SEC PROPOSED CLIMATE DISCLOSURES: PREPARING FOR A NEW ERA OF CLIMATE LITIGATION IN IDAHO AND BEYOND

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ABSTRACT

"We have paleolithic emotions, medieval institutions, and God-like technology.
We are drowning in information, while starving for wisdom." E.O. Wilson.[1]

It did not take long for Oatly to falter beneath the unblinking eye of investors. Within two months of going public, the global oat milk company faced multiple allegations of securities fraud. Oatly had merely intended to reassure investors: "sustainability is at the core of our business." Instead, those eight words became kindling for litigation. Without pause, investors filed a class-action lawsuit in a New York federal district court alleging the company misled investors about its environmental practices and artificially inflated its stock price. For Oatly, it was an unexpected welcome to a new era of climate litigation.

The story of Oatly's slip-up is an increasingly common narrative in climate-related litigation. As investor interest in sustainability grows, so does the risk of liability for public companies and directors. Attempts to mitigate the litigation risks are costly, but ignoring the risk carries even greater, perhaps even crippling, costs. True, companies have long been willing to volunteer climate information to investors in their sustainability reports, recognizing the reduction in risk premiums associated with such disclosures. But investors have challenged those disclosures as avalanches of information lacking meaningful, actionable data. Indeed, investors and directors alike are often left "drowning in information, while starving for wisdom."[2]

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1. James Watson and Edward O. Wilson: An Intellectual Entente, HARV. MAG. (Sep. 10, 2009), https://www.harvardmagazine.com/2009/09/james-watson-edward-o-wilson-intellectual-entente; E.O. WILSON, CONSILIENCE 294 (1998).

2. *Id.*

This paper addresses a new era of climate litigation, exploring the well-traveled private causes of action for securities fraud against the backdrop of the SEC's proposed climate disclosure rules. As written, the rules greatly expand the disclosure requirements for public companies. In doing so, the proposed rules also extend the footholds for private plaintiffs seeking to mount a securities class-action lawsuit. This paper analyzes these increased disclosure demands in the context of a historic reallocation of investment capital and the nascent ESG movement. Recognizing these climate-change efforts punch forward with considerable momentum, this paper provides solutions for public and private companies alike to prepare for and succeed in an expanding and uncertain climate litigation arena.

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I. INTRODUCTION

Amid increasing investor demand to address the rising threats of climate change, the Securities Exchange Commission (SEC) answered with one of its most comprehensive disclosure rules since the agency's creation in 1933.[3] The proposed disclosure rules, if adopted, would require public companies to substantially expand disclosure of climate-related risks.[4] Proposed in 2022, the rules join an already complex and robust swath of securities disclosure requirements, including existing climate-related risk disclosures.[5]

In the past decade, the SEC began its ascent into a new era of climate disclosure requirements,[6] joining the broader Environment, Social, Governance (ESG) movement that already has and will continue to bring securities litigation to the forefront of climate change policy for public corporations.[7] The proposal also comes on the heels of a historic reallocation of investment capital toward greener corporations.[8]

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

4. *Id.*

5. Elizabeth Ann Glass Geltman, *Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Laws*, 16 HARV. ENVTL. L. REV. 129, 144 (1992) (SEC interest in climate disclosures began as early as the 1970s).

6. U.S. SEC. AND EXCH. COMM'N, *Commission Guidance Regarding Disclosure Related to Climate Change*, Release No. 33-9106, 75 FR 6289 (Feb. 8, 2010) [hereinafter 2010 Guidance], https://www.sec.gov/rules/interp/2010/33-9106.pdf.

7. Press Release, U.S. Sec. and Exch. Comm'n, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

8. Lee Clements, Lily Dai & William Nicolle, FTSE Russel, *Investing in the Green Economy 2022: Tracking Growth and Performance in Green Equities* (May 2022),https://content.ftserussell.com/sites/default/files/investing_in_the_green_economy_2022_final_8.pdf.

The proposed regulation could give investors an important and additional foothold needed to mount the steep pleading requirements of securities litigation.[9] Thus, public companies must respond quickly to the escalating risks of event-driven litigation (*e.g.,* wildfires, hurricanes, and drought) and prepare for more stringent disclosure requirements.[10]

Board of directors already face a thicket of regulatory liability.[11] From existing climate disclosure rules to the increasing pressure of activist investors, public companies are recognizing the need for comprehensive internal compliance and reporting systems to keep directors informed and protected from liability.[12] Even if the SEC's current climate disclosure proposal does not survive in its current form[13] directors are well advised to prepare for the coming changes in the rising tide of securities litigation and potentially growing liability for climate-related disclosures.[14] Like the Sarbanes-Oxley Act or the Dodd Frank Act, large regulatory changes take time, even decades, and require multiple revisions. The SEC's proposal is only in its beginning, and in this form or another, the recent trend has expanded the scope of securities regulation and—based on the discussion below—is likely

9. *See, e.g.*, Fentress v. Exxon Mobil Corp., 304 F. Supp. 3d 569, 584 (S.D. Tex. 2018) ("[P]laintiffs have not identified a single climate-related regulation that would impair the oil business," suggesting additional climate-related regulation could aid in buffering the evidence in a plaintiff's pleading motion).

10. Kevin LeCroix, *Thinking About the SEC's Proposed Climate Change Disclosure Requirements*, D&O DIARY, (March 22, 2022), https://www.dandodiary.com/2022/03/articles/climate-change/thinking-about-the-secs-proposed-climate-change-and-greenhouse-gas-disclosure-requirements/ ("The fact is that for a host of reasons companies increasingly cannot ignore climate change-related issues.").

11. Ike Brannon, *Too Much Information? Investors and corporations could benefit from less frequent financial reporting*, CATO INSTITUTE (Fall 2020) at 20, https://www.cato.org/sites/cato.org/files/2020-09/regulation-v43n3-3.pdf.

12. TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, 2022 STATUS REPORT 80 (2022) [hereinafter TCFD 2022 Status Report], https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf (surveying directors from global public companies and finding a general need for more decision-useful data available for directors and managers).

13. Cooley LLP, *SEC Floats Dialing Back Climate Disclosure Rules*, JD SUPRA (February 7, 2023), https://www.jdsupra.com/legalnews/sec-floats-dialing-back-climate-6260506/ (SEC chair considering "scaling back potentially groundbreaking climate-risk disclosure rule" but the SEC remains set on still finalizing some form of climate-related disclosures, even if scaled back).

14. *See, e.g.,ClientEarth Files Climate Risk Lawsuit against Shell's Board with Support from Institutional Investors*, CLIENTEARTH (Feb. 9, 2023), https://www.clientearth.org/latest/press-office/press/clientearth-files-climate-risk-lawsuit-against-shell-s-board-with-support-from-institutional-investors/ (Example of derivative suit under U.K. law seeking to hold Shell's Board of Directors liable for "failing to properly prepare for the energy transition.").

here to stay.[15] Directors must respond to these changes in stride and develop robust plans for reporting and monitoring systems to mitigate the rising risk of liability associated with climate disclosures.

In part because much existing literature examines climate liability broadly, this paper seeks to narrow the scope and specifically focus on the liability that companies face from private causes of action. While public companies are exposed to litigation liability on many fronts, including SEC enforcement, state district attorney action, and investor activism, private litigation itself poses an especially formidable legal risk. Thus, other forms of legal action are referenced, but this paper examines the increased litigation risks that public companies would face from private causes of action if the SEC's new proposed climate-related rules were adopted.

To do so, this paper explores the proposed changes to climate disclosure for public companies, with a special nod to Idaho's public and private companies. It assesses how companies can prepare for increased liabilities from growing demand for transparency, oversight, and corporate responsibility. The paper then discusses the key avenues of private causes of action available for investors seeking to hold a corporation and its directors liable for climate disclosures. The paper concludes with recommendations specific to private-action litigation for companies and directors navigating a new era of climate-related disclosures.

II. SEC CLIMATE DISCLOSURE PROPOSAL

The SEC's disclosure tradition is premised on a simple bargain: investors will bear the risks of investing in public companies *so long as* those companies give full and fair disclosure of their risks.[16] In other words, if a company wants the benefits of public investment, the company must uphold its end of the bargain and provide certain disclosures. Against this bargain theory, SEC Chair Gary Gensler introduced the SEC's proposed climate disclosure rules by advocating that the new rules would fold neatly into this "traditional bargain."17 Thus, the historical context matters in understanding the SEC's proposed rules.

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15. Jacob H. Hupart et al., *What Public Comments on the SEC's Proposed Climate-Related Rules Reveal—and the Impact They May Have on the Proposed Rules*, MINTZ (July 20, 2022), https://www.mintz.com/insights-center/viewpoints/2022-07-20-what-public-comments-secs-proposed-climate-related-rules.

16. Chair Gary Gensler, *"Building Upon a Long Tradition" - Remarks before the Ceres Investor Briefing*, U.S. SEC. & EXCH. COMM'N (April 12, 2022), https://www.sec.gov/news/speech/gensler-remarks-ceres-investor-briefing-041222 (framing the proposed rules as "built on a long tradition" of the SEC mandating financial disclosures).

17. Gensler, *supra* note 16.

To give that history, this paper examines both the regulatory background of the SEC generally and as specifically applied to climate disclosures. Then, building on that background, this paper analyzes the exact scope and requirements of the proposed climate disclosure rules.

A. Regulatory Background on Federal Securities Law

In response to a rapid rise in the structured securities industry and its ruinous fall in 1929, Congress formed the SEC pursuant to the Securities Exchange Act of 1934.[18] Congress's goal was to enforce the securities laws and ultimately to rebuild what was lost in the stock market crash—investor trust.[19] Policymakers recognized "there cannot be honest markets without honest publicity."[20] Regaining that investor trust meant companies must give investors enough information to make a fair assessment of the risks they would bear purchasing a company's securities.[21] Thus, "the SEC's chief duty was—and continues to be—to ensure full and fair disclosure of all material facts regarding securities offered to the public for investment."[22]

As a federal agency, one of the SEC's foremost duties is rulemaking.[23] From the general securities laws passed by legislation, the SEC interprets and adapts the law to promulgate new rules for those engaged in the securities market.[24] In addition to its rule-making power, the agency also investigates and enforces possible securities law violations.[25] With the goal of protecting the investor ever at the forefront, the SEC enforces violations such as material misrepresentations or omissions in filings, securities fraud, insider trading deals, breach of broker-dealer fiduciary duties, and illegal registration and sale of securities.[26]

B. Background on SEC Disclosures for Climate-Related Risks

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18. Off. of Inv. Educ. and Advoc., *Investor Bulletin: An Introduction to The U.S. Securities and Exchange Commission – Rulemaking and Laws*, U.S. SEC. & EXCH. COMM'N (Aug. 20, 2015), [hereinafter *Investor Bulletin*] https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_rulemaking.

19. Mark Latham, Environmental Liabilities and the Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change-Related Risks, 39 ENV'T L. 647, 672 (2009).

20. *Id.* (quoting Francis Wheat, Disclosure to Investors: A Reappraisal of Administrative Policies under the '33 and '34 Acts 50 (1969)).

21. *Id.*; *see also* Gensler, *supra* note 16.

22. John H. Matheson, *Securities and Exchange Commission*, FREE SPEECH CTR. (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/securities-and-exchange-commission/.

23. *Investor Bulletin*, *supra* note 18.

24. Latham, *supra* note 19; *see also Investor Bulletin*, *supra* note 18.

25. Latham, *supra* note 19, at 672–73.

26. Latham, *supra* note 19, at 673–76.

While unprecedented in scope, the SEC's proposed rules are not without precedent in requiring disclosures of climate-related risks.[27] The Securities Act of 1933 and Securities Exchange Act of 1934 imposed significant filing requirements on publicly traded companies.[28] The filing requirements include "annual reports [such as the] Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K[.]"[29] Regulation S-K details the disclosures required in each report. Importantly, the current version of Regulation S-K already mandates disclosure of risks, including financial risks related to sustainability.[30] Indeed, in 2010, the SEC issued guidance on the required sustainability disclosures.[31] For example, the guidance requires disclosure of material effects of complying with environmental laws, change in demand related to climate change, and exposure to climate-related risks that could increase the overall risk of investment in the company.[32] While some investors and public corporations consider the current disclosure requirements adequate[33] other investors and the SEC expressed frustration with the lack of depth and consistency of those disclosure requirements, prompting the SEC to enhance and standardize mandatory climate-related disclosures.[34]

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27. Geltman, *supra* note 5, at 144.

28. Caitlin M. Ajax & Diane Strauss, Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?, 45 ECOLOGY L. Q. 703, 711–13 (2019).

29. *Id.* at 711.

30. *Id.*

31. 2010 Guidance, supra note 6. See also MICHAEL R. LITTENBERG, ROPES & GRAY, Corporate Social Responsibility Disclosure and Compliance: An Overview of Selected Legislation, Guidance and Voluntary Initiatives, 5–6 (2019) (summarizing the required disclosures relating to climate change). https://www.ropesgray.com/en/insights/alerts/2019/10/corporate-social-responsibility-disclosure-and-compliance.

32. *See* LITTENBERG, *supra* note 31, at 9 ("[t]he Guidance also indicates climate change-related matters that may trigger disclosure:" (1) "pending or existing regulations or legislation[,]" (2) "treaties or international accords[,]" (3) "indirect consequences of regulation or business trends[,] [and]" (4) "significant physical effects of climate change[.]").

33. *See, e.g.*, Cato Inst., Comment Letter on Proposed Climate-Related Disclosure Rules (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132199-302715.pdf; Heritage Found., Comment Letter on Climate Disclosure (June 13, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8914466-244728.pdf; Am. Enter. Inst., Comment Letter on Proposed Climate-Related Disclosure Rules (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132286-302818.pdf.

34. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21335 (proposed Apr. 11, 2022) [hereinafter SEC Climate Disclosure Proposal] ("We are concerned that the existing disclosures of climate-related risks do not adequately protect investors. For

C. Overview of the Proposed Rule

In April 2022, the SEC proposed the new rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors.[35] The rule, if adopted, would require public companies to disclose "climate-related risks" that are "reasonably likely to have a material impact on its business, results of operations, or financial condition."[36] A brief note on the goals and importance of the rule's timing is provided, followed by a brief summary of what disclosures would be required and what amendments to Regulation S-K are proposed.

i. Goals of Increased Investor Transparency

The SEC, in proposing the rule, aims to continue its mission safeguarding that traditional bargain between investors and public companies, further promoting the "efficiency, competition, and capital formation" in securities markets.[37] The SEC in its rule notes how the agency has long regulated disclosure requirements across the corporate industry, requiring companies to disclose information reasonably material to an investor.[38] The goal of increased investor transparency and corporate accountability is at the core of the agency's actions.

In addition, the timing of the proposal's release adds important context to the SEC's stated purpose. The proposed SEC rule came on the heels of recent action by the SEC, other countries, and global institutions to address pressing ESG and other environmental issues.[39] Notably, in March 2021, the SEC formed a task force to "proactively identify" climate and ESG related misconduct.[40] Known as the Climate and ESG Task Force, the group's first assignment was to identify "any material gaps or misstatements in issuers' disclosure of climate risks …."[41] The SEC's commitment to increasing corporate transparency for climate risks informs its motivation behind

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this reason, we believe that additional disclosure requirements may be necessary … to improve the consistency, comparability, and reliability of climate-related disclosures."), (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

35. *Id.*

36. *Id.* at 21334.

37. *Id.* at 21335 (quoting Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act).

38. *Id.* at 21473 n.614.

39. K&L Gates LLP, *ESG Regulatory Developments in the UK, Japan, and Hong Kong*, JD SUPRA (Jan. 18, 2022), https://www.jdsupra.com/legalnews/esg-regulatory-developments-in-the-uk-8444608/; *see also ISSB delivers proposals that create comprehensive global baseline of sustainability disclosures,* IFRS (Mar. 31, 2022), https://www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-disclosures/.

40. Press Release, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*, U.S. SEC. & EXCH. COMM'N (March 4, 2021), https://www.sec.gov/news/press-release/2021-42.

41. *Id.*

the new proposed rules and reinforces the significance of preparing for a future of more demanding climate-related disclosures.

ii. Scope and Requirements

To achieve this broader goal of protecting the investor, the rule adds to the existing disclosure requirements a distinct and detailed climate angle. This new climate-centric angle is designed to disclose three key insights about the company to help investors better assess the company's risk. First, what is the company's exposure to a changing climate. Second, what is the company's contribution to a changing climate. And lastly, in response to the first two, what are the company's board oversight and plans to mitigate its exposure and reduce its impact.

First, the rule would require a detailed deep-dive into a company's exposure to climate-related risks.[42] As it stands, the rule largely follows the well-recognized Task Force on Climate-Related Financial Disclosures (TCFD) reporting framework.[43] Doing so achieves a standardized reporting platform and also marginally lowers the costs of implementation.[44] Under a new section called "Climate-Related Disclosure," the company would list any climate-related risks over the short-, medium-, or long-term likely to have a material impact on the company's business and any climate-related risks likely to affect its strategy, business model, and outlook.[45] The climate-related risks that must be reported include the physical risks (severe weather events) and transition risks (shift to more sustainable energies).[46] In addition, the company would have to disclose its methodologies for identifying and measuring those climate-related risks.[47]

The identified risks are also to be reported on a line-by-line basis on a new footnote in the audited financial statements providing financial impacts from severe weather events and transition activities.[48] Of the identified climate risks, only those measured to carry a financial impact of greater than one percent of the related line item must be disclosed.[49] Thus, the proposed rule adopts a bright-line standard to determine material financial impacts.[50] While other SEC rules use

42. *Id.* at 21464.

43. *Id.*

44. *Id.* at 21343 ("[t]he TCFD framework has been widely accepted by issuers, investors, and other market participants, and, accordingly, we believe that proposing rules based on the TCFD framework may facilitate achieving this balance between eliciting better disclosure and limiting compliance costs.").

45. *Id.* at 21354.

46. *Id.* at 21345.

47. *Id.* at 21345.

48. SEC Climate Disclosure Proposal, 87 Fed. Reg. at 21366.

49. *Id.* at 21366.

50. *Id.* at 21366.

similar bright-line standards,[51] the traditional materiality thresholds do not, raising concerns of additional liability for reporting companies.

Second, the rule would require disclosure of any material impacts on the climate through detailed emissions data.[52] The proposal adopts the well-recognized Greenhouse Gas Protocol (GHG) that other agencies such as the Environmental Protection Agency impose.[53] In particular, the rule would mandate disclosure, in absolute and intensity terms, of disaggregated Scope 1 and Scope 2 GHG emissions, [54] which are the company's direct emissions or those produced as a result of the energy it purchases. [55] Any Scope 1 and 2 disclosure must be accompanied by an independent attestation report auditing the emissions data for reasonable assurance.[56] Additionally, a company must disclose material Scope 3 emissions, which include any emissions produced along a company's entire value chain,[57] or targets to address those emissions.[58]

Third, the proposed disclosure rules require a company to state any plans and strategies for handling its climate-related risks, including specifics on board and management oversight of those risks.[59] The plans and strategies would cover any transition goals or emissions targets.[60] Further, as written, registrants would be required to identify the board members responsible for the "oversight of climate-related risks."[61] As part of that requirement, registrants must disclose any directors with expertise in climate-related risks and the nature of that expertise.[62] Additionally, the proposal notes that disclosing plans or business strategies for

51. *Id.* at n. 869 ("[T]he choice of a one percent threshold is consistent with what the Commission currently uses in other contexts for disclosure of certain items within the financial statements and without (*e.g.,* §§ 210.5-03.1(a), 210.12-13, and 229.404(d)).").

52. *Id.* at 21345.

53. SEC Climate Disclosure Proposal, 87 Fed. Reg. at 21344 ("[T]he GHG Protocol has become the most widely-used global greenhouse gas accounting standard. For example, the Environmental Protection Agency ("EPA") Center for Corporate Climate Leadership references the GHG Protocol's standards and guidance as resources for companies that seek to calculate their GHG emissions.").

54. *Id.* at 21344.

55. Sheila Harvey et al, *SEC Issues Landmark Climate-Related Disclosure Proposal*, PILLSBURY (Mar. 25, 2022), https://www.pillsburylaw.com/en/news-and-insights/sec-issues-landmark-esg-proposal.html.

56. SEC Climate Disclosure Proposal, 87 Fed. Reg. at 21346.

57. *Id.*

58. *Id.*

59. *Id.* at 21361.

60. *Id.* at 21361–62.

61. SEC Climate Disclosure Proposal, *supra* note 34, at 21359.

62. *Id.*; *see also* Sullivan & Cromwell LLP, *SEC Proposes Expansive Climate-Related Disclosures* at 8, (March 28, 2022), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-sec-proposes-expansive-climate-related-disclosure-rules.pdf (expressing concerns over the liability such disclosures could expose directors to).

climate-related *opportunities* is permissible, but not required.[63] The exact reporting instructions of those three climate disclosure insights—impacts, exposure, and board oversight—would be amended in Regulation S-K.

iii. Amendment to Regulation S-K

The proposed rule would amend Regulation S-K ("Subpart 1500 of Regulation S-K").[64] As amended, Regulation S-K would now require filers to disclose "certain climate-related information, including information about its climate-related risks that are reasonably likely to have material impacts on its business or consolidated financial statements, and GHG emissions metrics that could help investors assess those risks."[65] The language of the proposed rule largely follows previous SEC disclosure requirements in demanding information "reasonably likely" to have "material impacts."[66]

The bulk of the anticipated climate litigation, similar to previous securities litigation, will likely turn on how courts determine the materiality of the information to a reasonable investor. Directors will be well-advised to proceed carefully in combing through information an investor might consider material. Indeed, as the next section discusses, much of the rise in climate-related litigation brings to light this risk of failure to disclose material climate risks.

D. Rise in Securities Litigation over Climate-Related Risks

Since the first climate-related case in 1986, climate litigation has grown significantly in the United States and globally, particularly in the last decade.[67] Climate-related *securities* litigation has also seen a notable increase.[68] Given the complexity and seemingly endless flavors of event-driven climate-related risks, public companies face an increasingly litigious landscape, where investors have new weapons to hold responsible those who mislead or fail to disclose material climate

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63. SEC Climate Disclosure Proposals, *supra* note 34, at 21465.

64. *Id*. at 21347–48.

65. *Id.* at 21345.

66. *Id.*

67. Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot*, THE CTR. FOR CLIMATE CHANGE ECON. AND POL'Y, 1, 4 (July 2, 2021), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

68. Ben Clapp and Casey J. Synder, *Climate Change Litigation Trends 2015–2020*, 36 NAT'L RES. & ENV'T, 1, 4. (Summer 2021), https://www.ehslawinsights.com/wp-content/uploads/sites/48/2021/10/Snyder-ABA-Article-CC-Litigation-Summer-2021.pdf.

risks.[69] A brief review of the following cases notes this general rise in climate-related litigation and highlights the continuing development of precedent-setting court decisions in the area of climate disclosures. The first case was a successful Rule 10b-5 suit, while the second demonstrates why most fall short.

i. *Ramirez v. ExxonMobil Corp.*

In *Ramirez*, investors led by a pension fund claimed that ExxonMobil (Exxon) used favorable, but different, carbon-proxy costs in its disclosure than the costs applied internally and failed to disclose to investors the "de-booking" of a certain investment operation.[70] The investors sued for securities fraud under Rule 10b-5.[71] Exxon countered by arguing the different carbon costs reflected two different types of costs, the distinction not being important to investors.[72] Exxon also argued its statements concerning the de-booking of an operation were protected forward-looking statements.[73] The federal court in Texas disagreed with Exxon.[74] First, the court held that the disparity in internally applied carbon-proxy costs and those disclosed was likely to be material to an investor.[75] Second, the court noted that, even if Exxon's statements were forward-looking, the facts indicated that Exxon knew at the time of the disclosure that its statement was false.[76] In denying Exxon's motion to dismiss, the court held that the pension fund sufficiently alleged material misrepresentation and scienter, as required to find Exxon liable for securities fraud.[77] The holding in *Ramirez* continues to be one of the only successful securities fraud suits for failure to disclose climate-related risks.[78]

ii. *Barnes v. Edison International*

The next case highlights the current difficulties plaintiffs confront in surviving a motion for summary judgment in their attempts to sue over climate-related risks. In *Barnes*, plaintiff investors sued Edison International, a California based public utility company, alleging that it had made false and misleading disclosures about its true exposure to wildfire risk, resulting in harm to its stock price from wildfire

69. *Id.* at 3.

70. Ramirez v. ExxonMobil Corp., 334 F. Supp. 3d 832, 845 (N.D. Tex. 2018).

71. *Id.* at 839.

72. *Id.* at 847.

73. *Id.* at 850.

74. *Id.* at 859-60.

75. *Ramirez*, 344 F. Supp. 3d at 846.

76. *Id.* at 850–51.

77. *Id.* at 859–60.

78. Roshaan Wasim, *Corporate (Non)disclosure of Climate Change Information*, 119 COLUM. L. REV. 1311, 1339 (2019).

events in 2018.[79] The statements in question included reassurances to investors about risks, such as that it had "long taken substantial steps to reduce the risk of wildfires in our service territory and continue to look for ways to enhance our operational practices and infrastructure."[80] Noting that even if a statement is not false, it may be misleading if it omits material information, the district court still held that the utility's statements not misleading because of the context in which the statements were made.[81] The court reasoned that, when the company made the allegedly false statements, investors were likely already aware of the company's safety failures.[82] Thus, the court held that the plaintiffs failed to sufficiently allege a false misrepresentation and dismissed the case.[83]

As these cases demonstrate, the rise in climate-related events will naturally increase climate-related lawsuits, including securities litigation where investors can potentially hold companies accountable for their role in causing climate events such as wildfires or for their failure to forecast and disclose their exposure to future climate risks. As it stands, private causes of action face stiff pleading hurdles to succeed against a motion to dismiss. If the proposed rules are adopted, investors will have additional tools at their disposal. As will be discussed below, the new SEC disclosure rules may give investors additional footholds but proving the elements for claims under Rule 10b-5 or Rule 14a-9 would remain a formidable challenge.

III. AVENUES FOR PRIVATE CAUSES OF ACTION: A FOCUS ON 10b-5 and 14a-9

Preparing for a new era of climate liability under the unblinking eye of investors necessitates a basic understanding of key private litigation pathways for investors to hold companies accountable. Rule 10b-5 and Rule 14a-9 are two oft-litigated examples of private causes of action that this paper will focus on. Before addressing how prospective plaintiffs may use those rules in climate-related contexts, a brief overview of those rules is provided.

A. Rule 10b-5 of the Securities Exchange Act

Forged from judicial construction, Rule 10b-5 remains the foremost avenue for plaintiffs to hold a company liable for inaccurate or incomplete disclosures,

79. Barnes v. Edison Int'l, CV 18-09690 CBM, 2021 WL 2325060 at *4–5. (C.D. Cal. Apr. 27, 2021), *aff'd*, 21-55589, 2022 WL 822191 (9th Cir. Mar. 18, 2022).

80. *Id.* at 9.

81. *Id.* at 10.

82. *Id.*

83. *Id.* at 12.

though successful claims are few and far between.[84] Congress enacted Section 10(b) of the Securities Exchange Act to protect investors against stock price manipulation.[85] Acting pursuant to Section 10(b), the SEC then promulgated Rule 10b-5. While Section 10(b) vests enforcement action with the SEC via Rule 10b-5, the regulation does not expressly provide for a private right of action.[86] Instead, courts have long interpreted the rule as implying that right.[87] Thus, the SEC and private plaintiffs can bring anti-fraud litigation and hold accountable companies who commit securities fraud.[88]

The rule fits within the SEC's granted congressional authority to promote investment transparency, specifically against statements that fraudulently mislead investors. Under Rule 10b-5, "it shall be unlawful for any person … to make any untrue statement of a material fact or to omit to state a material fact … with respect to the sale or purchase of a security."[89] A misrepresentation or omission is only material, and therefore actionable, if the information is relevant to an investor.[90] The sale or purchase of the security does not limit the action to the state in which the transaction occurred because the internet effectively allows any investor to be engaged in interstate commerce, thus widening a narrow path to relief for investors.[91] Further, although Rule 10b-5 applies to both public and private companies, the SEC disclosure rule, both existing laws and the proposed rule, only apply to public companies.[92]

Under Supreme Court precedent, a private right of action under Rule 10b-5 has six elements.[93] To hold a company liable under Rule 10b-5, a plaintiff must show the company made (1) a material misrepresentation or omission (2) with the required state of mind and (3) in connection with the purchase or sale of a security where the investor acted with (4) reliance, (5) suffered economic loss, and (6) their

84. Evan Hill, The Rule 10b-5 Suit: Loss Causation Pleading Standards in Private Securities Fraud Claims After Dura Pharmaceuticals, Inc. v. Broudo, 78 Fordham L. Rev. 2659, 2666 (2010). See also Janeen McIntosh et al., Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review, NERA Economic Consulting at 11 (2023) (of the securities class action lawsuits filed in the past decade, over 61% did not survive the motion to dismiss).

85. Hill, *supra* note 84, at 2666.

86. *Id.* at 2668.

87. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007).

88. 17 C.F.R. § 240.10b-5.

89. *Id.* at § 240.10b-5(b).

90. Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988).

91. Robert K. Cowan, Time for Plan(et) B? Why Securities Litigation is a Misguided Attempt at Regulating Climate Change, 33 GEO. ENV'T L. REV. 1, 36 (2021).

92. *Id.* at 58.

93. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–342 (2005).

loss is causally linked.[94] The two most contentious elements are materiality and scienter.[95]

Materiality will be examined in conjunction with Rule 14a-9 in more detail below. Unlike Rule 14a-9, however, Rule 10b-5 has an element of scienter, which adds a meaningful hurdle to a private plaintiff's case. In the seminal securities case, *Basic Inc.*, the Supreme Court reaffirmed prior Rule 10b-5 decisions and held that scienter requires more than mere negligence.[96] Most courts have found scienter to require at least recklessness. In addition, pursuant to the Private Securities Litigation Reform Act (PSLRA), a private plaintiff is required to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[97] Importantly, for each element, a private plaintiff must "state with particularity the circumstances constituting fraud or mistake."[98] This heightened pleading standard, in addition to the other elements, cuts into the already narrow pathway available for prospective climate plaintiffs—making any additional foothold that an investor could gain from the proposed climate rules critically important.

Rule 10b-5 is not the only litigation avenue for plaintiffs seeking to bring private action against a company. Suing under Rule 14a-9 offers an alternative.

B. Rule 14a-9 of the Securities Exchange Act

Another potential avenue of private action against a company for misleading investors is Rule 14a-9. Promulgated pursuant to Section 14(a) of the Securities Exchange Act, Rule 14a-9 primarily safeguards investors from proxy fraud.[99] Designed to provide additional investor protection, Rule 14a-9 prohibits solicitation made by proxy statement that includes any false or misleading statement or omission.[100]

To succeed under Rule 14a-9, a private plaintiff must establish these four elements: (1) a solicitation of proxies subject to Section 14(a); (2) containing a false or misleading statement or omission; (3) which is material; and (4) which causes

94. *Id.*; *see also Basic Inc.,* 485 U.S. at 231–32 (laying the bounds on material misrepresentations); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) (addressing in part the scienter requirement for Rule 10b-5).

95. *Basic Inc.,* 485 U.S. at 231–32.

96. *Id.* at 232 ("We now expressly adopt the *TSC Industries* standard of materiality for the § 10(b) and Rule 10b–5 context.").

97. Teachers' Ret. Sys. v. Hunter, 477 F.3d 162, 172 (4th Cir. 2007).

98. Fed. R. Civ. P. 9.

99. 15 U.S.C. § 78n (a); 17 C.F.R. § 240.14a-9(a).

100. 17 C.F.R. § 240.14a-9(a).

injury to the plaintiff.[101] Again, similar to Rule 10b-5 litigation, not all misleading statements or omissions are important to investors.[102] Instead, a plaintiff must prove the misstatement or omission was material by demonstrating it has "a substantial likelihood that a reasonable shareholder would consider … important in deciding how to vote."[103]

As noted, one key elemental difference between Rule 14a-9 claims and Rule 10b-5 is the lack of scienter requirement for Rule 14a-9.[104] Congress in drafting Section 14(a) did not include a necessary mental state.[105] Some jurisdictions require mere negligence while other jurisdictions have required a scienter showing.[106] Rules 10b-5 and 14a-9 are multi-faceted and complex, and an understanding of their elements would be incomplete without a deep dive into materiality and PSLRA safe harbors—both likely to play a central role in the evolving arena of climate litigation.

C. Liability Concerns from Increased Investor Attention

In the context of climate litigation, two important components of both Rule 10b-5 and 14a-9 are the materiality and the PSLRA safe-harbor provisions. Both components provide companies and their directors a buffer against the reach of investors bringing private claims. A third component, unique to Rule 14a-9, is the potentially nascent use of forum-selection bylaws to give corporations an additional foothold in mitigating liability risks. Each of these components will be analyzed in turn.

i. Proving Materiality

A successful private cause of action under either Rule 10b-5 or Rule 14a-9 requires proving materiality. This standard of materiality aims to weed out disingenuous suits and, in raising the bar for plaintiffs, serves to mitigate litigation risks for directors.[107]

In line with the objectives of Regulation S-K, the proposed rules aim to mirror the materiality trigger already routinely used when preparing the Management Disclosure and Analysis (MD&A) section of securities filings.[108] Thus, examining the materiality trigger under MD&A will likely provide helpful insights for companies in

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101. Jacobs v. Airlift Intern., Inc., 440 F. Supp. 540, 542 (S.D. Fla. 1977).

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

103. *Id.*

104. 17 C.F.R. § 240.14(a)-9(a) (2022).

105. *See* Jacobs, 440 F. Supp. at 542; *see also* Adams v. Standard Knitting Mills, 623 F.2d 422 (6th Cir. 1980).

106. *See* Jacobs, 440 F. Supp. at 542.

107. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

108. SEC Climate Disclosure Proposal, *supra* note 34, at 21352.

understanding the legal question of what would trigger disclosure for a material climate risk.

In preparing the MD&A section, a company must disclose material events, trends, or "uncertainties known to management that are reasonably likely to" adversely affect future operating results or a company's financial condition.[109] In a 1989 release, the SEC laid out the process a company should undertake to assess materiality for MD&A disclosures.[110] According to the SEC, management, when assessing *known* trends, events, or uncertainties, must first determine the likelihood those risks are "likely to come to fruition."[111]

Then, for those risks with sufficient probability of occurring, management must weigh the consequences and disclose those risks that have a "material effect on the registrant's financial condition or results of operations."[112] If management determines the known events or uncertainties are not likely to materialize, no duty to disclose arises.[113] Importantly, the process outlined above is not the same as the probability/magnitude test, as the SEC itself expressly points out in the release.[114]

While the SEC acknowledges that both the probability and magnitude of a climate risk are relevant considerations, the proposed rules suggest the test for disclosure aligns more closely with the trigger for MD&A disclosures. Mirroring the customary materiality language and using a disclosure trigger like that used in MD&A provides a degree of familiarity and eases the burden for registrants, even for disclosing climate-related risks.

But as will be discussed further below, even the traditional materiality determination carries uncertainty and complexities. The proposed rules, adding to that existing complexity, introduce novel time horizon assessments and a bright-line threshold.

ii. PSLRA Safe Harbor

Safe harbors from liability offer protection for companies from private litigation risk under both Rule 14a-9 and Rule 10b-5 for statements about future

109. 17 C.F.R. § 229.303(a) (2021).

110. Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6835 (May 18, 1989). *See also* Elizabeth Geltman, *Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Laws*, 16 HARV. L. REV. 129, 158 (1992).

111. *Supra* note 109.

112. *Id.*

113. *Id.*

114. *Id.* at 6 n.27.

performance.[115] The proposed rules for climate disclosure, consistent with other SEC regulation, apply the forward-looking safe harbors available in the PSLRA.[116] As will be discussed, however, the safe harbor provisions are "narrowly targeted" and corporate concerns over liability for incorrect statements or omissions remain.[117]

Acknowledging that forecasts are fraught with assumptions, the SEC has long protected forward-looking statements under the PSLRA safe harbor if the statements satisfy certain conditions.[118] Under the PSLRA, a statement will qualify as a protected forward-looking statement if one of two conditions are satisfied. The statement must either be "identified as a forward-looking" and "accompanied by meaningful cautionary statements."[119] Or alternatively, if the plaintiff fails to prove that the statement "was made with actual knowledge . . . that the statement was false or misleading," the statement may qualify for safe harbor protection.[120]

Important limitations, existing under PSLRA, also apply under the proposed climate disclosure rules, including limitations for forward-looking statements made for initial public offerings or those made in accordance with the Generally Accepted Accounting Principles (GAAP).[121] Further, the PSLRA safe harbor protection only applies to private litigation.[122] The proposed rules do not carve out protection from SEC investigation or enforcement for climate-specific disclosures.[123] Companies, particularly those relying on third-party data in their disclosures, have expressed concern over the increased exposure to liability and the PSLRA's inability to provide sufficient safe harbor protection against opportunistic private lawsuits and SEC action.[124] To both incentivize meaningful disclosure and hedge against the uncertainty inherent in climate risk assessments, companies have requested expanded safe harbor protections.[125] One 2022 survey found that 83% of respondents favored broader safe harbor provisions than what the rule currently

115. According to NERA's 2022 survey on securities class action litigation, over one-third of cases filed involved allegations of investors misled about future performance–the most prevalent allegation of 2022. *See* Janeen McIntosh et al., *supra* note 84, at 2.

116. SEC Climate Disclosure Proposal, *supra* note 34, at 21351–52.

117. *SEC Proposes Expansive Climate-Related Disclosures*, SULLIVAN & CROMWELL LLP, Mar. 28, 2022, at 16, https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-sec-proposes-expansive-climate-related-disclosure-rules.pdf.

118. 15 U.S.C. § 78u-5.

119. 15 U.S.C. § 77z-2(c)(1)(A)(i); 15 U.S.C. § 78u-5(c)(1)(A)(i).

120. 15 U.S.C. § 77z-2(c)(1)(B)(i); 15 U.S.C. § 78u-5(c)(1)(B)(i).

121. SEC Climate Disclosure Proposal, *supra* note 34, at 21352 n.219.

122. 15 U.S.C. §§ 77z-2(c)(1), 78u-5(c)(1).

123. SEC Climate Disclosures Proposal, *supra* note 34, at 21351–52.

124. *See, e.g.,* Bank Pol'y Inst., Comment Letter on SEC Climate Disclosures (June 9, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8901041-242153.pdf.

125. *Id.* at 3, 9.

proposes.[126] The proposed rules could change to accommodate such concerns, but as it stands, the rules will provide the well-established PSLRA safe harbor and a new, narrow safe harbor for Scope 3 emission disclosures.[127]

In large part, consistent with the overarching purpose to educate investors on the resilience of a company's business strategy in mitigating climate-related risks, the drafted rules, if adopted, would push companies up against the limits of these safe harbors. The required disclosures in the proposed rules, such as emission targets, internal carbon pricing algorithms, and scenario analysis, carry inherent future assumptions that may qualify as forward-looking under PSLRA safe harbor.[128]

For example, one way the TCFD recommends demonstrating resilience to climate risks is to employ climate-related scenario analysis, which leverages analytical tools to test strategies against various possible events.[129] According to a 2021 Status Report, however, the TCFD found that "only a small percentage of the surveyed companies disclosed the resilience of their strategies using scenario analysis."[130] Recognizing that scenario analysis may be costly, difficult, and not commonly practiced, the SEC's proposed rules do not mandate use of any scenario analysis, but the rules do encourage it by reminding registrants of the PSLRA safe harbors.[131] For a company who uses scenario analysis, "the PSLRA forward-looking safe harbors would apply" to those future assumptions provided "the other statutory conditions for application of the safe harbor are met."[132] Protecting the forward-looking characteristics of scenario analysis promotes the SEC's goal to balance the burdens of conducting scenario analysis with the benefits the results may offer investors.[133] The question remains whether the PSLRA safe harbor protections would provide adequate protection for the proposed climate-related disclosure requirements.

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126. John A. Zecca, Comment Letter on Proposed SEC Climate-Related Disclosure Rules, NASDAQ (June 14, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131426-301608.pdf.

127. SEC Climate Disclosures Proposal, *supra* note 34, at 21351–52.

128. Maria Ghazal, *The Proposed SEC Climate Disclosure Rule: A Comment from the Business Roundtable*, HARV. L. SCH.: HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (July 12, 2022), https://corpgov.law.harvard.edu/2022/07/12/the-proposed-sec-climate-disclosure-rule-a-comment-from-the-business-roundtable/.

129. *Recommendations of the Task Force on Climate-related Financial Disclosures*, TCFD 1, 9 (June 2017) https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf [hereinafter TCFD Recommendations].

130. SEC Climate Disclosures Proposal, *supra* note 34, at 21357 n. 259.

131. SEC Climate Disclosures Proposal, *supra* note 34, at 21356.

132. *Id.*

133. *Id.*

In addition to the PSLRA safe harbor, the SEC has explicitly proposed a phase-in approach and new, narrow safe harbor for Scope 3 disclosures.[134] Noting the inherent complexity of Scope 3 emission calculations, the safe harbor was designed to alleviate disclosure liability.[135] Because Scope 3 emissions evaluate the GHG emissions of a company's value-chain, the collection of such data largely relies on compliance from third parties and suppliers.[136] And the larger the company, the more complex the value-chain, which exacerbates the data collection challenge.[137] Under the proposal, the safe harbor "would extend to any statement regarding Scope 3 emissions that is disclosed pursuant to proposed subpart 1500 of Regulation S-K" and would protect the discloser unless the statement was "made without a reasonable basis or was disclosed other than in good faith."[138] If not, a disclosure of any fraudulent statement could dislodge the company from this safe harbor's protection. The proposal defines fraudulent statement as "an untrue statement of material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or that constitutes the employment of a manipulative, deceptive, or fraudulent device."[139] Accordingly, the Scope 3 safe harbor attempts to mitigate the liability risk arising from the challenges of reporting value-chain emissions.

iii. Forum Selection Bylaw Provisions

Forum selection bylaws could be used as an additional hedge against Rule 14a-9 claims. In anticipation of private litigation arising from Rule 14a-9, a company could draft their bylaws to include forum selection clauses to designate a court of choice. If enforceable, the bylaw could further insulate a company from the reach of private claims.

A forum selection clause is a contractual agreement designating the court of choice should any legal disputes arise.[140] When a corporation includes such a clause in their bylaws, the corporation is seeking to provide the forum court with personal jurisdiction and venue.[141] Including a forum selection clause and requiring litigation in a single forum can reduce litigation costs by giving more predictability to litigation outcomes.[142] This advantage, though, is only realized if the court finds the clause valid.

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134. *Id.* at 21406.
135. *Id.*
136. *Id.* at 21374.
137. SEC Climate Disclosures Proposal, *supra* note 34, at 21374.
138. *Id.* at 21391.
139. *Id.*
140. Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 500 (2016).
141. *Id.*
142. *Id.* at 506.

The Second Circuit created a four-part balancing test generally followed by courts in determining the enforceability of a forum selection clause.[143] The court must follow a four-step inquiry, asking whether the clause (1) was reasonably communicated to the opposing party, (2) states whether the clause is mandatory or permissive, (3) and subjects the parties in the suit to the clause. If so, (4) the clause is presumptively enforceable and the resisting party must rebut that presumption of enforceability.[144] While forum selection clauses do not entirely shield a corporation from the reach of liability, they may provide predictability against risks of liability from climate-related disclosures. With a basic understanding of the elements and key considerations of Rules 10b-5 and 14a-9, those litigation pathways are now applied against the SEC's proposed climate disclosure rule.

IV. INCREASED RISK OF PRIVATE LITIGATION UNDER 10b-5 and 14a-9

Prospective plaintiffs, equipped with Rules 10b-5 and 14a-9, could enter a new arena of climate litigation if the proposed rules are adopted. And public companies, at the epicenter of this litigious arena, are well-advised to understand the interplay between materiality and climate risks, recognize the potential limits in PSLRA safe harbors, and prepare for uncertainty surrounding the potential circuit split over forum selection clause enforceability.

A. Challenges Complying with Materiality

Plaintiffs seeking to bring a private cause of action against a public company under either Rule 10b-5 or Rule 14a-9 must hurdle the materiality threshold. The hurdle of materiality, as mentioned above, helps separate the disingenuous cases from real violations of securities laws. Thus, companies must understand climate risks and when those risks become material. Without clear precedent guiding materiality determinations, companies will need to rely on the limited guidance in the climate disclosure proposal's language and previous SEC disclosure requirements. The proposal's language defining climate risk and materiality will be examined, followed by a comparison to S-K materiality triggers, and lastly an analysis on investor climate risk perception.

i. What Are Climate-Related Risks?

First, consider how broadly the proposed rules define climate risks. According to the proposed rules, climate risks include any potential or actual negative impacts of climate-related conditions.[145] Borrowing from TCFD recommendations, the

143. Phillips v. Audio Active Ltd., 494 F.3d 378, 383 (2d Cir. 2007).

144. *Id.*

145. SEC Climate Disclosures Proposal, *supra* note 34, at 21349.

proposed rules aim to use an existing framework already adopted by many public companies for identifying climate risks.[146] Climate risks are further delineated into two general types: physical and transitional.[147] Its physical climate-related risks would include business and supply chain exposure to extreme weather events such as wildfires, drought, or flooding.[148] Transitional risks encompass a company's ability to transition to alternative energy sources as could be required under law or from market pressure.[149]

Because materiality largely hinges on what a reasonable investor considers risky, it is important that companies know how investors assess climate risks. One study stresses the different response investors have on both types of risks.[150] Notably, more sophisticated investors respond differently depending whether the risk is physical or transitional.[151] When companies disclosed more information about their *physical* risks to climate change, investors responded positively and considered the company a less risky investment.[152] The reduction in risk suggests that disclosing physical risks helps dispel any misconceptions and calm investor nerves.[153] Transitional risks, however, had the opposite effect.[154] The more detail investors learned about a company's transitional risks, the more uncertain investors became about the company's viability.[155] Risk premiums rose as disclosures for transitional risks rose.[156] Despite these varied correlations, the proposed rules do not let companies pick and choose the type of risk to disclose based on a strategy to reduce the cost of debt financing.[157]

Under this expansive definition of climate-risk, companies must assess potential exposure anywhere along their value-chain, upstream or downstream, and consider risks both in the short-term (acute) and long-term (chronic).[158] But this

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id*. at 21350.

150. Julian F. Kölbel, Markus Leippold, Jordy Rillaerts, & Qian Wang, *Ask BERT: How Regulatory Disclosure of Transition and Physical Climate Risks Affects the CDS Term Structure* (Swiss Fin. Inst., Research Paper Series No. 21-19 at 5, 2020), https://ssrn.com/abstract=3616324, *reprinted in* Julian F. Kölbel, Markus Leippold, Jordy Rillaerts, & Qian Wang, *Ask BERT: How Regulatory Disclosure of Transition and Physical Climate Risks Affects the CDS Term Structure*, J. OF FIN. ECONOMETRICS, July 2022.

151. *Id.* at 4.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 5.

156. Kölbel et al., *supra* note 157, at 5.

157. *Id.*

158. TCFD Recommendations, *supra* note 129, at Appendix 5 (defining climate-related risks).

expansive net for capturing climate-related risks must be filtered through a materiality threshold.[159]

ii. Triggering Disclosure of *Material* Climate-Related Risks

The broad definition of climate-related risks adds significant liability exposure for companies, particularly because of the proposed bright-line standard and the various time horizons. And as history teaches, the path companies take to avoid underreporting often triggers the unwanted "avalanche of trivial information."[160]

The language of the proposed climate-related disclosure rules generally aligns with the well-known materiality definition governing most SEC disclosures, except in two important ways: assessing risks over various time horizons and against a one-percent threshold.[161] First, the proposed rules require a company to identify and disclose climate-related risks over the short, medium, and long term that are reasonably likely to have a material impact on its financial state.[162] This temporal scope overlayed on the traditional MD&A disclosure trigger adds significant complexity for compliance. Any climate-related risks presently known must be assessed over the short, medium, and long term and with regard to what a reasonable investor would consider important. Because investors likely consider the present value of the risk, the longer time frame of disclosed risks the harder it is to achieve the accuracy valuable to investors. Further, the temporal scope broadens the already expansive definition of climate risks—including both categories of transitional and physical—exposing registrants to greater risks of underreporting.

Second, companies are concerned with the usefulness of a bright-line rule.[163] In one survey, 63% of respondents preferred the traditional principle-based materiality threshold over the bright-line one-percent rule.[164] And the majority of those in support of the bright-line standard were investor groups.[165] Assessing disclosure against a bright-line threshold could decrease the overall costs of

159. SEC Climate Disclosures Proposal, *supra* note 34, at 21349.

160. *TSC Indus*., 426 U.S. at 448–49.

161. *See* 17 CFR § 240.12b-2 (2022) (defining "material"); *see also* Basic Inc. v. Levinson*,* 485 U.S. 224, 231–32 (1988).

162. SEC Climate Disclosures Proposal, *supra* note 34, at 21351.

163. *See, e.g.*, Alphabet, Autodesk, Dropbox, eBay, Hewlett Packard Enterprise, HP Inc., Intel, Meta, PayPal, and Workday Comment Letter on SEC Climate Disclosure Proposal (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132086-302567.pdf.

164. *Responses to the SEC's climate proposal: Themes and Observations*, KPMG INT'L, 1, 6 (July 2022), https://frv.kpmg.us/content/dam/frv/en/pdfs/2022/kpmg-survey-responses-to-sec-climate-proposal.pdf [hereinafter KPMG 2022 Survey].

165. *Id.*

reporting, but that assumes companies can cost-effectively track and measure impacts across the broad scope of climate risks. Indeed, the difficulty of those judgments is what gives rise to the broad sentiment opposing the bright-line rule. And for companies seeking compliance to mitigate risks of private action under Rules 10b-5 and 14a-9, the bright line standard adds substantial litigation risk that not all material climate risks were disclosed.

Beyond the risks of complying with materiality thresholds, companies also must consider how traditional safe harbor protections from PSLRA will stand in a new climate litigation era if the proposed rules are adopted, in whole or in part.

B. Chinks in the Disclosure Safe Harbors

Traditionally, PSLRA safe harbor protections shield companies from liability for making statements about future projections and estimates, but climate-related disclosures, by their nature, add a complex nuance to those projections or estimates. Measuring, assessing, and particularly making any statement about future climate-related impacts relies heavily on assumptions and estimates subject to evolving methods for measuring climate data.[166] Accordingly, companies are concerned with adopting the PSLRA's traditional approach while not adopting an extension for Scope 3 emission disclosures.[167]

Before Congress adopted the PSLRA safe harbor language in 1995, the safe harbor available to companies for disclosure resided in Rule 175.[168] Under the language of Rule 175, a company can claim the protection against liability unless it is shown that the "statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith."[169] The "reasonable basis" and "good faith" language of Rule 175 mirrors that used in the Scope 3 safe harbor.[170] However, for that very reason, companies should be concerned. First, Rule 175 eventually gave way to PSLRA, because according to the House Report: "[t]his safe harbor has not provided companies meaningful protection from litigation."[171] The

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166. BASEL COMM. ON BANKING SUPERVISION, *Climate-Related Financial Risks – Measurement Methodologies*, BANK FOR INT'L SETTLEMENTS 1 (April 2021), https://www.bis.org/bcbs/publ/d518.pdf.

167. *See, e.g.*, Alphabet, et al., Comment Submission on SEC Proposed Rule, File Number S7-10-22 at 9 (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132086-302567.pdf; Bank Policy Institute, *Request for Public Input on Climate Change Disclosures* 3 (June 9, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8901041-242153.pdf.

168. H.R. REP. NO. 104-369, at n. 29 (1995).

169. 17 C.F.R. § 230.175(a) (2023).

170. GHG Emissions Metrics, 87 Fed. Reg. 21334, 21469 (Apr. 11, 2022) (to be codified at 17 C.F.R. § 229.1504(f)).

171. H.R. REP. NO. 104-369 at n.29.

PSLRA moved away from that language, opting for stricter language to increase the safe harbor's potency.[172]

Thus, public corporations have expressed concern over managing the heightened liability risks of reporting Scope 3 emissions.[173] As defined in more detail above, Scope 3 emissions include any emission outputs produced by third-party entities anywhere along the company's value-chain and financed emissions.[174]

Note how easily a plaintiff could uncover a disclosure error or omission. The plaintiff could supposedly travel down the tributaries of a company's vast value-chain and identify some fringe impact the company erred in reporting or failed to report altogether. That error or omission, of course, must be material to a reasonable investor. But the inclusion of Scope 3 emissions in disclosure requirements undoubtedly exposes companies, both public and private, to significantly more litigation risks. Thus, many companies have requested broader safe harbor protections.[175] Only 11% of companies who submitted a comment to the SEC supported the Scope 3 disclosure requirement — one of the least popular categories surveyed.[176] But 34% of the companies would support Scope 3 disclosures with changes.[177] The most common requested change relating to either scaling down the scope or enhancing the safe harbor for liability for data over which companies customarily have little control.[178]

C. Uncertainty Surrounding Forum Selection Bylaw Provisions

Lawsuits arising in the federal circuits have cast doubt on the enforceability of using forum selection provisions in a company's bylaws to divert all derivative actions to the Court of Chancery of the State of Delaware. Indeed, most

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172. Richard A. Rosen & Jessica S. Carey, *The Safe Harbor for Forward-Looking Statements after Twenty Years*, 30 INSIGHTS: THE CORP. & SEC'S L. ADVISOR (May 2016), https://www.paulweiss.com/media/3592238/insights_0516_rosen.pdf.

173. KPMG 2022 Survey, *supra* note 164, at 7.

174. *See supra* §2C.

175. KPMG 2022 Survey, *supra* note 164, at 10.

176. *Id.* at 7.

177. *Id.*

178. *Id.*; *See also* Public Comment from Tech Companies (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132086-302567.pdf. (Noting that Scope 3 emissions disclosure "relies heavily on estimates, assumptions, and third-party information" and calling for strengthened safe harbor protection for Scope 3).

corporations, including Idaho corporations, include such provisions in their bylaws.[179]

i. Circuit (almost) Split on Enforceability

In 2022, a Ninth Circuit three-judge panel dismissed a shareholder derivative suit asserting violations of Section 14(a) of the Securities Exchange Act on the grounds of a forum selection bylaw provision, picking Delaware as the exclusive forum.[180] The shareholders of Gap Inc. brought a derivative claim against the officers and directors for allegedly falling short in their commitment to diversity and inclusion.[181] The panel agreed to dismiss the claim without reaching the merits.[182] The panel enforced the exclusive forum selection clause, sending the case to be heard by the Delaware Court of Chancery.[183] The case illustrates the significant legal dilemma as to whether companies can avoid state substantive law by writing forum selection clauses into their bylaws. Interestingly, *Fisher*, in its original holding, temporarily split with the Seventh Circuit.[184]

Out in the Midwest, under similar facts the Seventh Circuit reached a different result.[185] There, a shareholder of Boeing sued directors on behalf of the company under Section 14(a).[186] The derivative suit claimed the corporation allegedly made false and misleading statements in its proxy statements concerning the development and operation of the 737 MAX aircraft.[187] Boeing had a forum selection clause in their bylaw that foreclosed any other forum than the Delaware Court of Chancery.[188] The bylaw, if enforceable, would have forced the plaintiffs to raise its Rule 14a-9 claims in a state court that lacks jurisdiction over them—"checkmate for defendants."[189]

179. For example, Micron, a public tech company based out of Idaho, states in Article VII Section 1 of its bylaws: "(a) Unless the corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation…"

180. Lee v. Fisher, 34 F.4th 777, 779 (9th Cir.), *reh'g en banc granted, opinion vacated sub nom.* Lee *ex rel.* The Gap, Inc v. Fisher, 54 F.4th 608 (9th Cir. 2022), *aff'd en banc*, 70 F.4th 1129 (9th Cir. 2023).

181. *Id.*

182. *Id.* at 782.

183. *Id.*

184. *See* Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714 (7th Cir. 2022).

185. *Id.*

186. *Id.* at 717.

187. *Id.*

188. *Id.*

189. *See Boeing Co.*, 23 F.4th at 720 (but as the dissent notes, the finality of phrase "checkmate for defendants" is likely exaggerated because shareholders have the option to bring the claim directly, thus sidestepping the bylaw provision).

The Seventh Circuit Court of Appeals reversed the district court ruling and held that Delaware law does not allow a corporation's bylaw to channel any derivative lawsuits to the Delaware Court of Chancery.[190] While noting that Delaware law offers corporations "considerable leeway" in drafting their bylaws, Delaware does not empower companies to sidestep Rule 14a-9 and other Exchange Act claims using forum selection clauses.[191] Notably, however, Judge Easterbrook dissented, interpreting the Delaware General Corporation Law to allow the plaintiff to bring the suit directly, not derivatively, meaning such a clause would not be the end of the road for a prospective plaintiff.[192]

The future of the potential split, vacated for now and hanging in the hands of the Ninth Circuit, carries important implications for investors hoping to use the proposed SEC climate rules as a foothold in their uphill climb to reach and hold corporations liable.

ii. Application for Litigation Arising Under Rule 14a-9

The Delaware legal arena is more predictable, allowing corporations to pursue business opportunities, including new climate technology investments, with calculated legal consequences.[193] Even the SEC in its proposal recognizes the more demanding disclosures may thrust companies interested in developing innovative climate technology, such as the often-targeted oil companies, into a fray of new liability.[194] These companies require a more predictable platform to pursue risky innovations for the climate. Increasing the volatility of climate-related litigation could destabilize that platform and risk chilling innovation in new climate technologies.[195]

Instead, directors of corporations best positioned to make meaningful steps toward greener technology need more autonomy to make the difficult decisions without the risk of being held liable for every choice they make or action they take.[196] Predictable forums like Delaware help reduce the risks of chilling innovations in climate technology as well as liabilities associated with disclosures.[197]

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190. *Id.* at 728.

191. *Id.* at 718.

192. *Id.* at 729.

193. *Fisher*, 34 F.4th at 781.

194. SEC Climate Disclosure Proposal, *supra* note 34, at 21351.

195. *Id.*

196. C. Leuz, A. Triantis, and T.Y. Wang, Why Do Firms Go Dark? Causes and Economic Consequences of Voluntary SEC Deregistrations, 45 J. of Acct. and Econ. 181, 182 (2008).

197. *See, e.g.*, Madison Condon, *Market Myopia's Climate Bubble*, 2022 Utah L. Rev. 63 (2022).

V. MITIGATING LIABILITY: BEST PATHS FORWARD

The trend of climate litigation presents a compelling narrative of increased investor demands for transparency and accountability being answered with increased regulations and laws enforcing those demands. The SEC is listening and proactively answering with its own enforcement and regulations.[198] It has become increasingly evident that the SEC's interest in regulating climate disclosure is likely here to stay.[199] And the SEC is not alone. Its counterparts in other developed countries are also proposing similar rules.[200] Every year more and more public companies support TCFD guidelines.[201] And the newly created ISSB, born for this very purpose, is set to release climate disclosure guidelines.[202] Thus, shareholders in the United States and abroad have new avenues to reach directors and their companies and hold them liable for their corporation's disclosures or lack thereof. Traditional safeguards remain available for directors to protect themselves from these expanding climate liabilities, but the need for comprehensive strategies to loosen the looming grip of litigation grows stronger.

Because broader climate disclosures and ESG regulations are likely here to stay, this paper offers five recommendations for corporations and their directors, in Idaho and beyond, to prepare and mitigate the risk of liability from private litigation. First, given the proposed rules are primarily modeled after the TCFD protocol, companies should begin implementing TCFD reporting recommendations. Second, taking conservative steps to front the implementation costs of more stringent climate reporting *before* they become mandatory will help position companies to reduce their exposure to litigation liability later. Third, adopting—but not solely relying on—forum selection bylaws can further buffer companies from future litigation risks. Fourth, companies must appreciate the limits of existing and proposed safe harbor protections when making forward-looking statements. And fifth, choosing the right board members and understanding potential liabilities from

198. *See* Press Release, *supra* note 7 at 42, ("the Climate and ESG Task Force will develop initiatives to *proactively* identify ESG-related misconduct.") (emphasis added).

199. *See, e.g.,*SEC v. Vale S.A., No.1:22-cv-02405 (E.D.N.Y. Apr. 28, 2022) (accusing a public mining company of intentionally concealing concerns over dam safety prior to its collapse which killed 270 people and leaked toxins into the watershed); *See also SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations*, U.S. SEC. EXCH. COMM. (May 23, 2022), https://www.sec.gov/news/press-release/2022-86 at 86, (charging investment advisor for misleading investors on the use of ESG factors, ultimately settling for $1.5 million penalty).

200. K&L Gates LLP, *ESG Regulatory Developments in the UK, Japan, and Hong Kong*, JD SUPRA (Jan. 18, 2022), https://www.jdsupra.com/legalnews/esg-regulatory-developments-in-the-uk-8444608/.

201. KPMG 2022 Survey, *supra* note164, at 9.

202. *ISSB delivers proposals that create comprehensive glob. baseline of sustainability disclosures*, IFRS (Mar. 31, 2022), https://www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-disclosures/.

climate-experts can help a company hedge against the risks of climate-related disclosure litigation.

A. Preparing for Climate Disclosure Using TCFD

Given the proposed rules are largely modeled after the TCFD disclosure framework, any future climate disclosure rules, even if scaled back, will still likely resemble TCFD disclosures. Thus, directors already using TCFD are well-advised to continue tightening their TCFD processes. And those who are not should begin assimilating that knowledge quickly. Reporting systems such as TCFD are complex and require significant costs to implement.[203] Opting to wait to implement a robust TCFD system, therefore, could put the corporation years behind its competitors and unnecessarily open it up to litigation liability.[204]

Already, public companies across multiple industries are adopting TCFD reporting systems. According to a 2022 report put out by TCFD surveying 1,400 international public companies, 80% of the companies' disclosures complied with at least one of the eleven TCFD disclosure recommendations, while 40% of the companies' disclosures complied with almost half the recommended disclosure categories.[205] Those percentages represent a significant increase over the past three years. But the reasons for adopting TCFD differ.

More than three-quarters of the surveyed companies implementing TCFD did so because of investor demand.[206] Only 26% implemented because TCFD is required by law or regulation. Thus, investors capable of carrying out private action do carry influence in climate disclosure decisions.[207] Global corporations recognize their influence and position their disclosures in line with TCFD in part because doing so attracts investors, but also because investors are increasingly better equipped to hold companies accountable.

Yet, despite the recognizing the importance of fortifying TCFD or GHG Protocol guidelines, the SEC's proposed rules are only modeled after those disclosure frameworks. As noted above, the proposed rules are stricter than current TCFD recommendations. TCFD recommendations are a good starting point, but companies should anticipate variations and prepare for the challenges complying with the SEC's version.

B. Getting Ahead of the Costs of Climate Disclosure Implementation

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203. TCFD Recommendations Report, *supra* note, 129, at 41.

204. *Id.*

205. TCFD 2022 Status Report, *supra* note 12, at 6.

206. *Id.*

207. *Id.*

Looking forward, whether this rule is adopted as written or not, public and private companies should begin preparing for the potential costs and challenges of complying with the proposed climate disclosure rules. Doing so will give companies more time to modify or adopt internal reporting processes ahead of the likely inevitable climate disclosure requirements. Those complications will include (1) implementation costs of disclosing disaggregated data that comply with materiality determinations, (2) the proprietary costs of disclosure, and (3) the costs for private non-filing companies complying with Scope 3 GHG disclosure requirements.

i. Implementation Costs of Disaggregated Data

Public corporations must take note of the increased costs associated with SEC's proposal that would, as written, demand disaggregated data. Climate-related disclosures carry costs for companies, and the SEC is cognizant of those costs.[208] In its proposed rule, the SEC provided cost estimates considering internal costs and outside professional help.[209] The SEC estimated the cost of compliance for small reporting companies (SRC) to be $490,000 the first year and $420,000 thereafter.[210] For non-SRC registrants, the cost was estimated at $640,000 the first year and $530,000 thereafter.[211]

As the 2022 survey by KPMG illustrates, most companies are interested and willing to pay for voluntary climate disclosures in their sustainability reports.[212] The information problem shows itself not as an issue of quantity, but one of quality.[213] While companies are ready and willing to tell the world of their climate-friendly culture and practices, much of that data is delivered on an aggregated basis, making it difficult for investors to discern a company's capacity to handle an unforeseen climate event.[214]

The SEC and many of the public comments have raised concerns over the difficulty in assessing climate-related financial risks, particularly to the degree the proposed rules would require.[215] While some commentators have pointed to the growing number of consulting companies able to perform such climate-risk

208. SEC Climate Disclosure Proposal, *supra* note 34, at 21413 ("We are also mindful of the costs that would be imposed by the proposed rules.").

209. SEC Climate Disclosure Proposal, *supra* note 34, at 21439–40.

210. *Id.*

211. *Id.*

212. KPMG 2022 Survey, *supra* note 164, at 8.

213. TSC Indus. v. Northway, Inc., 426 U.S. 438, 448 (1976) (attempting to strike a proper disclosure balance to not "bury shareholders in an avalanche of trivial information.").

214. Stephanie H. Jones et al., *What Investors and the SEC Can Learn from the Texas Power Crises,* BROOKINGS (June 2021), https://www.brookings.edu/articles/what-investors-and-the-sec-can-learn-from-the-texas-power-crisis/.

215. *See* SOC'Y FOR CORP. GOV'T, PUBLIC INPUT ON CLIMATE DISCLOSURE, SEC 1, 7 (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8914283-244663.pdf.

assessments, others have noted the cost of those services and cautioned against their usefulness.[216]

Against these increased costs of compliance, public companies in anticipation of mandatory climate disclosure requirements must assess how the costs will impact their operations and financial state. Directors should ready their companies for the direct costs of compliance including data systems expenses, consulting expenses, and litigation risk expenses. Beyond the direct costs, companies should also assess their exposure to the increased indirect costs of disclosure, most notably the potential proprietary costs.

ii. Proprietary Costs of Disclosures

The SEC recognizes in its proposed rule that one potential cost of disclosure is revealing confidential information.[217] While climate-related information likely does not actually constitute protected confidential, proprietary, or trade secret information, a company faces strong market pressures to keep certain information private.[218] Indeed, public utility companies, such as Idaho Power in particular, face heightened exposures to wildfires and extreme weather events.

For example, utility companies in Texas, after recent severe winter storms, felt the adverse pressure of disclosing potentially proprietary information.[219] The cost of withholding this information is not harmless. The withheld information has already accrued harm and will continue to accrue external harms unless a proper entity can challenge the company's proprietary claim. The SEC is arguably not well-equipped to challenge disputes over confidentiality, particularly because they already concede that climate-related information may qualify as proprietary in their disclosure rules.[220] Indeed, the judicial system is likely the best-equipped to handle

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216. *Id.*

217. SEC Climate Disclosure Proposal, *supra* note 34, at n.910 (referring to the costs of disclosure, "these costs may include the revelation of trade secrets, the disclosure of profitable customers and markets, or the exposure of operating weakness to competing firms, unions, regulators, investors, customers or suppliers. These costs are commonly referred to as 'proprietary costs.'").

218. *See* Kolbel, *supra* note 156, at 5 (increased risk premiums correlated with companies disclosing physical risks).

219. *See* Jones et al., *supra* note 214, at 6 ("However, most of these emergency plans are confidential; 'many plants decline to disclose them, citing rules that allow them to withhold trade secrets from competitors.'").

220. SEC Climate Disclosure Proposal, *supra* note 34, at 21444 ("Another potential indirect cost is the possibility that certain provisions of the proposed rules may force registrants to disclose proprietary information. Under the proposed rules, registrants would be required to disclose a wide

such a dispute, but costs of litigation may prevent such disputes from ever reaching the courthouse until a climate emergency event has already surfaced. The risk for widespread power outages illustrate a public utility company's strong interest in taking proactive measures to ensure it has comprehensive plans in place to handle adverse, and often unforeseen, weather events. Public companies, particularly utility companies, cannot afford to restrict themselves to reactive positions amid increasingly unpredictable climate disasters.[221]

iii. Compliance Costs and Risks for Private Companies

As noted above, the risk of litigation extends beyond publicly traded companies to those private companies financing emissions or operating in the value chain of public companies required to report Scope 3 emissions.[222] Even private agricultural companies, such as Idaho's J.R. Simplot, must also consider the costs of compliance and the litigation risks for not complying.

Simplot produces approximately 3 billion pounds of frozen French fries annually[223] and Simplot estimates about one third of those potatoes are purchased by McDonald's, a publicly traded company.[224] Simplot diligently and proactively seeks to position itself as a leader in sustainable agricultural products.[225] If the proposed rules are adopted, even private companies operating without the same rigorous disclosure requirements as publicly traded companies must assess the liability they could face for emission data provided to public companies.

Even if the SEC faces legal challenges for its agency capacity to compel climate disclosures and even if success under private causes of action through Rules 10b-5 and 14a-9 is unconvincing without stronger climate disclosure requirements, the nascent climate disclosure era and broader ESG movement is here to stay. Directors and their companies must not linger in implementing climate and ESG measures into their reporting and disclosure considerations.

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range of climate-related information, including potential impacts on its business operations or production processes, types and locations of its operations, products or services, supply chain and/or value chain. Registrants would be further required to disclose whether they have emissions-related targets and metrics or an internal carbon price, and if they do, what they are. To the extent that a registrant's business model or strategy relies on the confidentiality of such information, the required disclosures may put the registrant at a competitive disadvantage.").

221. *Id.* at 7.

222. *See supra* Section II.C.

223. *J.R. Simplot Sustainability Summary*, 1, 6 (2020), https://techsheets.simplot.com/Company_Info/sustainability_report.pdf.

224. John O'Connell, *McDonald's spent almost $136 million on Idaho ag products last year*, IDAHO FARM BUREAU FEDERATION (Aug. 26, 2019), https://www.idahofb.org/news-room/posts/mcdonald-s-spent-almost-136-million-on-idaho-ag-products-last-year/.

225. *See J.R. Simplot*, *supra* note 223, at 2.

C. Proceeding Amidst Uncertainty of Forum-Selection Enforceability

Corporations thrive in predictable legal landscapes—one of the reasons corporations around the nation prefer Delaware law with its long history of precedent.[226] The current flux in the federal circuit courts over forum-selection bylaws creates uncertainty for directors in mitigating their exposure to liability. The future decision of the Ninth Circuit could solidify the split, worsening the litigation uncertainty. Or the Ninth Circuit may align with the Seventh, restricting the availability of exclusive forum-selection bylaws. In the meantime, directors should not depend on their forum-selection bylaws to carry the day.

Instead, forum-selection bylaws should be viewed as one additional layer of protection or one additional hurdle, but not as an impenetrable shield itself. Drafting forum-selection bylaws may deter prospective plaintiffs from filing suit under Rule 14a-9 in the first place, but corporations must be ready to defend the enforceability of their clause against more determined plaintiffs. Thus, adopting forum-selection bylaws does not absolve a corporation of the responsibility of anticipating and preparing for litigation arising from their climate disclosures.

D. Anchoring in the Safe Harbor of PSLRA

The fourth recommendation for mitigating climate litigation risks is anchoring in the protection of available safe harbors for SEC disclosures. As discussed above, the PSLRA provides key safe harbors to protect companies from liability for qualifying statements.[227] Those same harbors will exist for the proposed rules as written. Though directors and their companies must understand the limits of those harbors so as to not stray from their protection.

One sure-fire way directors may stray from the safe harbors and quickly attract liability risk, particularly from sophisticated investors, is greenwashing their climate-related disclosures. The term greenwashing has been increasingly used to describe disclosure practices designed to distract the reader with colorful rhetoric on climate friendliness without giving any meaningful, actionable information.[228] The disclosure is focused on the company's public image, not educating investors.[229] A review of three companies forward-looking statements gives informative examples of how thin the ice beneath directors really is.

226. *See, e.g.,*Defendants' Reply in Support of Motion to Dismiss Plaintiff's Verified Shareholder Derivative Complaint; and Memorandum of Points and Authorities in Support, Lee v. Fisher, 2021 WL 1500000.

227. *See supra* Section III.C.2.

228. Chandler Farnworth, Do Shareholders Have the Power? Climate Change as a Material Risk, 34 TUL. ENVTL. L.J. 149, 152 (2021).

229. *Id.*

Oatly, a global oat-milk company, currently faces allegations of affirmative false statements about misleading investors on the company's high demand and environmental practices.[230] Oatly made general statements, like "[o]ur unwavering commitment to sustainability fuels our growth" and "on average, a liter of Oatly product consumed in place of cow's milk results in around 80% less greenhouse gas emissions."[231] The plaintiffs claim these statements are greenwashing.[232] The securities litigation concerning these statements is ongoing, and it is yet unknown how the federal court will rule. But companies should note the unique danger for statements containing climate rhetoric lurking just beyond the safe harbor.

Indeed, Exxon is well practiced in this danger. Companies looking for illustrative examples can learn much from comparing Exxon's pre-*Ramirez* and post-*Ramirez* cautionary language in its forward-looking disclaimers. After losing in *Ramirez*, Exxon significantly expanded its cautionary language in its forward-looking disclaimers — making it almost seven times longer.[233] The cautionary statement Exxon uses in its press releases and 10-K reports is now a well-drafted castle wall.[234]

Another effective method corporate lawyers use to anchor in PSLRA's safe harbor is what Micron does in its 10-K filings. Micron identifies its forward-looking statements, including those about its climate risks and opportunities, by specifically listing the types of words that may constitute forward-looking statements: "anticipate," "expect," "intend," "pledge," "committed," etc.[235] By doing so, Micron tags each of its statements with cautionary language. And to avoid making its warning mere boilerplate language, Micron tailors those warnings to particular risks

230. Memorandum of Law in Support of Defendants' Motion to Dismiss the Consolidated Amended Complaint, In Re OATLY GROUP AB SECURITIES LITIGATION., (No. 1:21-cv-06360), 2022 WL 1580745.

231. *Id.*

232. *Id.*

233. What was a short paragraph of 111 words in Exxon's 2015 10-K grew to a page long forward-looking disclaimer with 676 words of caution in their 2021 10-K. *See* ExxonMobil Form 10-K, U.S. SEC. AND EXCH. COMM'N 1, 41 (2021), https://investor.exxonmobil.com/sec-filings/all-sec-filings?form_type=10-K&year=##document-1965-0000034088-22-000011-2; *compare* ExxonMobil Form 10-k, U.S. SEC. AND EXCH. COMM'N 1, 40 (2015), https://investor.exxonmobil.com/sec-filings/all-sec-filings?form_type=10-K&year=##document-1571-0000034088-16-000065-2.

234. See, e.g., ExxonMobil, Press Release, *ExxonMobil moves forward with largest renewable diesel facility in Canada*, (Jan. 26, 2023), https://corporate.exxonmobil.com/news/news-releases/2023/0126-exxonmobil-moves-forward-with-largest-renewable-diesel-facility-in-canada ("Statements related to outlooks; projections; targets; expectations; estimates; descriptions of strategic, operating, and financial plans and objectives; statements of future ambitions and plans; and other statements of future events or conditions, are forward-looking statements.").

235. Micron Form 10-K, U.S. SEC. AND EXCH. COMM'N 1, 2 (2021) https://investors.micron.com/node/43076/html.

it faces as a corporation.[236] This approach aligns with the legislative intent behind PSLRA and case law.[237]

While bright line rules for drafting a castle wall disclaimer around forward-looking statements do not exist, from the examples above, several lessons are to be learned. Because climate-related risks add a new complexity and danger in forward-looking statements, companies should reassess their cautionary language and disclaimers, in all their public communications, and tighten the language around climate-related risk factors. Corporations should use exact language, reducing ambiguity, to identify any statement that could be construed as forward-looking. In light of the expanding recognition that climate-related risks are financial risks, investors will not shy away from holding corporations accountable if their forward-looking statements do not account for such risks.

E. Choosing the Right Board-Make-Up

Boards of directors are commonly asking for more information on their company's ability to transition using less carbon-intensive processes. Directors need this information in decision-useful formats.[238] As noted above, the proposed rules specifically require disclosure of board members with any climate-related expertise. Designed to improve investor understanding of a board's decision-making process for climate-related risks, the disclosure requirement also widens the liability door for directors.

Importantly, the proposed disclosure for climate experts differs from existing expert disclosures for audit committee experts and proposed disclosures for cybersecurity experts.[239] For example, the proposed rules for new cybersecurity disclosures specifically include a safe harbor for directors or managers deemed experts in cybersecurity under Item 407(j)(2).[240] The proposed rule "would not impose on such person any duties, obligations, or liability that are greater than the duties, obligations, and liability imposed on such person as a member of the board of directors in the absence of such designation or identification."[241] Because of this

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236. *Id.*

237. *See* Ann Morales Olazábal, Safe Harbor for Forward-Looking Statements Under the Private Securities Litigation Reform Act of 1995: What's Safe and What's Not?, 105 DICK. L. REV. 1, 14–15, 22 (2000).

238. TCFD 2022 Status Report, *supra* note 12, at 96.

239. John A. Zecca, *Nasdaq Comment on Climate-Related Disclosures Re: File No. S7-10-22*, (June 14, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131426-301608.pdf.

240. Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 87 Fed. Reg. 16590 (proposed Mar. 23, 2022).

241. *Id.* at 16602.

potential for specific liability for disclosing climate-experts, this provision is one of the most requested changes to the proposed rules by companies.[242]

Decisions on the right board make-up should take this exposure seriously. Choosing board members with climate-expertise will undoubtedly assist the board in navigating critical climate-related decisions for the company, including navigating the potentially increased exposure to litigation from future adopted rules. Nevertheless, the decision to elect a board member with climate-expertise carries risks in itself, and shareholders must take this into account should the proposed rules be adopted.

VI. CONCLUSION

Climate-related litigation is on the rise. Directors face increasingly complex exposure to liability as investors and regulators demand more transparency and oversight in corporate disclosures. Understanding the avenues available for investors to pursue climate-related claims against directors is paramount for effectively managing the climate-related litigation liability. Each litigation avenue presents its challenges for shareholders and third parties, alike. But each path puts pressure on directors to fortify existing disclosure methods and develop robust reporting systems and climate-risk plans to shield themselves from liability risks. The complexity of the proposed disclosure requirements forces directors to begin preparations as quickly as possible or to revisit their existing reporting platforms to ensure compatibility.

The proposed rules, however, face significant opposition. The debate over the SEC's power to regulate in this capacity casts additional uncertainty for public companies attempting to mitigate their liability risks. Between investors, companies, and policymakers, the future is uncertain, but amidst this uncertainty companies, both public and non-public, can and already have begun to prepare. Even if the proposed rules are not adopted in this form, the data of investor support for increased climate transparency suggest that the trend of more climate disclosures is here to stay. A new era of climate regulation is already underway.

242. KPMG 2022 Survey, *supra* note 164, at 9.