (Nov. 2019).

<sup>38</sup> The Federal Reserve System is the U.S.’s central bank that manages the nation’s monetary policy, promotes stability of the financial system and safety and soundness of financial institutions, fosters payment and settlement system safety and efficiency, and promotes consumer protection. BOARD OF GOVERNOR OF THE FEDERAL RESERVE SYSTEM, *About the Fed*, <https://www.federalreserve.gov/aboutthefed.htm> (last visited Jan. 19, 2021). The Federal Reserve System was created in 1913 by the Federal Reserve Act and is composed of the Board of Governors and twelve regional banks. *Id.* At Federal Reserve History, <https://www.federalreserve.gov/aboutthefed/centennial/about.htm>.

<sup>39</sup> Ann Saphir, “Fed has a role in combating climate change, says Powell,” REUTERS (Jan. 29, 2019), <https://www.reuters.com/article/us-usa-fed-climatechange/fed-has-a-role-in-combating-climate-change-risk-powell-says-idUSKBN1ZT031>.

<sup>40</sup> Board of Governors for the Federal Reserve System, “Financial Stability Report,” (Nov. 2020), <https://www.federalreserve.gov/publications/files/financial-stability-report-20201109.pdf>.

<sup>41</sup> Board of Governors for the Federal Reserve System, Press Release, “Federal Reserve Board announces it has formally joined the Network of Central Banks and Supervisors for Greening the Financial System, or NGFS, as a member,” (Dec. 15, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20201215a.htm>.

<sup>42</sup> The Network on Greening the Financial System, <https://www.ngfs.net/en>. The NGFS released a *Guide to climate scenario analysis for central banks and supervisors* in June 2020 that discusses considerations around scenario design.

<sup>43</sup> Avery Ellfeldt, *‘Enormously big deal’: Fed creates climate committee*, E&E NEWS (Jan. 25, 2021), <https://www.eenews.net/stories/1063723523>; Pete Schroeder, *U.S. Fed taps official to lead new climate change team*, REUTERS (Jan. 25, 2021), <https://www.reuters.com/article/usa-fed-climate/u-s-fed-taps-official-to-lead-new-climate-change-team-idUSL1N2K02GM>.



series of papers,<sup>44</sup> and its October 2019 issue of Community Development Innovation Review was titled “Strategies to Address Climate Change Risk in Low- and Moderate-income Communities.”<sup>45</sup> Until he was named the head of the Supervision Climate Committee, Kevin Stiroh was the executive vice president of the Federal Reserve Bank of New York and regularly spoke about climate change and financial risk.<sup>46</sup> Stiroh is also the co-chair of the Basel Committee on Banking Supervision’s high level Task Force on Climate-related Financial Risks (TCFR), established in February 2020 with the goal of developing supervisory practices to mitigate climate-related risks.<sup>47</sup> The Federal Reserve Bank of San Francisco released a report in early February 2021 on climate change as a financial risk that describes “how uncertainty about the magnitude, scope, and timing of the economic damages from climate change translates into financial risk, which can adversely affect financial markets, asset classes, and institutions as well as the income and balance sheets of businesses, households, and governments.”<sup>48</sup>

In addition to the work the Federal Reserve is doing, the Commodity Futures Trading Commission (CFTC) has studied climate change risk.<sup>49</sup> The CFTC’s Market Risk Advisory Committee (MRAC) commissioned a report on climate-related systemic risk that was released in September 2020.<sup>50</sup> The

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<sup>44</sup> “The Economics of Climate Change,” Economic Research Conference held by the Federal Reserve Bank of San Francisco (Nov. 19, 2019), <https://www.frbsf.org/economic-research/events/2019/november/economics-of-climate-change/>.

<sup>45</sup> Strategies to Address Climate Change Risk in Low- and Moderate-income Communities, COMMUNITY DEVELOPMENT INNOVATION IN REVIEW, Vol. 14, Issue 1 (Oct. 2019), <https://www.frbsf.org/community-development/publications/community-development-investment-review/2019/october/strategies-to-address-climate-change-low-moderate-income-communities/> (last visited Jan. 25, 2021).

<sup>46</sup> For example, in 2020 he delivered remarks on climate change and risk management in bank supervision at an event at Harvard Business School. Kevin Stiroh, “Climate Change and Risk Management in Bank Supervision,” Remarks delivered at Harvard Business School (March 4, 2020), <https://www.newyorkfed.org/newsevents/speeches/2020/sti200304> (last visited Jan. 25, 2021).

<sup>47</sup> The Basel Committee on Banking Supervision (BCBS) is “the primary global standard setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Its mandate is to strengthen the regulation, supervision and practices of banks worldwide with the purpose of enhancing financial stability.” BANK FOR INTERNATIONAL SETTLEMENTS, *Basel Committee Charter*, <https://www.bis.org/bcbs/charter.htm> (last visited Jan. 19, 2021). The BCBS set up the TCFR in 2020 as part of its efforts to support central banks in addressing climate change-related risks. BIS Annual Report, 2019/20 at 106-108, <https://www.bis.org/about/areport/areport2020.pdf>. In his role as co-chair, Kevin Stiroh spoke several times in 2020 about the work of the TCFR and the risks of climate change to the financial system. See, e.g., Kevin Stiroh, “The Basel Committee’s initiatives on climate-related financial risks,” Speech at 2020 IIF Annual Membership Meeting (Oct. 14, 2020), <https://www.bis.org/speeches/sp201014.htm>; Kevin Stiroh, “A microprudential perspective on the financial risks of climate change,” Remarks at the Global Association of Risk Professionals’ 2020 Climate Risk Symposium (Nov. 10, 2020), <https://www.bis.org/review/r201110b.htm> (last visited Jan. 25, 2021).

<sup>48</sup> Glenn D. Rudebusch, Climate Change Is a Source of Financial Risk, Federal Reserve Bank of San Francisco Economic Letters (Feb. 8, 2021), <https://www.frbsf.org/economic-research/publications/economic-letter/2021/february/climate-change-is-source-of-financial-risk/>.

<sup>49</sup> Created in 1974 by the Commodity Futures Trading Commission Act to regulate the U.S. derivatives markets. See more about its history at <https://www.cftc.gov/About/AboutTheCommission>.

<sup>50</sup> 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).



subcommittee responsible, the Climate-Related Market Risk Subcommittee, was given a broad mandate: to evaluate climate-related risk across the U.S. financial system and markets.

The report identifies and examines climate-related risks and provides specific recommendations for addressing them. These recommendations range from establishing an economy-wide price on carbon to incorporating climate-related risks within the monitoring and oversight functions of federal financial regulatory agencies.<sup>51</sup> The report advises that the Financial Stability Oversight Council (FSOC)<sup>52</sup> research the financial implications of climate-related risks, including sub-systemic shocks to markets, and that the CFTC investigate how such risks impact markets and market participants under its oversight. The advisory subcommittee also recommended that U.S. regulators join international groups established specifically to address these risks (the Federal Reserve has recently done so) and that financial supervisors require financial firms address climate-related risks through their risk management frameworks and pilot climate risk stress testing. The report calls upon state insurance regulators to require insurers to assess, address, and disclose climate risks in their underwriting activity and investment portfolios, and focuses on how financial regulators can help improve disclosure and standardize classification systems.

Notably, the report calls on the SEC to clarify the definition of materiality for disclosing medium- and long-term climate risks both quantitatively and qualitatively, and advises the SEC to update its 2010 climate risk guidance. The subcommittee further recommends that regulators review and clarify the law on using climate-related factors in investment decisions for retirement and pension plans under the ERISA and non-ERISA fiduciary duties and encourages a rethinking of rules recently issued by EBSA, described below.

The Climate-Related Market Risk Subcommittee's suggestions serve as a blueprint for potential regulatory action and some are already being acted on.<sup>53</sup> The Federal Reserve Board acts independently of the White House, but works closely with the Treasury Department to manage our economy. The CFTC, like the SEC, is relatively independent as well but the President appoints its leadership. In his January 27<sup>th</sup> Executive Order on Tackling the Climate Crisis at Home and Abroad, President Biden instructed the Treasury Secretary to participate in international fora working on managing climate-related risks.<sup>54</sup> Biden's Secretary of the Treasury, Janet Yellen, has committed to

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<sup>51</sup> *Id.*

<sup>52</sup> The FSOC was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 to monitor the stability of the financial system. Chaired by the Secretary of Treasury, it comprises the various agency financial regulators and responsible for identifying risks and responding to emerging threats to financial stability. The FSOC has supervisory authorities over certain nonbank financial firms. Learn more at U.S. DEPT. OF THE TREASURY, *About FSOC*, <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/about-fsoc> (last visited Jan. 19, 2021).

<sup>53</sup> For example, as was noted previously, the Federal Reserve has since joined the Network of Central Banks and Supervisors for Greening the Financial System and is actively researching climate-related systemic risks. The Biden administration is also expected to act on considering new SEC guidelines or regulations around climate-related disclosures and may reconsider the EBSA rulemaking.

<sup>54</sup> Executive Order 14008, 86 Fed. Reg. 7619, <https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad>.



creating a high level climate team within the department to work on these issues.<sup>55</sup> This could provide additional support for the Federal Reserve's efforts to engage on climate-related risk in international bodies as well as for acting on the recommendations to tackle the challenges to the U.S. financial system presented in the CFTC advisory committee report.

## **Trump Erected Barriers for Climate-Concerned Financial Actors Where Possible**

Although the president has the power to appoint the SEC chair and party control swings with the party in the White House, former President Trump did not have direct control over the SEC's activities nor did he exert significant influence over other federal financial regulators' actions. However, two offices in which the president does maintain more direct control over the policy direction and regulatory agenda demonstrated a willingness to try to reign in considerations of climate-related realities in investing and financing. These too are expected to succumb to the new administration's redirection of policy.

### **EBSA 2020 Rulemakings**

Former President Trump issued a directive to the Department of Labor in 2019 to review data on Employee Retirement Income Security Act (ERISA) plans, identify trends in investments in the energy sector, and review guidance on fiduciary responsibilities.<sup>56</sup> Two rules finalized by the Employee Benefits Security Administration (EBSA)<sup>57</sup> towards the end of 2020 emphasize the limits of how ERISA plan fiduciaries can consider ESG topics, including climate, in their investment planning and in the exercise of their shareholder rights.

EBSA finalized a new rule on investment duties under ERISA in November 2020.<sup>58</sup> The rule cautioned against considering ESG factors in ERISA-covered plan investments, emphasizing financial outcomes over other considerations, and restricted fiduciaries from offering ESG-themed funds as default options. The regulation included requirements for potentially burdensome documentation of economic returns and risks to support investment choices. Some observers argued it would limit

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<sup>55</sup> Zachary Warmbrodt, *Yellen vows to set up Treasury team to focus on climate, in victory for advocates*, POLITICO (Jan. 19, 2021), <https://www.politico.com/news/2021/01/19/yellen-treasury-department-climate-change-460408>.

<sup>56</sup> Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, 84 Fed. Reg. 15495 (April 10, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-04-15/pdf/2019-07656.pdf>.

<sup>57</sup> EBSA is a sub-cabinet division of the Department of Labor that administers and enforces the fiduciary, reporting, and disclosure provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). EBSA's authority covers private retirement plans, some health plans, and welfare benefit plans. See *What We Do*, <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/what-we-do> and *History of EBSA and ERISA*, [https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa#:~:text=The%20Employee%20Benefits%20Security%20Administration,Welfare%20Benefits%20Administration%20\(PWBA\)](https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa#:~:text=The%20Employee%20Benefits%20Security%20Administration,Welfare%20Benefits%20Administration%20(PWBA)) (last visited Jan. 25, 2021).

<sup>58</sup> Employee Benefits Security Administration, Department of Labor, *Final Rule - Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 72846 (Nov. 13, 2020), <https://www.federalregister.gov/documents/2020/11/13/2020-24515/financial-factors-in-selecting-plan-investments>.



ERISA plan fiduciaries' voice in overseeing corporate decision-making around climate change preparedness and planning and other ESG topics.<sup>59</sup>

EBSA also finalized a rule in December 2020 on an EBSA fiduciary's duties for proxy voting and exercising shareholder rights.<sup>60</sup> The regulation clarifies that plan fiduciaries are not required to vote all proxies, but emphasizes that votes they do make should be based on pecuniary factors.<sup>61</sup> The rule lists specific principles a plan fiduciary must consider when deciding whether to exercise shareholder rights, including not using plan assets to further "policy-related or political issues, including ESG issues."<sup>62</sup>

President Biden signed Executive Order 13990 on his first day in office that directs all agencies to review regulations promulgated during the Trump administration that may be inconsistent with the new administration's climate policies.<sup>63</sup> EBSA's 2020 rulemakings are expected to be part of this review and potentially revised as a result of it.

### **Office of the Comptroller of the Currency's Proposal to Restrict Bank Lending Policies**

With lenders changing policies to incorporate climate change considerations and announcing lending policies based on financial evaluations that consider climate change costs some industries were facing the possibility of decreased financing options for major projects. Banks are committing to disclosing climate-related risks in their assets and to making estimates of the environmental and climate impacts of their lending practices.<sup>64</sup>

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<sup>59</sup> Professor and legal scholar Ann Lipton argued the rule "may functionally disenfranchise ERISA fiduciaries." 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](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).

<sup>60</sup> EBSA, Final Rule, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," 85 Fed. Reg. 81658.

<sup>61</sup> *Id.* at 81663 ("The final rule carries forward from the proposal a provision that requires plan fiduciaries, when deciding whether to exercise shareholder rights and when exercising such rights, including the voting of proxies, to carry out their duties prudently and solely in the interests of the plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan.").

<sup>62</sup> *Id.* at 81665.

<sup>63</sup> Executive Order 13990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 20, 2021).

<sup>64</sup> Morgan Stanley and Bank of America have committed to disclosing the climate change impacts of their financing through the Partnership for Carbon Accounting Financials (PCAF), which released the "Global GHG Accounting and Reporting Standard for the Financial Industry" in November 2020. Caroline Hudson, *Bank of America to join other big banks in disclosing environmental effect of lending practices*, CHARLOTTE BUSINESS JOURNAL, <https://www.bizjournals.com/charlotte/news/2020/07/30/bank-of-america-will-report-lending-and-emissions.html>; Zack Colman, *Morgan Stanley commits to tallying its climate impact*, POLITICO (July 20, 2020), <https://www.politico.com/news/2020/07/20/morgan-stanley-climate-impact-371696>; Pippa Stevens, *Goldman Sachs to spend \$750 billion on climate transition projects and curb fossil fuel lending*, CNBC (Dec 16, 2019), <https://www.cnbc.com/2019/12/16/goldman-sachs-targets-750-billion-for-climate-transition-projects.html> (noting lending policy changes that included no longer financing upstream Arctic oil and gas, coal fired power plants without capture or emissions reduction technologies, or new thermal coal projects); Partnership for Carbon Accounting Financials, "Global GHG Accounting and Reporting Standard for the Financial Industry," (Nov. 18, 2020), <https://carbonaccountingfinancials.com/standard>. JP Morgan announced in October it will establish emission targets for its financing portfolio and become carbon neutral in its operations



The largest banks have made commitments not to finance certain types of projects that exacerbate GHG emissions—such as oil and gas exploration in the Arctic National Wildlife Refuge, coal projects, and tar sands development.<sup>65</sup> For example, Goldman Sachs Group Inc., JP Morgan Chase & Co., Wells Fargo & Co., Citigroup, Morgan Stanley, and, most recently, Bank of America, have all stated that they will not finance oil and gas projects in the Arctic National Wildlife Refuge coastal plain.<sup>66</sup> Adding to the divestment pressures, the Rockefeller family, that owes its fortune to the John D. Rockefeller's Standard Oil Co., has committed to pressuring banks to stop investing in fossil fuels, creating the organization BankFWD to engage on the topic.<sup>67</sup>

Partly in response to these commitments, the Office of the Comptroller of the Currency (OCC)<sup>68</sup> finalized a rule in January 2021 designed to prevent banks from refusing to finance categories of projects or companies, requiring them to undergo individual risk assessments to support their decision to deny services to any particular potential customer. The OCC proposed the rule, which applies to banks with more than \$100 billion in assets, in November 2020 and finalized it the last week of the Trump presidency, ten days after the public comment period on the proposal closed.<sup>69</sup>

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in 2020. The bank will advocate for the federal government to establish a price on carbon and will engage its corporate clients on climate-related strategies and carbon disclosures, in addition to tracking their carbon intensity. JP Morgan Chase Press Release, *JP Morgan Chase Adopts Paris-Aligned Financing Commitment* (Oct. 6, 2020), <https://www.jpmorganchase.com/news-stories/jpmorgan-chase-adopts-paris-aligned-financing-commitment>.

<sup>65</sup> David Benoit, *JPMorgan Pledges to Push Clients to Align With Paris Climate Agreement*, WALL STREET JOURNAL (Oct. 6, 2020), <https://www.wsj.com/amp/articles/jpmorgan-pledges-to-push-clients-to-align-with-paris-climate-agreement-11602018245> (“Other banks have made various pledges to stop supporting Arctic drilling and coal companies. British banks NatWest Group PLC (the former RBS Group PLC) and Barclays PLC have both committed to using their business to further the Paris agreement, the 2015 deal that called on global governments to curb rising temperatures. Citigroup Inc. earlier this year said it would walk away from clients that aren’t taking climate change seriously.”); Christopher Flavelle, *Global Financial Giants Swear Off Funding an Especially Dirty Fuel*, THE NEW YORK TIMES (Feb. 12, 2020), <https://www.nytimes.com/2020/02/12/climate/blackrock-oil-sands-alberta-financing.html>; Tsevetana Paraskova, *Deutsche Bank Immediately Ends Funding For Oil Sands And Arctic Oil Projects*, OILPRICE.COM (July 27, 2020), <https://oilprice.com/Latest-Energy-News/World-News/Deutsche-Bank-Immediately-Ends-Funding-For-Oil-Sands-And-Arctic-Oil-Projects.html>; Lananh Nguyen, *BofA Says It Won’t Finance Oil and Gas Exploration in the Arctic*, BLOOMBERG (Nov. 30, 2020), [https://www.bloomberglaw.com/product/blaw/document/QKMMNJT1UM0W?criteria\\_id=85a1d6e099f94377191fb0a56233eddb](https://www.bloomberglaw.com/product/blaw/document/QKMMNJT1UM0W?criteria_id=85a1d6e099f94377191fb0a56233eddb).

<sup>66</sup> Dino Grandoni, *The Energy 202: The last big environmental fight of the Trump era is over drilling in Alaska's Arctic*, WASHINGTON POST (Nov. 23, 2020), <https://www.washingtonpost.com/politics/2020/11/23/energy-202-last-big-environmental-fight-trump-era-is-over-drilling-alaska-arctic/>.

<sup>67</sup> Zack Colman, *Oil scions rally wealthy peers to press banks on climate*, POLITICO (Oct. 2, 2020), <https://www.politico.com/news/2020/10/02/oil-scions-rally-wealthy-peers-to-press-banks-on-climate-425018?gsBNFDNDN=undefined>.

<sup>68</sup> The OCC is a bureau of the U.S. Department of Treasury that charters, regulates, and supervises national banks, federal savings associations, and federal branches and agencies of foreign banks. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *Who We Are*, <https://www.occ.treas.gov/about/who-we-are/index-who-we-are.html> (last visited Jan. 19, 2021). The OCC was created in 1863 by the National Currency Act. *Id.* at History, <https://www.occ.treas.gov/about/who-we-are/history/index-history.html> (last visited Jan. 19, 2021).

<sup>69</sup> OCC, Proposed Rule, *Fair Access to Financial Services*, 85 Fed. Reg. 75261, <https://www.federalregister.gov/documents/2020/11/25/2020-26067/fair-access-to-financial-services>; OFFICE OF THE COMPTROLLER OF THE CURRENCY, Press Release, “OCC Finalizes Rule Requiring Large Banks to Provide



The rule would have required large banks to provide services offered to all lawful businesses in a given market if it provides those services to any. The OCC states that “a bank may not rely on factors that cannot be quantified” when deciding whether or not to provide a financial service to a customer.<sup>70</sup> The OCC specifically mentioned climate-related commitments from banks as a reason for its proposal (and pointed to a letter from the Alaska congressional delegation about banks announcing they would not finance oil and gas development in the Arctic),<sup>71</sup> but did not directly mention them in the final rule.

The week after President Biden took office, the Comptroller of the Currency and has placed a pause on the rule, preventing it from being published in the Federal Register in order to allow the next nominated Comptroller of the Currency time to review it.<sup>72</sup> Congressional Democrats are reportedly considering using the Congressional Review Act to eliminate the rule.<sup>73</sup>

## Conclusion

The last few years have proven a period of contradictions for climate disclosure and financial risk management. On the one hand, the private sector has made progress in incorporating climate-related information into risk management and financial analysis. On the other, federal regulatory bodies with the power to referee the points of contention have largely stayed on the sidelines or taken steps to stifle the discussion. The new administration has already changed this dynamic, emphasizing its desire for action on these issues in its policies, leadership choices, and calls to engage the powers of the government across agencies to ensure better disclosure, assessment, and management of risks from climate change. Companies and financial actors should expect financial regulators to start turning their research and statements about the risks of climate change into regulatory initiatives.

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Fair Access to Bank Services, Capital, and Credit,” (Jan. 14, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8.html>.

<sup>70</sup> OFFICE OF THE COMPTROLLER OF THE CURRENCY, Final Rule, “Fair Access to Financial Services,” RIN 1557-AF05 at 36 (Jan. 14, 2021), <https://www.occ.gov/news-issuances/federal-register/2021/nr-occ-2021-8a.pdf>.

<sup>71</sup> OCC, Proposed Rule, *Fair Access to Financial Services*, 85 Fed. Reg. 75261, <https://www.federalregister.gov/documents/2020/11/25/2020-26067/fair-access-to-financial-services>.

<sup>72</sup> Press Release, OCC Puts Hold on Fair Access Rule, Office of the Comptroller of the Currency (Jan. 28, 2021), <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html>; Eric Rosenbaum, *Banking regulator pauses rule that enraged Wall Street and climate investors*, CNBC (Jan. 28, 2021), <https://www.cnbc.com/2021/01/28/occ-pauses-bank-rule-that-enraged-wall-street-climate-investors-.html>.

<sup>73</sup> Juliet Eilperin and Dino Grandoni, “In Trump’s last days, a spree of environmental rollbacks,” WASHINGTON POST (Jan. 15, 2021), <https://www.washingtonpost.com/climate-environment/2021/01/15/trump-environmental-rollbacks/>.