The Race to Net Zero: How ESG Investors Are Driving Corporations to Ethically Lower Greenhouse Gas Emissions

By Kamari Koonce

Scientists, economists, lawyers, government officials, and environmentalists have struggled for decades to answer why climate change is hard to fix. There is no absolute answer to this question because there are many factors that increase global temperature. However, one undeniable fact is that corporations are one of the primary emitters of greenhouse gas emissions. Corporations currently enjoy lax regulatory requirements for disclosing these emissions and adhering to climate action plans. Investors—traditionally thought of as an unlikely proponent of climate action—want to see corporations held to a higher standard. There is a growing number of environmental, social, and governance (ESG) focused investors who are positively influencing corporate behavior. Additionally, recent international ESG case law demonstrates strategies U.S. domestic courts could use to hold corporations accountable to their climate action plans. This ESG case law is increasingly important as the United States seeks to meet its goals within the Paris Climate Agreement. Additionally, the Securities Exchange Commission's ("SEC") proposed climate risk disclosure rule (The Enhancement and Standardization of Climate-Related Disclosures for Investors) and the H.R. 1187 Corporate Governance Improvement and Investor Protection Act, arguably provide more significant mitigation and adaptation transparency for today's time. It is important to evaluate how the proposed climate rule will cause corporations to approach their net zero plans. ESG investors and other environmentalists should carefully analyze these net zero plans to ensure that there is a meaningful reduction in overall emissions. Altogether, ESG investors, the SEC's authority to regulate environmental disclosures, and H.R. 1187 work to improve corporate governance in the environmental arena.

INTRODUCTION

Fifty-six leading investors of the Institutional Investors Group on Climate Change ("IIGCC"), who manage more than $14 trillion of assets, are calling for new corporate governance measures to ensure shareholders can hold companies accountable in achieving net zero and other action commitments.[1] Net zero emissions means a zero balance between greenhouse gas emissions produced and removed from the atmosphere.[2] According to the Intergovernmental Panel on Climate Change ("IPCC"), global greenhouse gas emissions must fall by forty-five percent from 2010 levels by 2030 to limit warming to a manageable 1.5 degrees Celsius.[3] The IPCC is the United Nations body responsible for assessing the science related to climate change globally.[4] The IPCC determined that if global greenhouse gas emissions do not drop, then the global temperature is on track to rise by 2.5°C or higher by 2100.[5]

Investors outside of the IIGCC are also interested in reaching net zero emissions. Over the last decade, investors in the United States have increasingly

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1 *Investor Position Statement – Vote on Transition Planning*, THE INSTITUTIONAL INVESTORS GROUP ON CLIMATE CHANGE (Jul. 28, 2021), https://www.iigcc.org/resource/investor-position-statement-vote-on-transition-planning/ (The IIGCC is a European membership body that develops strategies to tackle climate change in investing and consists of 360 members across 22 countries).

2 73 CAIL Annual Institute on Energy Law § 13.03 (2022).

3 THE INSTITUTIONAL INVESTORS GROUP ON CLIMATE CHANGE, Investor Position Statement: A Call for Corporate Net Zero Transition Plans at 1 (2021).

4 *Id.*

5 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, Special Report on Global Warming of 1.5°C 17 at 12 (Valerie Masson-Delmotte et. al. eds., 2018).

engaged in socially responsible investing (SRI).[6] Socially responsible investing means equally valuing a company's approach to environmental, social, and governance (ESG) issues and their likelihood of providing a return on an investment.[7] As climate change rapidly progresses, investors will continue to scrutinize how a corporation analyzes their environmental impact and ability to adapt to the changing environment.

In response to this shift in investor preferences, there are more ESG investors speaking out publicly about companies. The Climate Action 100+ analyzes 166 focus companies, which account for over eighty percent of corporate industrial greenhouse gas emissions.[8] The Climate Action 100+ is an initiative adopted after the Paris Climate Agreement that tracks the progress of companies' reduction in greenhouse gas emissions based on their net zero pledges and the organization was founded after the Paris Climate Agreement.[9] The Paris Climate Agreement is an international treaty adopted by almost every nation in 2015 at the United Nations Framework Convention on Climate Change's 21st Conference to address climate change and its negative impacts.[10] The agreement heeds the IPCC's predictions and aims to limit the global temperature increase in this century to 2 degrees Celsius above pre-industrial levels, while implementing strategies to limit the increase to 1.5 degrees Celsius.[11] According to PWC, "an effective net zero strategy combines actions that reduce emissions across the value chain, absorb unavoidable emissions, and/or offset emissions that cannot be avoided or absorbed by investing in sustainable projects."[12] These corporations can attempt to reach the first two goals using technology and renewable energy.[13] To reach the third goal, they will need to purchase "carbon credits."[14] Carbon credits are tradable instruments that convey a right to emit a unit of pollution and are used to reduce an estimated amount of carbon emissions.[15] Once a corporation purchases carbon credits, they can account for it as an asset that helps reduce their carbon

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6 *Does Socially Responsible Investing Change Firm Behavior?*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jul. 29, 2021), https://corpgov.law.harvard.edu/2021/07/29/does-socially-responsible-investing-change-firm-behavior/.

7 *Will ESG Disclosures Be Mandated by Law? a Legislative Analysis*, KING & SPALDING (Sep. 22, 2021), https://www.kslaw.com/news-and-insights/will-esg-disclosures-be-mandated-by-law-a-legislative-analysis.

8 *The Three Asks*, CLIMATE ACTION 100+, (last visited Mar. 24, 2023) https://www.climateaction100.org/approach/engagement-process.

9 *Id.*

10 *See* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

11 *Id.* § 2.1(a).

12 *Accounting For Your Company's Zero-Carbon Future*, PWC (Jul. 3, 2022), https://viewpoint.pwc.com/dt/us/en/pwc/in_the_loop/in_the_loop_US/zeroing_in_on_net_zero.html.

13 *Id.*

14 *Id.*

15 *Id.*

footprint.[16] Accounting for carbon credits as an asset on financial statements is not the problem. The problem with this approach is that companies will state that these credits help reduce their carbon footprint, without knowing how authentic these credits are or if they truly are effective means of reducing GHG emissions.[17] Because government regulation of this market is still developing, the rules are vague and inconsistently enforced.[18]

All of these corporate strategies of addressing climate change are important because consumers are more environmentally conscious than ever before.[19] AFLAC, a large insurance company, has researched what it means to be a socially responsible company every year since 2015.[20] Their survey found that seventy-seven percent of consumers are motivated to purchase from companies committed to making the world a better place, while seventy-three percent of investors state that efforts to improve the environment and society contribute to their investment decisions.[21] Investors have taken notice of environmentally conscious consumer preferences because these views can impact consumer purchases. When given a choice between two similarly situated companies where one company has a stronger ESG plan, consumers may choose to buy from that company over the other. As a result, the latter company's revenue and stock prices may decline overtime in the long run.[22]

Corporations recognize this shift as well.[23] Many leaders of U.S. Fortune 500 Companies seek to capitalize off these consumer preferences and have publicly created net zero campaigns or signed onto pledges like the Climate Action 100+ initiative.[24] When corporations make statements about climate action goals, they inevitably influence potential consumers and investors to purchase their goods, services, or stocks.[25] I argue that public statements regarding corporate climate action goals must comply with the Securities Act of 1934 and other controlling

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16 *See* PWC, *supra* note 12.

17 *Id.*

18 *Id.*

19 Tim Stobierski, *15 Eye-Opening Corporate Social Responsibility Statistics Business Insights - Blog*, HARVARD BUSINESS SCHOOL (Jun. 15, 2021), https://online.hbs.edu/blog/post/corporate-social-responsibility-statistics.

20 *2019 CSR Aflac Survey Report Results and Analysis*, AFLAC (July 2019), https://www.aflac.com/docs/about-aflac/csr-survey-assets/2019-aflac-csr-infographic-and-survey.pdf.

21 Stobierski, *supra* note 19.

22 *See id.* ("Twenty-five percent of consumers and twenty-two percent of investors cite a ''zero tolerance policy toward companies that embrace questionable practices on the ethical front.")

23 *See id.*

24 *See* Climate Action 100+, *supra* note 8; Stobierski, *see generally supra* note 19 ("Creating value for the customer, positively impacting society, and inspiring innovation and positive change are the three top reasons impacting an organization's purpose.")

25 *See* Stobierski, *supra* note 19.

securities law.[26] Accordingly, their statements cannot be false or misleading because this information is material to the public's investing decisions.[27] However, if there is no regulatory framework, how can we ensure corporations do not publish misleading statements?

This paper will explore the benefits of requiring companies to disclose more climate-related information in their public disclosures—especially if a company has made net zero claims. Part I is background information necessary to understand what climate change is and how corporations contribute to climate change. It also explains how greenhouse gas emissions are categorized, what net zero is and different strategies for achieving it, and criticisms of net zero. Part II discusses domestic and international litigation regarding climate change disclosures and investor scrutiny. Part III introduces the present landscape of the United States Securities and Exchange Commission's ("SEC") regulatory authority, discusses the Major Questions and Chevron doctrines, and analyzes how the Supreme Court's recent decision in *West Virginia v. EPA*[28] may hinder those attempts without passage of bill H.R. 1187 – Corporate Governance Improvement and Investor Protection Act. Finally, part IV concludes that (1) the SEC should have full authority to regulate climate change disclosures and (2) net zero plans must evaluate the impact they have on marginalized communities to ensure there is a meaningful reduction in overall emissions.

I. BACKGROUND

Climate targets differ from goals because they use concrete and quantifiable terms while goals are qualitative, non-operational objectives that usually require targets to achieve them.[29] An abstract climate change goal, like to prevent anthropogenic global warming reaching dangerous levels,[30] might be helpful, but is not as descriptive for business plan purposes.[31] Thus, climate targets are better for corporations to use.[32] Accordingly, net zero pledges, a type of climate target,[33] articulate a company's efforts into measurable GHG units for reporting purposes.[34]

Companies understand that the primary benefit of disclosing environmental targets is providing transparency to the public and investors about a corporation's

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[26] Securities Exchange Act of 1934, ch. 404, title I, § 1, 48 Stat. 881.

[27] *See* 15 U.S.C.S § 78j (b).

[28] W. Va. v. EPA, 142 S. Ct. 2587 (2022).

[29] *See* Chris Hilson, *Hitting the Target? Analyzing the Use of Targets in Climate Law*, 32 ENVIRONMENTAL LAW 195-220 (2020).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 196.

products and services impact on climate change.[35] Disclosure also provides investors with insight into a corporation's true long-term valuation.[36] The federal securities laws protect investors in two ways.[37] First, through disclosure requirements, companies that issue securities must provide specific detailed information to investors about themselves and the securities.[38] Second, the laws create a cause of action for investors who purchased securities from issuers who use false or misleading information.[39] Thus, if corporations do not accurately disclose their net zero or general ESG related claims accurately, then investors will likely have a viable suit against the corporation and their directors, this will be explored later.

A. U.S. Corporations Impact on Climate Change

Climate change is a "change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable periods."[40] This human-caused change in the global atmosphere can create deadly consequences for biodiversity. Examples of dangerous consequences include rising seawater levels, increased occurrence of natural disasters, and species extinction.[41] A strong contributor to climate change is excessive greenhouse gas emissions (GHG) due to human activity.[42] Human activity began to contribute significant GHG emissions into the atmosphere when the Industrial Revolution began in 1750 and the economy began to rely on fossil fuels for power.[43] Current emissions models show that climate change is inevitable at this point; however, reducing GHG emissions will protect our plant and animal species.[44]

Experts have categorized the different types of greenhouse gasses that human activity emits into the global atmosphere.[45] GHG emissions are globally

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35 *See generally* Stobierski, *supra* note 19.

36 *Id.*

37 David G. Epstein et al., *Business Structures*, 1, 357-358 (5th ed. 2019).

38 *Id.*

39 *Id.*

40 United Nations Framework Convention on Climate Change, 3, U.N. Doc. FCC/INFORMAL/84, GE.05-62220 (E) 200795 (1992).

41 Jeffrey Thaler, *Fiddling as The World Floods and Burns: How Climate Change Urgently Requires a Paradigm Shift in The Permitting of Renewable Energy Projects*, 42 Env't Law, 1101, 1115-25 (2012).

42 *Id.* at 1107.

43 *Id.*

44 *See id.* at 1125. ("The IPCC Fourth Assessment found that "approximately 20-30% of plant and animal species assessed so far are likely to be at increased risk of extinction if increases in global average temperature exceed 1.5-2.5 [degrees] C"- a range likely to be exceeded in the coming decades.")

45 *See* Nathan Campbell, Note, *The Duty to Update Corporate Emissions Pledges*, 74 Vand. L. Rev.1137, 1147 (2021));); *see also* Alexander Farsan, Andres Chang, Annemarie Kerkhof, Bence

recognized using the GHG Protocol accounting tool that categorizes a company's GHG emissions into three categories called Scope 1, Scope 2, and Scope 3.[46] Scope 1 covers direct emissions that a company owns or operates.[47] Scope 2 covers emissions related to purchased generated electricity.[48] Scope 3 includes all other indirect emissions produced throughout a company's value chain that are difficult to track."[49] Using these categories, a corporation can effectively track their GHG emissions reductions and contributions to the atmosphere.

Scope 1 emissions are easiest to track because they are easier to measure in a short amount of time, as these emissions come from sources directly linked to an organization's resources.[50] Scope 2 emissions are easier to track than Scope 3 emissions.[51] Although the carbon dioxide (CO2) emissions—a greenhouse gas—result from an organization's influence and activities, these emissions occur at sources that the organization does not own or control.[52] Scope 3 emissions are indirect greenhouse gas emissions that take place entirely outside of an organization.[53] These emissions primarily occur in an organization's supply chain as upstream or downstream activities.[54] Since Scope 3 includes both upstream and downstream activities, it may create issues for large corporations to track Scope 3 emissions produced by suppliers and subcontractors.[55] So although an organization might be in a particular sector, their Scope 3 emissions can extend to other sectors of the economy.[56] It is estimated that for most corporations Scope 3 emissions—the hardest to calculate of all scopes—contribute eighty-five to ninety-five percent of a corporation's emissions.[57] Since Scope 3 emissions encompass the largest source of emissions out of all 3 categories, it is the largest

Cserna, Chendan Yan, Fernando Rangel Villasana & Nicole Labutong, *Sci. Based Targets, Value Change in the Value Chain: Best Practices in Scope 3 Greenhouse Gas Management*, (2018) ("Scope 3 emissions do fall outside of the company's direct control/ownership. It is, therefore, more difficult to collect scope 3 data and the inherent control and ownership structure can create barriers to reduce these emissions.").

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* ("Some common Scope 3 emission sources are business travel (not owned or controlled), services, subcontractors, processing of sold products, use of sold products and the end-of-life treatment of sold products").

56 *Id.*

57 Eric Rosenbaumm, *Climate Experts Are Worried About the Toughest Carbon Emissions for Companies to Capture*, CNBC (Aug. 18, 2022), https://www.cnbc.com/2021/08/18/apple-amazon-exxon-and-the-toughest-carbon-emissions-to-capture.html.

opportunity to target carbon reduction for an organization.[58]

Overall, a corporation needs to accurately measure their Scope 1, 2, and 3 emissions to meet their net zero plans.[59] Requiring disclosure of Scope 1, 2, and 3 emissions in net zero plans promotes transparency to investors and incentivizes corporations to reduce their emissions. However, disclosing Scope 1-3 emissions or any net zero plans is not currently mandated by law.[60] Climate change is happening at a much faster rate than ever before and targeting carbon reduction is an effective way to keep global temperature increase at a steady 1.5 degrees Celsius. If corporations focus primarily on reducing their Scope 3 emissions, we can avoid the worst of climate change impacts.[61]

B. Reaching Net Zero

The good news is that corporations recognize that reducing Scope 1, 2, and 3 emissions is important to meeting their net zero targets.[62] Some corporations make independent announcements to reach net zero emissions while others take a more collective approach, like signing a pledge with other corporations.[63] Some of the most known climate pledges or organizations tracking climate pledges include Climate Action 100+, the Climate Pledge, and the Climate Action Tracker.[64] The Climate Action 100+ and the Climate Pledge focus primarily on corporations while the Climate Action Tracker analyzes corporations within countries, regions, and cities on a global scale.[65] These pledges incentivize corporations to find creative ways to target Scope 1–3 emission reductions. For example, Accenture reduced a portion of their Scope 3 emissions in 2017 by reducing each employee's carbon emissions from air travel by about four percent.[66] To reduce emissions by 2025, Accenture also aims to decrease their Scope 3 emissions by requiring ninety percent of their key suppliers to disclose their environmental targets and actions.[67]

Corporations might instead focus more heavily on technology as a way of

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58 *Id.*

59 *Id.*

60 Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors, (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46.

61 Campbell, *supra* note 45, at 1148.

62 *Id.*

63 Rosenbaum, *supra* note 57.

64 *See* CLIMATE ACTION 100+, *supra* note 8; *see About*, THE CLIMATE PLEDGE, (last visited May 11, 2023), https://www.theclimatepledge.com/us/en/the-pledge/About; *see What is CAT?*, THE CLIMATE ACTION TRACKER, (last visited May 11, 2023), https://climateactiontracker.org/about/.

65 *Id.*

66 *360° Value Report: Measuring Value in All Directions*, ACCENTURE, https://www.accenture.com/content/dam/accenture/final/corporate/corporate-initiatives/sustainability/document/360-Value-Report-2022.pdf

67 *Id.*

reducing their Scope 1–3 carbon emissions.[68] Corporations are investing in geologic sequestration, a nascent technology.[69] Geologic sequestration removes carbon emissions from the atmosphere by using a carbon capture machine and then stores it deep underground.[70] In 2020, the total capacity of carbon capture and storage facilities either currently operating or under construction grew thirty-three percent worldwide.[71] However, corporations are generally more open to traditional mitigation efforts than they are to carbon sequestration since it is a more recent practice.[72]

Perhaps the most significant mitigation effort corporations will use to meet net zero commitments is using carbon offsetting (also known as carbon credits).[73] Despite efforts to use newer technologies and renewable energy sources to reduce a corporation's carbon footprint, some corporations will not reach net zero with those two sources alone.[74] They will need to invest into and implement carbon offsetting programs.[75] Carbon offsets represent an actual reduction of one ton of carbon dioxide or greenhouse gas from the atmosphere.[76] Corporations invest into carbon offset programs because they create carbon credits they can use as reportable assets to reduce their Scope 1 and 3 emissions.[77] These carbon credits are in demand because many corporations will rely on them to meet their net zero goals.[78]

Some environmental justice organizations, such as Friends of the Earth, criticize carbon offsetting as an ineffective strategy to address climate change.[79] Friends of the Earth, the largest grassroots environmental network comprising two million members, has published a report on the long-term effects of offsets.[80] The report cites the IPCC which advocates that to tackle climate change there must be

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68 PWC, *supra* note 12, at 4.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* at 4.

76 *Id.*

77 Lisa Pham, *ESG Activists Seen Targeting Firms on Net-Zero Emissions Claims*, BLOOMBERG LAW, (Feb. 9, 2022, 7:12 AM), https://www.bloomberg.com/news/articles/2022-02-09/esg-activists-seen-targeting-firms-on-net-zero-emissions-claims#xj4y7vzkg.

78 *Id.*

79 *See generally* Simon Bullock et al., *A Dangerous Distraction: Why Offsetting Is Failing the Climate and People: The Evidence*, FRIENDS OF THE EARTH INTERNATIONAL, (Feb. 20, 2011), https://www.foei.org/resources/publications/publications-by-subject/climate-justice-energy-publications/a-dangerous-distraction-why-offsetting-is-failing-the-climate-and-people-the-evidence; *See generally NOT ZERO: How 'Net Zero' Targets Disguise Climate Inaction* 7, FRIENDS OF THE EARTH INTERNATIONAL, (2020), https://www.foei.org/publication/not-zero-climate-inaction-briefing/.

80 *Id.*

a drastic change in behavior in developed and developing countries.[81] However, offsetting means that offsetting projects can take place in developing countries and count as part of an action needed for companies in developed countries, essentially letting developed countries get away without making a drastic change.[82] One common example is when an offset project intends to plant trees in Southern countries, but no action is created in the Northern countries that initiated the project.[83] The result is that reductions that can be claimed toward national targets occur only in one country rather than both.[84] Additionally, many projects in developing countries would have happened anyway without the project because countries have their own climate action programs in place.[85]

Environmental justice organizations and the IIGCC also are critics of net zero campaigns.[86] On October 27, 2021, 354 groups released a statement calling "net-zero" emission pledges by corporations and governments a dangerous distraction from real climate action.[87] This is because net zero does not mean producing zero emissions, rather, that any carbon emissions produced will be neutralized.[88] Thus, reaching net zero is a gamble because it relies on the fact that companies can continuously neutralize their emissions without more potential harm.[89] This approach can lead to inequality for marginalized communities, as developing countries are impacted the most from climate change but do little to contribute to it.[90] Overall, this discussion highlights why requiring disclosure of emission reduction strategies used within a net zero plan is also important; disclosure provides transparency to investors about the real impact on addressing climate change and protects marginalized communities.

II. WHY NOW?

Companies recognize that they cannot meet their net zero goals on renewable technology and energy alone. They will become increasingly reliant on carbon offsets to meet their stated net zero goals. An expert estimated that the carbon

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81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 Press Release, The Inst. Inv. Grp. on Climate Change, Climate Action 100+ Net Zero Company Benchmark shows Continued Progress on Net Zero Commitments is not Matched by Developments and Implementation of Credible Decarbonization Strategies (Oct. 13, 2022) (Available for download https://www.iigcc.org/news/climate-action-100-net-zero-company-benchmark-shows-continued-progress-on-net-zero-commitments-is-not-matched-by-development-and-implementation-of-credible-decarbonisation-strategies/.)

87 Climate Justice Alliance et al., "Net-Zero" Is A Dangerous Distraction (Oct. 27, 2021).

88 *Id.*

89 *Id.*

90 *Id.*

market will be worth $100 billion by 2030.[91] Company disclosures would give investors the opportunity to know which approaches, such as carbon offsetting, the company will use to reduce Scope 1–3 emissions. Thus, requiring disclosures is important because excessive reliance on offsetting can lead to greenwashing—misleading information that makes a company appear more environmentally friendly than they are—if corporations are not careful.[92] Indeed, the New Climate Institute and Carbon Market Watch recently published a report titled "Corporate Climate Responsibility Monitor 2022" which found that 25 of the world's most valuable companies have publicly announced climate pledges yet rely mostly on offsets to reach that goal.[93]

In the New Climate Institute's report, Figure 1 demonstrates how headline pledges are often misleading as the aggregate emissions these corporations are likely able to reduce are forty percent versus the one hundred percent that the term net zero suggests.[94] Google, for example, produced 12.5 million tons of carbon emissions in 2019 yet claims it has eliminated its "entire carbon legacy" through the purchase of high-quality offsets.[95] Or, consider how Nestle produced 113.1 million tons of carbon in 2018, but their Ready Refresh bottled water brand claims to be carbon neutral due to the fact that Nestle purchased offsets to claim the gas emissions reduction.[96] Google and Nestle purchasing large offsets to reach net zero are examples of why investors have raised questions about whether obtaining these credits is truly an accurate reflection of carbon reduction.[97] This is because corporations are purchasing credits without changing behavior that adds carbon

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91 Jess Shankleman & Akshat Rathi, *Wall Street's Favorite Climate Solution is Mired in Disagreements*, BLOOMBERG (Jun. 2, 2021), https://www.bloomberg.com/news/features/2021-06-02/carbon-offsets-new-100-billion-market-faces-disputes-over-trading-rules.

92 *See* 73 CAIL Annual Institute on Energy Law § 4.03 (2022). (Environmentalist Jay Westerveld created this term to describe the "façade of environmentally conscientious acts and advertising.")

93 Thomas Day et al., *Q&A With the Authors: Corp. Climate Responsibility Monitor 2022*, NEW CLIMATE INSTITUTE, (Feb. 7, 2022) https://newclimate.org/2022/02/07/corporate-climate-responsibility-monitor-2022https://newclimate.org/2022/02/07/corporate-climate-responsibility-monitor-2022. .

94 Pham, *supra* note 77.

95 Jess Shankleman & Akshat Rathi, *supra* note 91.

96 *Id.*

97 Erin Blanton & Samer Mosis, *The Carbon-Neutral LNG Market: Creating a Framework for Real Emissions Reductions*, CENTER ON GLOBAL ENERGY POLICY AT COLUMBIA SCHOOL OF INT' AND PUB. AFFAIRS, (July 8, 2021), https://www.energypolicy.columbia.edu/research/commentary/carbon-neutral-lng-market-creating-framework-real-emissions-reductions.

emissions into the environment.[98]

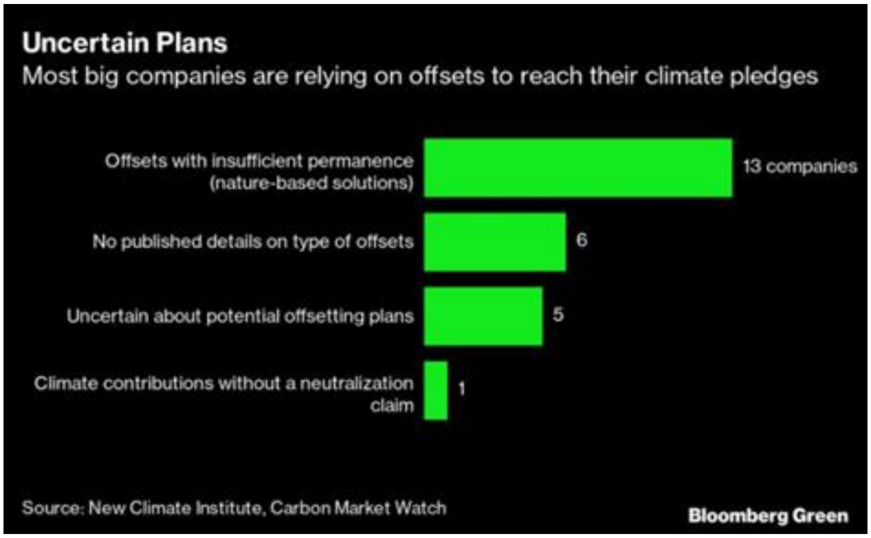

Figure 1: Uncertain Plans from major multinational corporations to address climate carbon reduction or net zero promises.[99]

Purchasing carbon credit voluntarily is an evolving and unregulated market.[100] The market is not a formal federal trading system, but rather a company conducts research to find a variety of carbon credits.[101] These credits may be available on a registry or purchased directly from the producer of a GHG reduction project.[102] Importantly, there are some carbon credits that align with the United Nations' Sustainable Development Goals (SDGs) and are climate certified by the following standards: "The Gold Standard, Climate Action Reserve (CAR), Verified Carbon Standard (VCS), Architecture for REDD+ Transactions, and American Carbon Registry."[103] There are also community-based projects managed by local groups and NGOs that generally produce a smaller volume of credits, which are less verifiable but traded at a higher premium than credits not in alignment with SDGs at all.[104] This distinction is incredibly important as more corporations rely on

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98 *Id.*

99 Pham, *supra* note 77.

100 Silvia Favasuli & Vandana Sebastian, *Voluntary Carbon Markets: How They Work, How They're Priced and Who's Involved Energy Transition*, S&P GLOBAL, https://www.spglobal.com/platts/en/market-insights/blogs/energy-transition/061021-voluntary-carbon-markets-pricing-participants-trading-corsia-credits.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

offsetting to meet their ultimate net zero goals.[105] The type of credits chosen matter because a corporation may rely on credits that may have less of a real impact on reducing GHG emissions. If there is no mandatory requirement to explain the type of offset chosen, then companies may appear more environmentally conscious than they truly are in practice.

A. International Private Suits Against Corporations

Two foreign cases highlight the importance of corporations' net zero claims, as they approach their respective deadlines, for socially responsible investors.[106] In June 2021, a Dutch Court made a landmark decision in *Milieudefensie et al. v Royal Dutch Shell plc. Shell* held that Shell's plan to reach net zero by 2050 is inadequate based on Dutch tort law's unwritten duty of care.[107] The Court held that there is an "obligation of result" to reduce carbon emissions produced by the Shell group's activities, and a "best-efforts obligation" to reduce emissions generated by its business relations, including suppliers and consumers.[108] The Court cited provisions of the Paris Agreement as evidence of Shell's duty of care.[109] Although this case is not binding on U.S. jurisdictions, it is relevant to U.S. Courts because (1) *Shell* demonstrates we can impose an individual duty on corporations to prevent climate change and (2) *Shell* provides an argument for federal judges to likewise enforce a duty of care in the U.S. since the U.S. is officially part of the Paris Agreement again.[110]

Shell unsuccessfully argued two main arguments.[111] First, Shell disputed a sufficient causal link between its emissions and climate change.[112] Shell argued that global climate change is caused by "aggregate emissions at the global level" and so cannot incur liability for "merely contributing"" to them.[113] The court rejected this argument, stating that while Shell is not solely responsible for preventing dangerous climate change, Shell still has "an individual partial

105 *Id.*

106 *Milieudefensie et al. v Royal Dutch Shell plc*, NL:RBDHA:2021:5339 (May 26, 2021) (the "Court Decision"), para. 4.2.3. (Shell is a multinational oil and gas company; however, this action was brought in the Netherlands.).

107 *Id. para* 5.3.

108 *Id. para* 4.1.4.

109 *Id. para* 4.4.27.

110 *UNITED NATIONS, supra* note 10. (President Obama entered into the Paris Climate Agreement in 2016; however, President Trump withdrew the US in 2020. Once President Biden entered office, he rejoined the Paris Agreement on Feb. 19, 2021).

111 *Shell's Statement of Defense*, Climate Case Chart, (last visited March 12, 2023) http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20191113_8918_reply.pdf

112 *Id.*

113 *Id.* §§ 7.4.1-7.4.2.

responsibility" to take preventative measures."[114] Although Shell has not technically violated its reduction obligation yet, the Court held that there was a danger that Shell would "imminently breach" their obligation to fulfill their net zero goal.[115] Shell must now reduce its emissions by forty-five percent by 2030 instead.[116] This decision is the first time that any court in the world has imposed a duty of care on a company to prevent dangerous climate change.[117]

Second, Shell argued that there are other actors who need to reduce their emissions and that any of Shell's reduction efforts would be offset by Shell's suppliers increasing emissions.[118] The court rejected this argument, reiterating that the existence of other "offenders" does not absolve Shell of its individual responsibility.[119] This is significant because the practical effect of the court's decision is that Shell must figure out how to reduce supplier emissions since supplier emissions are counted within Shell's Scope 3 emissions. Shell may elect to reduce Scope 3 emissions in two ways: choose new suppliers that are actively reducing their emissions or require Shell's current suppliers to reduce their emissions.

Although *Shell* is the first of its kind, it may influence other courts and create a global "domino effect" among large corporations.[120] The court recognized that although imposing an obligation to reduce emissions ultimately impacts Shell's profits and growth, their duty to prevent climate change outweighed their commercial interests and financial burden.[121] This impacts investors because any increase in financial burden can negatively impact a corporation's stock price.[122]

In a second case, Santos Limited: Australasian Centre for Corporate Responsibility v Santos Limited, an Australian oil and gas company, Santos, likely faces a similar fate as in *Shell*.[123] On August 25, 2021, the Australasian Centre for Corporate Responsibility (ACCR), a shareholder advocacy NGO, filed

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114 The Hague District Court, Milieudefensie et al. v Royal Dutch Shell plc, NL:RBDHA:2021:5339 (May 26, 2021) (the "Court Decision"), para. 4.4.49. (Shell is a multinational oil and gas company; however, this action was brought in the Netherlands.).

115 *Id. para. 3.2.*

116 *Id. para. 5.3.*

117 Daniel Boffey, *Court Orders Royal Dutch Shell to Cut Carbon Emissions by 45% by 2030*, THE GUARDIAN, (May 26, 2021), *https://www.theguardian.com/business/2021/may/26/court-orders-royal-dutch-shell-to-cut-carbon-emissions-by-45-by-2030.*

118 The Hague District Court, *supra* note 114, *para. 4.4.49.*

119 *Id.*

120 *Id.*

121 *Id. para. 4.4.53.*

122 *Id.*

123 *See Santos Limited: Australasian Centre for Corporate Responsibility v Santos Limited*, Federal Court of Australia proceeding NSD 858/2021; *See also* Media Release, Australasian Centre for Corporate Responsibility expands landmark Federal Court case against Santos, ACCR, https://www.accr.org.au/news/australasian-centre-for-corporate-responsibility-expands-landmark-federal-court-case-against-santos/ (This case is still pending and as of August 25, 2022 was amended to include additional allegations against Santos over alleged greenwashing).

a complaint against Santos over its 2020 annual report stating a plan for net zero emissions by 2040.[124] Similar to the net zero claim in *Shell*, Santos made claims to reach net zero by 2050 without sufficient climate change plans to support this goal.[125] Santos reported that these changes in their operations would fall into Scope 1 and 2 emission categories.[126] The ACCR, citing the Australian Consumer Law and the Corporations Act 2001, demands that Santos publish a corrective statement to their shareholders on the basis that the statements are or are likely to mislead or deceive.[127] This case is still pending and the claims are uncontested, but it demonstrates global investors' strong interest to have certified information related to net zero claims.[128]

B. Domestic Localities Suing U.S. Corporations

In the United States, there are individual states that have started investigating companies in connection with climate change matters such as Exxon Mobil Corporation (Exxon).[129] Exxon is an American multinational oil and gas corporation.[130] Exxon is currently litigating private civil cases against its directors and officers.[131] New York, Massachusetts, New Jersey, and the US Virgin Islands, have launched investigations to determine if Exxon misrepresented to investors its carbon proxy costs and the impact of climate change on its business in voluntary disclosures.[132] The US Virgin Islands Attorney General terminated its investigation, while the New York and Massachusetts Attorneys General filed separate suits against Exxon in 2020.[133]

The New York Attorney General alleged that Exxon disclosed a higher carbon

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124 *Id.*

125 *Id.*

126 *Australasian Centre for Corporate Responsibility files landmark case against Santos in Federal Court*, NAT'L AUSTRALASIAN CENTRE FOR CORPORATE RESPONSIBILITY, (August 26, 2021), https://www.accr.org.au/news/australasian-centre-for-corporate-responsibility-files-landmark-case-against-santos-in-federal-court/

127 *Id.*

128 Santos, *supra* note 123.

129 In re Exxon Mobil Corp. Derivative Litig., No. 2:19-cv-16380-ES-SCM (D.N.J.); *See also* City of Birmingham Ret. and Relief Sys. v. Tillerson, No. 2:19-cv-20949-BRM-SCM (D.N.J.); *See also* Gerard Pecht & Lisa Schapira, Directors and Officers Face Increased Liability Risk Due to Climate Change, Norton Rose Fulbright (Mar. 2020), https://www.nortonrosefulbright.com/en/knowledge/publications/09038445/directors-and-officers-face-increased-liability-risk-due-to-climate-change.

130 In re Exxon Mobil Corp. Derivative Litig., No. 3:19-cv-01067-K (N.D. Tex.)

131 Pecht & Schapira, *supra* note 129.

132 *Id.*; Breanna Jane Parker & Dr. Alexander R. Barron, *What is a Proxy Price on Carbon*, SECOND NATURE (Sep. 5, 2018), available at https://secondnature.org/wp-content/uploads/SMITH-What-is-a-Proxy-Price-on-Carbon.pdf ("A proxy carbon price is a tool that acknowledges and internalizes the social, ecological, and/or economic costs of emitting one metric ton of carbon dioxide equivalent").

133 Pecht & Schapira, *supra* note 129.

"proxy cost" to the public while their internal reports contained a lower proxy cost in connection to investment and business decisions.[134] Exxon's definition of its carbon proxy cost measures Exxon's impact on climate change.[135] After a twelve day trial, the New York court dismissed the New York Attorney General's complaint in its entirety.[136] The Court held that the New York Office of the Attorney General failed to establish that Exxon made any material misstatements or omissions that misled any reasonable investor about its practices or procedures for climate risk accountability in its *mandatory* disclosures as opposed to its *voluntary* ones.[137] Thus, the Court ruled in Exxon's favor because voluntary disclosures are irrelevant when considering materiality and reliance elements.[138] The Massachusetts court denied Exxon's motion to remove the case to Federal Court, and the case remains pending.[139]

Finally, the New Jersey suit brings a derivative suit against Exxon's directors and officers.[140] The New Jersey Court transferred the suit to and is pending in Exxon's home state, Texas.[141] Like *Shell*, this suit also alleges Exxon directors and officers breached their fiduciary duty.[142] Exxon argued that the plaintiff's suit is procedurally improper because the plaintiffs never asked Exxon's board to investigate the allegations.[143]

Shell, *Santos*, and recently, *In re Exxon*, demonstrate that corporations that have avoided liability for environmental damage claims may not avoid liability for environmental claims made to investors.[144] This trend, of legal pressure private investors are putting on corporations, suggests that ESG investors may be one of the best motivators for corporations to ethically lower greenhouse gas emissions. These cases signal to other companies that they will need specific objectives to address climate change to avoid similar suits. Additionally, these cases demonstrate the measures state and international governments are willing to litigate to address global warming. The increase in climate change litigation is unlikely to slow down as higher courts address these issues and socially responsible investors cite environmental issues as an increasingly important concern when making their financial decisions.[145]

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134 *Id.*
135 *Id.*
136 *Id.*
137 People v. Exxon Mobil Corp., 119 N.Y.S.3d 829, 80 (2019) (Sup. Ct.).
138 *Id.* at 83.
139 Commonwealth v. Exxon Mobil Corp., 187 N.E.3d 393, 401 (Mass. 2022).
140 In re Exxon, *supra* note 137.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 Investor Position Statement, *supra* note 1.

III. The Present Federal Landscape

Despite the uptick in climate change litigation, corporations continue to address their impact on the environment—a fifth of the world's largest public companies have committed to net zero targets including 52 percent of the high-emitting companies engaged through the Climate Action 100+ initiative.[146] Some corporations want to give investors a clearer idea of their climate change plans but are concerned about potential lawsuits regarding their disclosed information, if it is found to be misleading or misinformation.[147] To address those concerns the United States Securities and Exchange Commission ("SEC") proposed a climate change disclosure rule, Release No. 33-11042: The Enhancement and Standardization of Climate-Related Disclosures for Investors, which would require corporations to disclose their Scope 1, 2, and 3 emissions.[148] The rule also requires certain disclosures if a corporation has made a public commitment about its net zero plans.[149] A review of the statutory authority and case law supports the SEC's decision to propose a rule on climate-related disclosures. However, the Supreme Court's recent decision in *West Virginia v. EPA* may hinder the SEC's proposed rule unless H.R. 1187 bill is passed. Nevertheless, the SEC should have full authority to regulate climate change disclosures.

A. SEC Involvement

Although corporations may want to address climate change issues for investors before a dispute reaches litigation, it may be difficult to do so without a formal ESG regulatory framework that includes net zero and environmental concerns from federal governments. The SEC enforces the U.S. securities laws, regulates corporations, and protects investors in the process. In March 2021, having noticed a spark of interest from investors, the SEC initiated requests for comments about climate change disclosure issues.[150] The SEC's proposed rule would require climate related disclosures in public filings as early as 2024.[151] Specifically, of Scope 1, 2, and 3 emissions.[152] Further, if the registrant publicly set climate targets or goals, they would need to publicly disclose information about carbon offsets

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146 *Id.*; Jack Graham, *Net-Zero Emissions Targets Adopted by One-Fifth of World's Largest Companies*, Reuters (Mar. 23, 2021, 2:50 PM), reuters.com/article/us-global-climate-carbon-business-trfn-idUSKBN2BF2ZX.

147 *Id.*

148 *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors,* U.S. Sec. & Exch. Comm'n, (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46.

149 *See id.*

150 *Comments on Climate Change Disclosures*, U.S. Sec. & Exch. Comm'n, (2021), https://www.sec.gov/comments/climate-disclosure/cll12.htm.

151 The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21346 (proposed Apr. 11, 2022).

152 *Id.*

and how they intend to meet those goals.[153] In response to the SEC's 2021 request for comments, the SEC received more than 550 comments from varied organizations including environmental groups, asset managers, research organizations, and NGOs. Many comments from corporations wanted a rule that detailed reporting requirements per industry. However, there is opposition to requiring public climate change disclosures largely due to the expenses corporations incur to accurately disclose information.

1. SEC's Statutory Authority to Regulate

Although the proposed rule would be the first time that the SEC would mandate climate related disclosures, Congress already grants the SEC statutory authority under the 1934 Federal Securities Act to (1) enforce securities laws, (2) require disclosures in formal reports for investors (3) prohibit fraud, misstatement, or omission of a material fact.[154] Section 10b-5 provides investors a private right of action to sue a public company for making false or misleading material statements.[155] The Supreme Court first held in *TSC Industries v. Northway Material* that a fact is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available."[156] In *Basic, Inc. v. Levinson*, the Supreme Court reaffirmed this standard of materiality, extending its application to section 10b-5.[157] The Court also clarified that materiality is a fact-specific inquiry that "depends on the significance the reasonable investor would place on the withheld or misrepresented information."[158] A factfinder would need to consider both the magnitude and probability of the effect with regard to materiality.[159]

Here, ESG investors are concerned with climate-related disclosures because the voluntary regime could inadvertently cause companies to state false, misleading, or omit material information. Critics are against the SEC mandating disclosures at all.[160] They argue mandated climate disclosures are unnecessary because if

153 *Id.* at 21437-38.

154 Securities Exchange Act of 1934, *supra* note 26; *See also* 17 C.F.R. § 240.10b-5.

155 17 C.F.R. § 240.10b-5.

156 TSC Indus. v. Northway, 426 U.S. 438, 449 (1976).

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

158 *Id.* at 240.

159 *Id.* at 239. (The Court lays out a rule that "in order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels . . . to assess the magnitude of the transaction to the issuer of the securities allegedly manipulated, a factfinder will need to consider such facts as the size of the two corporate entities and of the potential premiums over market value.")

160 *See generally Comments on Climate Change Disclosures*, U.S. Sec. & Exch. Comm'n, (Last visited Apr. 18, 2023), https://www.sec.gov/comments/climate-disclosure/cll12.htm (The SEC provides the public access to Comments on their proposed rule to regulate climate change disclosures.

climate-related information is "material," then the company would have disclosed it already.[161] This argument is challenged for two reasons.

First, a standardized climate disclosure framework gives investors an idea of the true magnitude of how a company's current operations impact the environment. Information related to Scope 1–3 emissions fall into this category. These emission reports are not always published or consistent across companies or industries. Mandating this information limits the likelihood of omitting material information.

Accurately measuring Scope 1–3 emissions allow investors to identify specific activities in their operations that are high carbon-emitting and the likelihood that a company will mitigate those concerns. This lessens the likelihood that the information is false or misleading. Furthermore, an ESG investor would find this information significant when evaluating companies, since they want to choose a company demonstrating an effort to lessen their Scope 1–3 emissions over time. A standardized climate change disclosure would allow investors to measure that performance across companies and industries. It also provides companies an opportunity to see how their peers are performing and decreasing their GHG emissions overtime.

Second, it provides investors with transparency in how the company plans to adapt to increasing environmental risks in their net zero plans. Investors want to know these concrete risks and hold corporations accountable to their net zero goals. There are different strategies that a company can use to adapt to climate change as discussed in the Background section of this paper. Some strategies are more established practices while others are more controversial. For example, renewable energy versus carbon sequestration and investing into carbon credits. Mandated climate change disclosures would allow for investors to compare information across similarly situated companies, resulting in a corporation having a lower incentive to publish misleading information. Additionally, investors can analyze the probability that a company's emissions reduction strategy will adequately adapt them to the changing environment. Altogether, a rule mandating climate change disclosures allows investors to choose a company whose net zero strategy is attainable, truthful, and provides a meaningful reduction in overall emissions.

2. Chevron Doctrine

Opponents to the SEC's proposed rule may challenge the SEC's authority to regulate under the Administrative Procedure Act (APA) of 1946.[162] Under the

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Organizations, individuals, corporations, and other entities have submitted comments in favor and against a proposed rule).

[161] *Id.*

[162] 5 U.S.C. §§ 701-706.

APA §706, Courts can vacate agency action that is arbitrary and capricious.[163] The Chevron Doctrine is a two-step test developed by the Supreme Court to determine whether an agency's statutory interpretation was arbitrary and capricious, given Congress's intent.[164] At step 1 a court determines whether Congress has spoken directly to the precise question at issue.[165] If Congressional intent is clear, the court must give effect to that unambiguous intent. Otherwise at step two, when the statute is ambiguous or silent on a specific issue, the court asks whether the agency's statutory interpretation is reasonable or permissible.[166] It is reasonable or permissible if the agency explains its choice or provides evidence, produced through the informal rulemaking process, for its action.[167] If it is reasonable, then the Court grants the agency Chevron deference.[168] If the agency's interpretation was not reasonable, then a Court can vacate it for being arbitrary and capricious.[169]

Purposivism, a judicial tool to interpret statutes, looks at the statute's title, societal values, and if there was any mischief that Congress was trying to remedy.[170] The SEC takes the same approach and cites the Federal Securities Act of 1934 to promulgate its new rule.[171] As discussed in *I. Securities Authority to Regulate*, the statutory text explicitly provides the SEC authority to oversee public information disclosed to investors. Society values the free flow of information from publicly traded companies to investors. Although the SEC has not expressly mandated climate change related disclosure before, Congress granted the SEC the authority under section 10b-5 of the Federal Securities Act of 1934 to regulate disclosures to avoid fraud as discussed in *I. The SEC's Authority to Regulate*.

Congress has found the SEC's regulatory actions in the past as reasonable and permissible. In a 1971 release issued during the Nixon Administration, the SEC emphasized the requirement that public companies disclose "material matters

163 *Id.* § 706.

164 *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

165 *Id.*

166 *Id.*

167 United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977) (when an agency does not provide reasoning such as scientific data or consider alternatives to their conclusions, then the agency action on is arbitrary and capricious).

168 *Chevron*, 467 U.S. 837 at 843; *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (holding that if Congress addressed the issue ambiguously then Congress intended for the agency to interpret the statute).

169 *Id.*

170 *Id.*; *See generally* Church of the Holy Trinity v. United States, 143 U.S. 457, at 459 (1892) (The Court analyzed the "spirit" of the statute to explain Congress's intentions in passing it which includes, but are not limited to "the circumstances surrounding its enactment," "the intention of its makers," and the "results which follow.")

171 U.S. Sec. & Exch. Comm'n, Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 34-61469, 75 Fed. Reg. 6289 (Feb. 8, 2010).

involving the environment and civil rights."[172] "In 1973, the SEC mandated disclosure of various environmental proceedings, and in 1976 it required disclosure about capital expenditures relating to environmental compliance."[173] The SEC's most recent guidance, "Guidance Regarding Discloses Related to Climate Change,"[174] gives issuers direction as to what environment related information they need to report, but has not been updated since 2010. Additionally, the currently proposed rule corresponds with and cites scientific data collected from the Environmental Protection Agency ("EPA"), the Greenhouse Gas Protocol ("GHG Protocol"), and the United Nations ("UN") Framework Convention on Climate Change.[175] This information can always be voluntarily disclosed, but without a clear requirement standard, the quality of information is varied and hard to compare across companies or industries.

3. Major Questions Doctrine

Critics claim there is a "mismatch" between the SEC's authority and expertise in securities law and the SEC's claiming it has authority to regulate in environmental law, through its required climate related disclosures.[176] Claims of agencies asserting authority beyond what they were granted was an often raised concern that culminated in the "major questions"" doctrine in the Supreme Court's *West Virginia v. EPA.*[177] The major questions doctrine is a limitation to the *Chevron* doctrine.[178] In *West Virginia v. EPA*, the Court held that in "extraordinary cases" where an agency is asserting power of great "economic and political significance," that power must be supported by "clear congressional authorization."[179]

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172 Jill E. Fisch, et al., *Climate Change, W. Va. v. EPA and the SEC's Distinctive Statutory Mandate*, THE CLS BLUE SCHOOL'S BLOG ON CORPORATIONS AND THE CAPITAL MARKETS (Sep. 6, 2022), https://clsbluesky.law.columbia.edu/2022/09/06/climate-change-west-virginia-v-epa-and-the-secs-distinctive-statutory-mandate/.

173 *Id.*

174 U.S. Sec. & Exch. Comm'n, Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 34-61469, 75 Fed. Reg. 6289 (Feb. 8, 2010).

175 *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (requiring the agency to cite technical studies to support action).

176 Fisch, et al., *supra* note 172.

177 *W. Va. v. EPA, supra* note 28, at 260 ("As for the major questions doctrine "label[ ],". . . it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.")

178 *See* Mass. v. EPA, 549 U.S. 497, 520 (2007) (If an issue is much bigger than the specific agency action that can impact great economic and social issues, then there is no reason to consider if the agency action is arbitrary and capricious because they shouldn't have done the action to begin with since it's outside their scope).

179 *Id.* at 512; *W. VA v. EPA, supra* note 28, at 2608-09*; See also* Catherine Campbell et. al., *Supreme Court Restricts EPA Regulation of Greenhouse Gas Emissions*, DLA PIPER, (Jul. 19, 2022) https://www.dlapiper.com/en/us/insights/publications/2022/07/supreme-court-restricts-epa-

First, the SEC's proposed rule is not an extraordinary case of asserting power of great economic and political significance. In fact, the SEC has supported its rule by using globally accepted standards for technical data and similar rulemaking in the past as discussed in *II. Chevron Doctrine*. Further, while the SEC does not have specialized knowledge in the topics of climate change, it has a history of regulating the disclosure of other specialized topics like human capital management.[180] Admittedly, citing clear congressional authorization is arguably the toughest issue for the SEC to overcome. This is because environmental disclosures are not expressly mentioned in the Securities Act of 1934. Thus, the SEC's proposed rule may have trouble withstanding similar challenges the EPA faced in *West Virginia v. EPA* if the SEC cannot cite express congressional authorization to regulate climate related disclosures.

B. Congressional and Supreme Court Involvement

The *West Virginia v. EPA* case highlights that Courts must analyze what Congress intends as well. Luckily, the SEC is not the only government entity looking to improve the current manner that corporations disclose climate change information to investors.[181] In addition to the SEC's attempt to regulate climate disclosures, controversial domestic litigation and federal goals of meeting net zero have put public pressure on Congress to act on this issue as mentioned earlier in this Comment.[182] Congress is currently considering a bill that Representative Juan Vargas introduced in February 2021 called the Corporate Governance Improvement and Investor Protection Act.[183] Though originally introduced in the House, it narrowly passed into the Senate on June 17, 2021 by a 215-214 vote.[184] The Senate received the bill and referred it to the Committee on Banking, Housing, and Urban Affairs for further review.[185] However, over a year later the bill remains pending.[186] The proposed bill includes 11 titles that would require public companies to make disclosures more transparent on a broad range of topics from the environment, tax, race, gender, labor, and more ESG umbrella issues.[187] Title I. ESG Disclosure Simplification Act and Title IV. Climate Risk Disclosure Act are the most applicable titles that address ESG disclosures; however, Title I

regulation-of-power-plants-greenhouse-gas-emissions.

[180] Fisch et. al., *supra* note 172.

[181] Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. (2021).

[182] In re Exxon, *supra* note 129.

[183] H. R. 1187, 117th Cong., *supra* note 181.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.* §§ 101-1101.

is only discussed here for our purposes.[188]

Title I grants broad authority to the SEC to define ESG disclosures and empowers the SEC to define the framework that they would use to enforce those requirements.[189] This is the first time that a title like this would grant that broad authority to the SEC to regulate climate change disclosures.[190] Title I also would require the SEC to report to Congress shareholder collective action to promote ESG standards.[191] This bill signals that the SEC noticed that ESG issues are a top priority for the current Congress. The SEC also has publicly stated that ESG issues are its top priority, so the SEC will likely use H.R. 1187 (if passed) to speed up the rulemaking process if it is passed in the Senate in the coming session.[192] As mentioned, *West Virginia v. EPA* held that a government agency must act ". . .pursuant to a clear delegation from that representative body."[193] H.R. 1187 helps support the SECs role by providing that express congressional authority to act. Thus, passing H.R. 1187 is necessary for the SEC to overcome a major questions challenge to its proposed rule.

IV. CONCLUSION

As one of the biggest emitters of GHG emissions in the world, the United States has an obligation under the Paris Climate Agreement to reduce its carbon emissions drastically. The United States can only meet these goals if there is more transparency from large corporations. Corporations currently enjoy lax regulatory requirements in disclosing these emissions and adhering to climate action plans. ESG Investors want the SEC and Congress to address this issue. This paper argues that corporations must disclose their Scope 1–3 emissions to ensure they disclose their emissions and demonstrate steps to meeting their climate action plans. They must also disclose how they plan to reach net zero if they publish a pledge to the public. This information provides investors the opportunity to determine if a corporation's net zero plans will ensure a meaningful reduction in overall emissions. It also provides investors with information on how a corporation plans to adjust their operational activities to adapt to the changing climate. Investors deserve to know what strategies a corporation uses to meet those plans as strategies vary in how established they are, how effective they may be in reducing

188 *Id.* §§ 101-105; 401-405.

189 *Id.* §§ 101–105.

190 Fisch et. al., *supra* note 172.

191 H. R. 1187, 117th Cong. *supra* note 181, §§ 101–105.

192 Public Statement, Allison Lee, Public Input Welcomed on Climate Change Disclosures, U.S. Sec. & Exch. Comm'n (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

193 *See* W. Va. v. EPA, *supra* note 28, at 2592 ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.")

overall emissions, and how they impact local communities.

It is clear that voluntary disclosures are inadequate to accurately determine how much a corporation's operational activities contribute to GHG emissions. A mandated framework, as proposed by the SEC's Enhancement and Standardization of Climate-Related Disclosures for Investors Climate Change Act, will standardize the disclosure process across companies and industries. This will also curb liability for corporations because they will have a model to follow and can compare their results across industry.

Additionally, the Securities Act of 1934 imposes a duty on corporations to not provide investors with materially false or misleading information. The Securities Act of 1934 explicitly grants the SEC authority to enforce this duty and section 10b-5 explicitly provides investors a right to sue in case corporations do violate their duty. The current lack of transparency around a corporation's Scope 1–3 emissions and their plans to meet net zero goals are likely an omission of material fact. Even though international cases, *Shell* and *Santos,* are not binding on U.S. jurisdictions, they highlight why a climate change disclosure rule is vital today. These cases provide persuasive legal authority that Courts in the United States may use as a model to hold corporations accountable for climate-related litigation. Climate related litigation is likely to continue, as domestic cases like *In re Exxon* indicate that private actors want to hold corporations accountable. Thus, a mandated framework provides a benchmark for accountability.

Although there might be challenges to the SEC's authority to regulate climate-related disclosures under *Chevron*, the SEC already possesses statutory authority and legislative history. Congress's H.R. 1187 bill, if passed, would solidify the SEC's authority to regulate and effectively strike down a major questions challenge to the SEC's authority. Overall, the SEC should have full authority to regulate climate change disclosures and those disclosures should be evaluated to ensure meaningful reductions in overall emissions.