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by M.M. Crough and S.M. Bharmal

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Gerald Pachoud
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Prof. Kim Talus
Tulane Center for Energy Law, Tulane Law School.
View profile

Statutory and Voluntary Programs and Regimes in the United States Focusing on the E in ESG

Maureen M. Crough, Samina M. Bharmal[1]

Executive Summary

The environmental component (E) of environmental, social, and governance (ESG) issues focuses on both environmental impacts and the disclosure of those impacts. For many investors, customers and other corporate stakeholders, existing environmental law does not adequately address E. Those stakeholders are often interested in environmental impacts not clearly regulated by, and environmental disclosure not clearly required by, current law. In the United States, the statutory approaches to the environmental component of ESG are limited on the federal level. In contrast, many states and cities are showing a commitment to addressing E, especially with regard to climate risk, while many companies are voluntarily adopting E initiatives. The short-term approach to E on the federal level will likely depend on the results of the November 2020 elections. The Trump campaign has been silent on the issue, while the Biden campaign has proposed a $2 trillion clean energy and infrastructure plan and a clean energy and environmental justice plan. Given the current uncertainty about E, short-term flexibility about a corporate approach to E can be beneficial to the oil and gas sector as well as other industries.

I. Introduction

When President Nixon signed the Clean Air Act into law in 1970, he called it the "*year of the beginning*."[2] Fifty years later, the environmental spotlight seems to have shifted from direct regulation of air emissions and the imposition of other environmental "*command and control*" requirements to the E in ESG. While there are different views of what ESG means, a general definition is a company's commitment to "*actively strive to contribute positively to the environment or social causes and to conduct [itself] responsibly*."[3] Such a commitment is viewed by some as indicative of a resilient company with the potential for maximizing risk-adjusted returns.[4] Key forces now pushing a focus on E in the United State include significant investor pressure, rising public activism, and consumer and employee concerns.

The E in ESG can be viewed as (1) responsible corporate environmental behavior extending beyond compliance, and (2) appropriate disclosure of that behavior. A consensus, though,

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[1] Maureen M. Crough is counsel in the Environmental Practice Group of Sidley Austin LLP. https://www.sidley.com/en/people/c/crough-maureen-m.
Samina M. Bharmal is an associate in the Environmental Practice Group of Sidley Austin LLP. https://www.sidley.com/en/people/b/bharmal-samina. She is the associate lead for the group's work in environmental, social, and governance matters.
[2] Presidential Statement on Signing the Clean Air Act Amendments of 1970, 7 WEEKLY COMP. PRES. DOC. 11 (Jan. 4, 1971).
[3] Tine Thygesen, *Everyone Is Talking About ESG: What Is It And Why Should It Matter To You?,* FORBES (Nov. 8, 2019), https://www.forbes.com/sites/tinethygesen/2019/11/08/everyone-is-talking-about-esgwhat-is-it-and-why-should-it-matter-to-you/#7e5a6fed32e9 (last viewed Sept. 9, 2020).
[4] Caroline Crenshaw, SEC Comm'r, *Public Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105* (Aug. 26, 2020), https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k (last viewed Sept. 9, 2020).

does not exist in the United States about exactly what the behavior or disclosure should be.[5] The spotlight on the E of ESG, without a clearly accepted view of its meaning, leaves some companies unsure about how best to calibrate their environmental performance and some stakeholders questioning what environmental disclosure they need. Many groups have offered a plethora of ideas to fill this gap, but a commonly accepted approach to the E in ESG has yet to be adopted. Part of the reason for the gap may be that companies, investors, and other stakeholders are evolving in their understanding of what is possible and what is meaningful in terms of environmental behavior and disclosure. In addition, because the E considers an individual company's environmental impact, differences among companies — even in the same business sector — may lead to inevitable challenges in adopting a uniform approach.

This paper reports on the E in ESG statutory and voluntary regimes in use in the United States. To put the environmental component of ESG in context, in Section II we consider what E means for the oil and gas industry, and in Section III we discuss why ESG is now receiving increasing attention from corporate stakeholders. In Section IV, we discuss the evolving, and often unrelated, E programs and regimes at the federal, state, local, and voluntary levels. We conclude in Section V with a discussion of how companies can consider positioning themselves to participate strategically in the ongoing development of the environmental component of ESG.

II. The Meaning of E in ESG for the Oil and Gas Industry

The lifecycle of oil and gas production and consumption has a variety of different impacts on the environment.[6] The management of those impacts can be important to investors and other stakeholders when evaluating environmental performance. At the beginning of the lifecycle, when exploration is undertaken to estimate the size of an oil and gas reserve and its quality, seismic surveys and exploratory drilling can lead to habitat disturbance. Also, drilling often generates muds and cuttings that can cause contamination if not properly handled. Actual production of oil and gas in the field raises the same environmental issues. In addition, it generates air emissions from venting and flaring. If hydraulic fracturing is used, a significant amount of water is typically needed, and a significant quantity of wastewater may be generated. Moreover, hydraulic fracturing has raised concerns about protection of drinking water wells in rural areas.[7] Petroleum refining presents a host of significant air emission, water discharge, waste generation and disposal issues, many of which are highly regulated. The transport of petroleum by pipeline, rail, or tanker truck raises concerns about safety and

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[5] *See,* e.g., Richard Mattison & Molly Mintz, *Accounting for Climate: The Next Frontier in ESG,* S&P Global Market Intelligence (Oct. 11, 2019), https://www.spglobal.com/en/research-insights/featured/accounting-for-climate-the-next-frontier-in-esg ("*[A]n absence of shared terminology, benchmarks, and policies threaten to stymie investors and companies as they attempt to account for climate risk.*") (last viewed Sept. 9, 2020); U.S. Gov't Accountability Off., GAO-20-530, *Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them* at 21-23 (July 2, 2020) (GAO Report), https://www.gao.gov/products/gao-20-530 (last viewed Sept. 9, 2020).

[6] *See,* e.g., U.S. Energy Information Administration, *Oil and Petroleum Products Explained: Oil and the Environment* (Aug. 25, 2020), https://www.eia.gov/energyexplained/oil-and-petroleum-products/oil-and-the-environment.php (last viewed Sept. 9, 2020); Barclays, *Environmental and Social Risk Briefing: Oil & Gas* (Mar. 2015), https://www.banktrack.org/download/160620_oil_and_gas_guidance_note_pdf/160620_oilandgasguidancenote.pdf (last viewed Sept. 9, 2020).

[7] Congressional Research Service, *Hydraulic Fracturing and Safe Drinking Water Act Regulatory Issues* (July 13, 2015), https://fas.org/sgp/crs/misc/R41760.pdf (last viewed Sept. 9, 2020).

spills or releases. Moreover, pipeline construction often presents issues about habitat protection. Activities throughout the lifecycle of oil and gas production and consumption can raise issues about greenhouse gas (GHG) emissions and climate risk.[8] Many of the environmental impacts of the oil and gas industry in the United States are regulated.

Although questions exist about how to define the E in ESG, the types of environmental impacts encompassed by it often include air emissions, water discharges, energy consumption, waste and recycling, water usage, supply chain impacts, ecological impacts, GHG emissions, and climate change.[9] The oil and gas industry, like many businesses, confronts all the impacts. Various voluntary disclosure regimes help companies further define some of these impacts, such as GHG emissions, into direct (e.g., from facility operations), indirect (from energy consumption), and indirect (from the company's value chain, such as through suppliers).

III. Increasing Focus on the E of ESG

Federal environmental law has regulated air emissions, water discharges, waste disposal, and contamination for decades,[10] and has protected fish, wildlife, and plants for over a century.[11] These laws, as well as requirements at the state and local level, set the foundation for environmental performance for industry. They establish limits for air emissions and water discharges, regulate waste handling, govern cleanups, and impose reporting requirements for spills, emissions, discharges, and chemical storage. While environmental laws have set substantive standards for environmental performance, they have also increasingly imposed reporting requirements. For example, the Emergency Planning and Community Right-to-Know Act is itself a disclosure statute whose "*provisions help increase the public's knowledge and access to information on chemicals at individual facilities, their uses, and releases into the environment*."[12] The Greenhouse Gas Reporting Program requires certain industrial and energy industry sources to report GHG data and other relevant information, which businesses and the public use to track and compare GHG emissions performance, and thus identify opportunities for greater efficiencies and reduced carbon emissions.[13]

With the existence of a multitude of federal, state, and local environmental laws and regulations, questions can arise about the role and purpose of the environmental component in ESG. The answers may, at least in part, stem from the focused nature of environmental legal requirements, which regulate certain behaviors, but not necessarily all that can be of concern. Moreover, while existing environmental law requires the reporting of certain environmental metrics, that reporting does not present an overall view of a company's

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[8] The GAO Report notes that oil and gas industry ESG disclosures focus more on climate change than other industries do. GAO Report, *supra* note 5, at 23.

[9] *See,* e.g., SASB, *SASB Materiality Map* (2018), https://materiality.sasb.org/ (last viewed Sept. 9, 2020).

[10] Clean Air Act (42 U.S.C. § 7401 et seq.); Clean Water Act (33 U.S.C. § 1251 et seq.); Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.); and Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601 et seq.).

[11] Lacey Act, 16 U.S.C. § 3371 et seq.

[12] 42 U.S.C. § 11001 et seq.; EPA, *What is EPCRA?,* https://www.epa.gov/epcra/what-epcra (last viewed Aug. 19, 2020).

[13] 40 C.F.R. pt. 98; *see also* EPA, *Greenhouse Gas Reporting Program,* https://www.epa.gov/ghgreporting/learn-about-greenhouse-gas-reporting-program-ghgrp#:~:text=The%20GHGRP%20(codified%20at%2040,sites%20in%20the%20United%20States.&text=GHG%20emissions%20from%20covered%20sources,CO2e%20per%20year (last updated Oct. 2, 2019; last viewed Sept. 9, 2020).

environmental impacts and is often not provided in a format that is easy to locate or review. Institutional investors have recently articulated their own reasons for focusing on the E of ESG. Some have described themselves as the "*Stewards of the Commons,*"[14] seeking to use their influence to encourage companies to look beyond short-term returns that might be recognized absent ESG principles at the expense of longer-term returns and broader economic benefits that might be realized when ESG principles are incorporated.[15] In August 2019, the CEOs of BlackRock and Vanguard joined approximately 180 other CEOs of the largest U.S. companies and committed to create value for a broad range of stakeholders in the Business Roundtable's Statement on Corporate Purpose.[16] The statement included commitments to generate long-term value for shareholders and to support communities, including through "*protect[ing] the environment by embracing sustainable practices*."[17]

Some large investors are increasingly combining traditional investing with ESG-related insights on the belief that companies with strong profiles on sustainability issues are more likely to outperform those with poor profiles in both good times and bad. In its annual letter to clients, BlackRock set out a number of initiatives to incorporate the E into its investment decisions, including: "*making sustainability integral to portfolio construction and risk management; exiting investments that present a high sustainability-related risk, such as thermal coal producers; launching new investment products that screen fossil fuels; and strengthening [its] commitment to sustainability and transparency in [its] investment stewardship activities*."[18] This year, State Street explained that, based on its data and research, the market rewards companies that are more resilient to crises as shown through strong ESG characteristics.[19]

With climate risk a focus of many institutional investors, several of them are now asking companies to provide information on their preparedness to address (i) the long-term effects of climate change, including ability to withstand the physical effects of rising global temperatures — including water scarcity, extreme weather events, or crop loss — and (ii) how the global transition to a low-carbon economy — such as through the repricing of assets or reallocation of resources — could affect a company's long-term profitability.[20, 21] Existing environmental laws do not go far enough to help a company achieve or demonstrate long-term resilience to the satisfaction of these investors. BlackRock CEO Larry Fink has stated that, while the government must lead the way to the transition to a low-carbon

[14] State Street, *Crisis as Catalyst: Corporate Resiliency and the Future of ESG* (July 2020), https://www.statestreet.com/content/dam/statestreet/documents/Articles/Crisis%20as%20Catalyst%20-%20Corporate%20Resiliency%20and%20the%20Future%20of%20ESG.pdf (last viewed Sept. 9, 2020).

[15] *Id.* at 6.

[16] Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 28, 2020), https://opportunity.businessroundtable.org/ourcommitment/ (last viewed Sept. 9, 2020).

[17] *Id.*

[18] CEO Letter, Larry Fink, Chairman & CEO, *A Fundamental Reshaping of Finance,* BLACKROCK (2020) (Fink Letter), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter (last viewed Sept. 9, 2020); *see also* BlackRock Letter to Clients, *Sustainability as BlackRock's New Standard for Investing,* BLACKROCK (2020) (BlackRock Client Letter), https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter (last viewed Sept. 9, 2020).

[19] State Street, *Crisis as Catalyst: Corporate Resiliency and the Future of ESG* (July 2020) (State Street Statement), https://www.statestreet.com/content/dam/statestreet/documents/Articles/Crisis%20as%20Catalyst%20-%20Corporate%20Resiliency%20and%20the%20Future%20of%20ESG.pdf (last viewed Sept. 9, 2020).

[20] BlackRock Client Letter, *supra* note 18.

[21] State Street Statement, *supra* note 18.

economy, companies must also play a role.[22] Likewise, State Street CEO Ron O'Hanley has stated that institutional investors can set the tone for companies to follow, and that carbon emissions represent the "*classic externality problem*" that must be addressed.[23]

From the perspective of many corporate stakeholders, a company's E falls into two categories: (1) substantive performance, and (2) communication of that performance. Substantive performance includes a company's reduction of its own environmental impacts and its plans for withstanding the physical impacts of climate change (e.g., to its facilities, its productivity, and its supply chains). A company's communication of its environmental performance includes its disclosure in Securities and Exchange Commission (SEC) filings, participation in voluntary disclosure regimes, production of corporate social responsibility reports, investor calls, and other public-facing communications.

The current emphasis on the E in ESG signals a focus beyond a company's compliance record to its identification, management, and disclosure of its environmental impacts. Many investors believe there is significant correlation between a company's ability to address these issues and its financial performance.[24] While investors push the market, environmental activism is also on the rise. Industries face scrutiny from their customers, employees, and the public about how their actions affect the environment. The oil and gas industry is among the sectors receiving such scrutiny.

IV. E Programs and Regimes in the United States

At the national level, the United States does not have, and has not had, an economy-wide regulatory program to address a key substantive environmental issue receiving significant ESG stakeholder attention, which is GHG emissions. Actions by the Trump administration have rolled back efforts by the Obama administration to address those emissions, although some federal regulatory programs impacting GHG emissions are in place. With regard to ESG reporting, the SEC's recent update of important regulations does not create an ESG reporting framework. But, while the federal government has taken limited action to address the E in ESG, many states, municipalities, and companies have adopted a different approach.

A. Federal Actions — GHG Emissions

The actions of the Obama and Trump administrations regarding GHG emissions have differed significantly. The following are key examples of those differences. In 2016, the United States notified the United Nations that it was joining the Paris Agreement, which was described by the Obama White House as "*the most ambitious climate change agreement in history*."[25] It provides a framework for countries to reduce their carbon emissions over time. Three years later, the Trump Administration began the process of withdrawing from the Paris

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[22] Fink Letter, *supra* note 18.
[23] State Street Statement, *supra* note 19.
[24] *See* BlackRock Client Letter, *supra* note 18 ("*Resilient and well-constructed portfolios are essential to achieving long-term investment goals.*"); Fink Letter, *supra* note 18 ("*[A]ctions that damage society will catch up with a company and destroy shareholder value.*").
[25] Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement* (Sept. 3, 2016), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement (last viewed Sept. 9, 2020).

Agreement.[26] In a statement, Secretary of State Mike Pompeo explained the withdrawal by stating: "*President Trump made the decision to withdraw from the Paris Agreement because of the unfair economic burden imposed on American workers, businesses, and taxpayers by U.S. pledges made under the Agreement. The United States has reduced all types of emissions, even as we grow our economy and ensure our citizens' access to affordable energy*."[27]

In accord with the Paris Agreement, the Obama administration's Clean Power Plan (CPP) sought to reduce GHG emissions from electric generating units. It took a "*beyond the fenceline*" interpretation of Section 111 of the Clean Air Act (CAA), which allowed the United States Environmental Protection Agency (EPA) to base its formulation of the "*best system of emissions reduction*" for a facility on considerations that went beyond those technologies that could be applied directly at the facility itself. The CPP also set GHG emissions limits at the statewide grid level rather than at the individual facility level. In 2019, the current EPA administration disagreed with that statutory interpretation and repealed the CPP based on the argument that it exceeded the agency's authority under the CAA. EPA has replaced the CPP with the Affordable Clean Energy rule (ACE Rule).[28] Consistent with its repeal of the CPP, in the ACE Rule EPA determines that any compliance mechanisms used by a facility to meet its GHG emissions targets must be implemented at the source facility itself. The ACE Rule also requires states to set specific GHG emissions limits for each individual facility rather than statewide.

In 2020, the Trump administration completed a rollback of U.S. vehicle emissions standards adopted under the prior administration. The new standard requires 1.5% annual increases in efficiency through 2026, rather than the 5% increases in the prior standards.[29] California, 22 other states, and several jurisdictions are challenging the rollback.[30] In addition, California and five automakers announced a voluntary agreement in August 2020 to continue producing cleaner vehicles and more electric cars.[31]

In August 2020, EPA completed its reconsideration of the agency's 2016 oil and gas regulations by revising the new source performance standards for new oil and gas sources. EPA describes the revisions as reducing undue regulatory burdens and providing substantial cost savings without increasing emissions. Several environmental groups argue the revisions unlawfully reduce regulation of methane. In one rule, EPA removes the transmission and storage segment from the regulation. For the production and processing segment, direct federal limits on methane emissions are removed. Another rule includes several technical

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[26] Press Statement, Michael R. Pompeo, Sec'y of State, *On the U.S. Withdrawal from the Paris Agreement* (Nov. 4, 2019), https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/ (last viewed Sept. 9, 2020).

[27] *Id.*

[28] Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015); Affordable Clean Energy Rule, 85 Fed. Reg. 32,520 (July 8, 2019) (repealing and replacing the Clean Power Plan).

[29] David Shepardson, *Trump finalizes rollback of Obama-era vehicle efficiency standards,* REUTERS (Mar. 31, 2020), https://www.reuters.com/article/us-usa-autos-emissions/trump-finalizes-rollback-of-obama-era-vehicle-fuel-efficiency-standards-idUSKBN21I25S (last viewed Sept. 9, 2020).

[30] Press Release, Cal. Air Res. Bd., *California and 22 other states take Trump Administration to court over vehicle emissions rollback,* No. 20-11 (May 27, 2020), https://ww2.arb.ca.gov/news/california-and-22-other-states-take-trump-administration-court-over-vehicle-emissions-rollback (last viewed Sept. 9, 2020).

[31] Nick Cahill, *California Finalizes Deal With Five Automakers to Reduce Emissions,* COURTHOUSE NEWS SERVICE (Aug. 17, 2020), https://www.courthousenews.com/california-finalizes-deal-with-five-automakers-to-reduce-emissions/ (last viewed Sept. 9, 2020).

amendments, including revising the timing and scope of certain monitoring, repairs, recordkeeping, and reporting requirements.[32]

While some federal programs to reduce GHG have recently been repealed or replaced, some other programs remain. Renewable energy tax credits and solar and wind generation tax credits are two prominent examples of a federal approach encouraging investment in reduced emissions. However, these tax credits must be regularly renewed by the Congress.[33] In addition, the Renewable Fuels Standard (RFS) program, added to the CAA through the Energy Independence and Security Act of 2007,[34] requires that a certain quantity of specific types of renewable fuel replace traditional petroleum-based fuel, with various exceptions. This program, though, faces debate over whether it has the intended effect of reducing GHG emissions or is instead a subsidy to the ethanol industry.

B. Federal Actions — ESG Investment and Reporting

In June 2020, the Department of Labor (DOL) proposed a rule to provide clear guidance that fiduciaries of pension plans subject to the Employee Retirement Income Security Act of 1974, as amended, may not invest in an ESG-focused vehicle if its investment strategy subordinates financial return or creates increased risk for nonfinancial purposes.[35] The proposal "*acknowledges that ESG factors and similar considerations may constitute financial considerations, but only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories*."[36] DOL has received more than 1,500 comments, many of which were investor concerns about the proposed rule's treatment of ESG factors in investment decision-making.[37] Soon after DOL proposed its rule, the Government Accountability Office released a report about ESG disclosures, and more recently, the Commodities Futures Trading Commission released a report on the impact of climate change on financial markets, each of which show the increasing stakeholder interest in attention to ESG.[38]

Recent legislative proposals introduced in Congress to address ESG disclosure have not moved past Committee. For example, a proposed bill in the House, the ESG Disclosure

[32] Sidley Austin LLP, Sidley Energy Blog, *EPA Revises Oil and Gas Regulations, Spurring Divergent Reactions* (Aug. 18, 2020), https://sidleyenergyblog.sidley.com/epa-revises-oil-and-gas-regulations-spurring-divergent-reactions/ (last viewed Sept. 9, 2020).
[33] 26 U.S.C. § 25D.
[34] 42 U.S.C. § 7545(o). The Energy Policy Act of 2005, Pub. L. No. 109-58 (Title XV, Subtitle A, Section 1501) established the RFS, as amended by the Energy Independence and Security Act of 2007, Pub. L. No. 110-140.
[35] Proposed Rule, Financial Factors in Selecting Plan Investments, Employee Benefits Security Administration, Department of Labor, 85 Fed. Reg. 39,113 (June 30, 2020).
[36] Sidley Austin LLP, *Proposed Department of Labor Rule Limits Consideration of ESG Factors in Investment Decisions* (June 25, 2020), https://www.sidley.com/en/insights/newsupdates/2020/06/department-of-labor-proposes-rule-clarifying-how-esg-investment-factors-should-be-considered.
[37] Brian Anderson, *Commenters Hammer DOL on Proposed ESG Rule,* 401(K) SPECIALIST (Aug. 3, 2020), https://401kspecialistmag.com/commenters-hammer-dol-on-proposed-esg-rule/ (last viewed Sept. 9, 2020).
[38] GAO Report, *supra* note 5; Commodities Futures Trading Comm'n, Climate-Related Market Risk Subcmte., Market Risk Advisory Comte., *Managing Climate Risk in the U.S. Financial System* (Sept. 9, 2020) https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf (last viewed Oct. 11, 2020).

Simplification Act of 2019,[39] would require issuers of securities to annually disclose to shareholders certain ESG metrics, and would establish the Sustainable Finance Advisory Committee, which would make recommendations to the SEC on facilitating ESG investments. Under the proposed Climate Risk Disclosure Act of 2019 (S.B. 2075),[40] issuers would be required to disclose to the SEC information regarding climate change-related risks, actions to mitigate those risks, direct and indirect GHG emissions, and fossil fuel-related assets. It would also require the establishment of a social cost of carbon standard to capture the effects of carbon dioxide in a given year as measured in dollars per ton of carbon dioxide emissions. A parallel bill appeared in the House.[41]

1. SEC Regulations

Much of the focus in the United States on the E in ESG reporting has been the extent to which existing SEC regulations mandate environmental disclosure and whether more disclosure should be required. Since the 1970s, two regulations issued by the SEC, and recently updated, have specifically mandated narrative disclosure about material environmental compliance costs and legal environmental proceedings with the government.[42] Under one regulation known as Item 101, a registrant is required to disclose the material effect of regulatory requirements, including environmental, on the capital expenditures, earnings, and competitive position of it and its subsidiaries for the current fiscal year, succeeding fiscal year, and further periods the registrant may deem material.[43] Under another regulation known as Item 103,[44] the registrant must disclose a pending administrative or judicial proceeding (including one contemplated by the government) arising under environmental laws and to which the registrant or its subsidiaries is a party, or to which their property is subject, and which: (1) is material to the registrant's business or financial condition; (2) involves an amount, exclusive of interest and costs, exceeding 10% of the current assets of the registrant and its subsidiaries on a consolidated basis; or (3) involves potential monetary sanctions exceeding a certain threshold.[45]

Two other SEC regulations can be particularly relevant to environmental disclosure. Item 503(c), which governs risk factors, calls for a discussion, "*where appropriate,*" of the most significant issues that cause an investment to be speculative or risky.[46] Item 303(a), known as Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A), imposes certain disclosure requirements on a registrant's prospects for the future, which can include disclosure of potentially material expenditures to address

[39] ESG Disclosure Simplification Act of 2019, H.R. 4329, 116th Cong. (2020). Full text available at https://www.congress.gov/bill/116th-congress/house-bill/4329/text (last viewed Sept. 9, 2020).
[40] Climate Risk Disclosure Act of 2019, S. 2075, 116th Cong. (2019). Full text available at https://www.congress.gov/bill/116th-congress/senate-bill/2075/text (last viewed Sept. 9, 2020).
[41] Climate Risk Disclosure Act of 2019, H.R. 3623, 116th Cong. (2019). Full text available at https://www.congress.gov/bill/116th-congress/house-bill/3623/text (last viewed Sept. 9, 2020).
[42] In addition, accounting rules have been interpreted to require that certain environmental liabilities be accrued, or at least disclosed in a footnote, in financial statements.
[43] 17 CFR § 229.101.
[44] 17 CFR § 229.101.
[45] Under final amendments effective November 9, 2020, the threshold will be either US$300,000 or a different threshold the registrant determines is reasonably designed to result in disclosure of material environmental proceedings so long as this company-specific threshold does not exceed the lesser of US$1 million or 1% of the current assets of the company and its subsidiaries on a consolidated basis. Before November 9, 2020, the threshold is US$100,000. *Modernization of Regulation S-K Items 101, 103, and 105,* Release Nos. 33-10825; 34-89670 (Aug. 26, 2020); 85 Fed. Reg. 63,726 (Oct. 8, 2020).
[46] 17 CFR § 229.503(c).

environmental issues. The MD&A regulations require registrants to disclose "*known trends ... events or uncertainties that ... are reasonably likely*" to have a material impact on liquidity, capital resources, or operating results.[47]

a. Climate Change Release

In 2010, at a time of increased focus on climate change, the SEC published a Release stating its views on disclosure of climate change issues under its existing rules (Climate Release).[48] The Climate Release was issued after requests were made over several years by a variety of environmental, investor, and business groups, as well as some members of Congress, for the SEC to address when and how registrants should address climate change issues in their SEC filings. The Climate Release identifies legislation and regulation, international accords, indirect consequences of regulation or business trends, and physical impacts of climate change as areas that may elicit disclosure requirements under one or more of Items 101, 103, 303(a) and 503(c).

With regard to Item 101, the SEC reminds registrants to consider whether international, state, or local climate change requirements impose an obligation on them to disclose the material costs of complying with environmental law. An example is the cap-and-trade system in the European Union to reduce GHG emissions.[49]

With regard to Item 503(c), the SEC advises companies to consider the specific climate risks they face and to avoid generic disclosure. As an example, the SEC explains that registrants that could be significantly impacted by GHG legal requirements, such as energy companies, may confront very different risks from such requirements than registrants that rely on GHG emitting products, such those who provide transportation.

Much of the Climate Release focuses on Item 303. The SEC argues that it requires registrants to evaluate whether climate change laws are reasonably likely to have a material effect on their financial condition or results of operations. With regard to a known climate change uncertainty, such as pending legislation or regulation, the SEC advises registrants to engage in a two-step analysis. The first step is to determine whether the pending legislation or regulation is reasonably likely to be enacted. Unless management can make that negative determination, it must assume the legislation or regulation will be enacted. If management must assume enactment, it proceeds with the second step of the analysis. In that step, unless management can determine that enacted legislation or regulation is not reasonably likely to have a material effect on it, its financial condition, or its results of operations, disclosure is required. The Climate Release does not demand disclosure of the amount of GHG emissions, but indicates that a registrant should have enough information about them to assist it in making judgments about disclosure. The Climate Release also states that the registrant needs to consider disclosure, if material, of the difficulties of assessing the timing and effect of the pending legislation or regulation. Examples of the financial consequences of pending climate change legislation and regulation identified by the SEC include possible costs to upgrade

[47] 17 CFR § 229.303(a).

[48] *Commission Guidance Regarding Disclosure Related to Climate Change,* Release Nos. 33-9106; 34-61469 (2010) (Climate Release), http://www.sec.gov/rules/interp/2010/33-9106.pdf (last viewed Sept. 9, 2020).

[49] EU Emissions Trading Systems (EU ETCS), https://ec.europa.eu/clima/policies/ets_en (last viewed Sept. 3, 2020).

facilities and equipment to reduce emissions to meet regulatory limits or to reduce the costs of acquiring allowances or offset credits in a cap-and-trade program. Changes to profit or loss might also result from a change in demand for goods or services arising from legislation or regulation.

The Climate Release includes a discussion of the indirect consequences of climate change regulation on business trends, reputational risk, physical impacts, and voluntary ESG disclosure. With regard to indirect consequences, the Climate Release states that "*[l]egal, technological, political and scientific developments regarding climate change may create new opportunities or risks for registrants*."[50] They may create new or increased demand for some products or services, such as for energy-efficient products that result in lower emissions than competing products and for electricity generated from alternative energy sources. Similarly, they may create decreased demand for goods that cause significant GHG emissions or services related to carbon-based energy, such as drilling or equipment maintenance services. According to the Climate Release, those business trends or risks may need to be disclosed as risk factors or in the MD&A. In some cases, the developments may have a sufficiently significant impact on a registrant's business that disclosure would be required under Item 101, as might be the case if a registrant decided to change its plan of operation to benefit from potential opportunities.

The Climate Release also raises the possible need to disclose reputational risk resulting from climate change developments. "*Depending on the nature of a registrant's business and its sensitivity to public opinion,*" the SEC asserts, "*a registrant may have to consider whether the public's perception of any publicly available data relating to its GHG emissions could expose it to potential adverse consequences to its business operations or financial condition resulting from reputational damage*."[51]

The Climate Release relies on a 2007 Government Accountability Office report, and the sources it cites, for the proposition that elevated levels of GHG can cause severe weather. The SEC identifies examples of the possible consequences of such weather as including: (1) property damage and disrupted operations for businesses on coastlines; (2) indirect financial and operational impacts if the operations of major customers or suppliers are disrupted by hurricanes or floods; (3) increased claims for insurers and reinsurers; (4) decreased agricultural output in areas impacted by drought; and (5) increased premiums and deductibles, or decreased insurance coverage availability, for facilities and operations in areas prone to severe weather. The SEC advises registrants whose businesses may be harmed by severe weather or other climate-related events to consider disclosing "*material risks of, or consequences from, such events in their publicly filed documents*."[52]

While focusing on disclosure under SEC regulations, the Climate Release states that, because many corporations voluntarily report information about their GHG emissions and other climate change matters to organizations, such as CDP (formerly known as the Carbon Disclosure Project), who make that information publicly available, registrants should consider whether that disclosure is consistent with their SEC filings.

[50] Climate Release, *supra,* at 25.
[51] *Id.* at 26.
[52] *Id.*

b. Post-Climate Release

In the 10 years since the Climate Release, numerous requests have been made for the SEC to take additional action regarding disclosure of climate risk and/or to more broadly address ESG disclosure. Recently, in May 2020, the SEC's Investor Advisory Committee (IAC) recommended that the SEC initiate an effort to update its public company reporting requirements to include "*material, decision-useful, ESG factors*."[53] The IAC suggests that the SEC solicit input from investors, issuers, and other market participants through roundtables, requests for information, or similar means. The IAC also proposes that the SEC consider widely accepted third-party ESG reporting frameworks (e.g., the Global Reporting Initiative (GRI), the Sustainability Accounting Standards Board (SASB), and the Task Force on Climate-related Financial Disclosures (TCFD)) as it contemplates developing its own ESG disclosure framework. It is unclear, though, whether there will be much, if any, progress on the IAC recommendation in the near term. Soon after the recommendation was made, SEC Chair Jay Clayton stated: "*I believe I have made it clear that, while I believe that in many cases one or more 'E' issues, 'S' issues, or 'G' issues are material to an investment decision, I have not seen circumstances where combining an analysis of E, S and G together, across a broad range of companies, for example with a 'rating' or 'score,' particularly a single rating or score, would facilitate meaningful investment analysis that was not significantly over-inclusive and imprecise*."[54]

Amendments to regulations finalized by the SEC in August 2020 do not address climate change, despite the SEC's receipt of over 1,000 comment letters about it.[55] The Amendments were adopted by a 3-2 vote of the SEC Commissioners. The two dissenting Commissioners, Caroline Crenshaw and Allison Herren Lee, expressed their disapproval that the Release "*is silent on two critical subjects: diversity and climate risk disclosures*."[1] Commissioner Crenshaw urged the SEC to form (1) an internal task force to study how investors use information about human capital management, climate change risk, and other ESG metrics to assess long-term financial performance and (2) an external ESG Advisory Committee composed of investors, reporting companies, and subject matter experts to guide the SEC in revising and expanding its approach to, and regulation of, ESG disclosures.

C. State and Local Activity

While there have been limited actions to address the environmental component of ESG at the federal level, there have also been a variety of different actions to address that component on the state and local levels. As of August 2020, 23 states and the District of Columbia had

[53] Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure, 7, 10 (May 14, 2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf (last viewed Sept. 9, 2020).
[54] Jay Clayton, SEC Chairman, *Public Statement, Remarks at Meeting of the Asset Management Advisory Committee* (May 27, 2020), https://www.sec.gov/news/public-statement/clayton-amac-opening-2020-05-27 (last viewed Sept. 9, 2020).
[55] Allison Herren Lee, SEC Comm'r, *Public Statement, Regulation S-K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26 (last viewed Sept. 9, 2020).

established economy-wide GHG emissions targets.[56] They are state-level goals to reduce GHG emissions by a specific amount by a certain date.

The Regional Greenhouse Gas Initiative (RGGI) was the first mandatory "*cap-and-trade*" program designed to reduce GHG emissions at the state level. Through a cooperative effort to establish and implement RGGI, 10 Northeastern and mid-Atlantic states[57] agreed to cap CO_2 emissions from fossil fuel-fired electricity generating units having a rated capacity equal to or greater than 25 megawatts. To reduce GHG emissions, the cap decreases over time. The participating states have created allowances for emissions equal to the amount of emissions represented by the cap, have allocated the allowances among themselves, and periodically auction the allowances. The participating states require regulated units to obtain allowances equal to the amount of CO_2 that they emit over a three-year compliance period. In some circumstances, a regulated entity can use offsets in lieu of allowances. The offsets are created by a limited number of initiatives recognized by RGGI as reducing GHG emissions.

Shortly after RGGI was enacted, the California Global Warming Solutions Act (AB 32) became law. It mandated that GHG emissions in California be reduced to the 1990 baseline of 427 million metric tons of carbon dioxide equivalent by 2020. California met that goal in 2016.[58] AB 32 also established a 2030 emissions reduction target 40% below 1990 levels. California currently describes its efforts to reduce GHG as the use of "*an integrated set of regulations and programs designed to address sources from every sector*."[59]

One of the mechanisms California uses to continue to reduce GHG emissions is a cap-and-trade program.[60] Many of the concepts underlying it are similar to RGGI, although California's program extends well beyond electric generating facilities. California's program now applies to approximately 80% of California's GHG emissions.

California's Low Carbon Fuel Standard (LCFS) is another California program to reduce GHG emissions. The LCFS aims to promote the replacement of petroleum-based transportation fuels with renewable alternatives.[61] The LCFS standards are expressed in terms of carbon intensity—i.e., the life-cycle GHG emissions associated with the production, transportation, and use of a given fuel as well as the indirect land use effects of a given transportation fuel. (Thus, for example, ethanol does not fare as well under the LCFS as it might under other programs.) The LCFS credit market allows regulated entities to trade credits to meet the LCFS standards. The program also requires third-party verification of various representations. Other jurisdictions have become part of California's LCFS program, including Oregon, Washington, and British Columbia.

[56] Ctr. for Climate & Energy Sols., *U.S. State Greenhouse Gas Emissions Targets,* https://www.c2es.org/document/greenhouse-gas-emissions-targets/ (last updated Aug. 2020) (last viewed Sept. 9, 2020).
[57] Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New Hampshire, New York, Rhode Island, and Vermont are the participating states. *The Regional Greenhouse Gas Initiative, an initiative of the New England and Mid-Atlantic States of the US,* https://www.rggi.org/ (last viewed Sept. 9, 2020).
[58] Office of Governor Gavin Newson, *Governor Newsom Announces Climate Pollution Continues to Drop Below 2020 Target While State's Economy Grows* (Aug. 12, 2019), https://www.gov.ca.gov/2019/08/12/governor-newsom-announces-climate-pollution-continues-to-drop-below-2020-target-while-states-economy-grows/ (last viewed Sept. 9, 2020).
[59] *Id.*
[60] *Id.*
[61] *See* Cal. Air Res. Bd., *Low Carbon Fuel Standard: About,* https://ww2.arb.ca.gov/our-work/programs/low-carbon-fuel-standard/about (last viewed Sept. 3, 2020) (providing history of LCFS).

New York recently joined California in adopting a broad approach to GHG emission reduction. On January 1, 2020, it enacted the Climate Leadership and Community Protection Act (CLCPA). The new law requires total statewide GHG emissions to be 40% below 1990 levels in 2030 and 85% below 1990 levels in 2050.[62] CLCPA has an aspirational goal of a 100% reduction in 2050. The statute has been described as "*one of the strongest climate change laws in the world, and people everywhere are watching its implementation for models of what can be done elsewhere*."[63] The CLCPA has established a Climate Action Council to devise a "*scoping plan*" for implementation.

While the RGGI states and California have adopted cap-and-trade program to reduce GHG, other states have used a different tool by adopting renewable portfolio standards (RPS). They are regulatory mandates for utilities to use renewable generation resources such as wind, solar, geothermal, biomass, landfill gas, or others, and may allow the trading of renewable energy credits (RECs).[64]

While RPS and REC systems have been around for many years, newer ESG trends at the state level are also emerging. Most recently, California Governor Newsom issued an executive order aiming to transition to electrified or zero emission vehicles by 2025-2050.[65] In addition, California recently codified requirements that two state retirement funds publicly report on their analyses of material climate-related financial risks.[66] Under the recently enacted Illinois Sustainable Investing Act,[67] state agencies that manage funds must develop sustainable investment policies. Colorado,[68] Connecticut,[69] the District of Columbia,[70] Hawaii,[71] Maine,[72] Maryland,[73] Minnesota,[74] New Jersey,[75] New York,[76] Oregon,[77] and

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[62] N.Y. ENV'T CONSERV. LAW § 75-0107 (Consol. 2020).

[63] Kate Marsh, Neely McKee & Jordan Gerow, *Compilation of Recommendations to Reduce Greenhouse Gas Emissions in New York State,* COLUMBIA LAW SCHOOL (July 30, 2020), https://climate.law.columbia.edu/sites/default/files/content/CLCPA%20Proposal%20Recommendations%20_0.pdf (last viewed Sept. 9, 2020).

[64] U.S. Energy Information Administration, Renewable energy explained: Portfolio standards, https://www.eia.gov/energyexplained/renewable-sources/portfolio-standards.php (last viewed Sept. 9, 2020).

[65] *See* Cal. Exec. Order N-79-20 at ¶ 2 (Sept. 23, 2020), *available at* https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-text.pdf (last viewed Oct. 7, 2020).

[66] *See An act to add and repeal Section 7510.5 of the Government Code, relating to public retirement systems*, S.B.964, Ch. 731 (Cal. 2018), http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SB964; *see also* Karen Doron, News Release, *CalSTRS expands reporting on climate risk management*, Cal. State Teachers' Ret. Sys. (Dec. 31, 2019), https://www.calstrs.com/news-release/calstrs-expands-reporting-climate-risk-management; Cal. Pub. Emps.' Ret. Sys., *Addressing Climate Change Risk: CalPERS' First Response to Senate Bill 964* (Dec. 2019), https://www.calpers.ca.gov/docs/forms-publications/addressing-climate-change-risk.pdf (foregoing links last viewed Sept. 10, 2020).

[67] 30 ILCS 238.

[68] Colo. Pub. Emp. Ret. Ass'n, *Investment Stewardship Report 2020* (July 2020), https://www.copera.org/sites/default/files/documents/5-169.pdf (last viewed Sept. 9, 2020).

[69] Shawn T. Wooden, Treasurer of the State of Connecticut, *Investment Policy Statement for the State of Connecticut Retirement Plans & Trust Funds* (adopted April 10, 2019; approved May 8, 2019), https://www.ott.ct.gov/pensiondocs/IPStatementapproved_050819.pdf (last viewed Sept. 9, 2020).

[70] D.C. Ret. Bd., *Environment, Social, and Governance Policy Statement* (Nov. 21, 2013), https://dcrb.dc.gov/publication/environmental-social-and-governance-policy-statement (last viewed Sept. 9, 2020).

[71] Employees Retirement System of the State of Hawaii signed onto the United Nations-supported Principles for Responsible Investment (PRI), an international network of institutional investors committed to incorporating ESG factors in their investment decision-making. *See ERS Commits to Socially Responsible Investing,* HOLUMA (Winter 2018), https://ers.ehawaii.gov/wp-content/uploads/2018/12/Winter-2018.pdf (last viewed Sept. 9, 2020).

Washington[78] each have similar ESG considerations as part of their state fund investment controls. In addition, Delaware recently enacted legislation prioritizing ESG principles for estate fiduciaries.[79] Notably, Delaware also enacted the Certification of Adoption of Transparency and Sustainability Standards Act (2018), which allows companies to opt into regular reporting to the state and shareholders on their ESG performance.[80]

Interest in, and commitments to combatting, climate risk in the United States extend beyond the states. One hundred and seventy-one cities in the country have joined the Global Covenant of Mayors for Climate & Energy.[81] These cities have committed to "*register, implement, and monitor their [climate] strategic action plans and make information on their efforts and results publicly available*."[82]

D. Voluntary Activity

In response to stakeholder concerns and business considerations, many companies have decided to establish their own environmental goals for ESG and to make voluntary environmental disclosures.

1. Goal-setting

A company that commits to improved environmental performance as part of ESG has the task of identifying its environmental goals. Some do so with input from internal specialists, key stakeholders, and/or benchmarking. Others look to third-party standards and resources to help establish appropriate goals. One such resource is the Science Based Targets (SBT). It allows companies to set their emissions goals based on sector, proportion of Gross Domestic Product, or an absolute reduction approach.[83] SBT has opened a comment period for soliciting input on developing targets to meet the goals of the Paris Agreement for the oil and

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[72] *See* Me. Pub. Emps. Ret. Sys., *Environmental, Social and Governance Report* (2019), https://www.mainepers.org/Investments/Invest%20Data/MainePERS%202019%20ESG%20Report%20-%20FINAL.pdf (last viewed Sept. 9, 2020).

[73] Md. State Ret. & Pension Sys., *2nd Biennial Report by The Environmental, Social and Governance Risk Committee of the Maryland State Retirement and Pension System* (Feb. 18, 2020), https://sra.maryland.gov/sites/main/files/file-attachments/esg_risk_committee_report_-_february_2020.pdf?1581707201 (last viewed Sept. 9, 2020).

[74] Minn. State Bd. of Inv., *SBI Investment Beliefs* (June 14, 2018), https://www.house.leg.state.mn.us/comm/docs/a103a0e7-a90c-49ff-88ba-eb3fdcd54799.pdf (last viewed Sept. 9, 2020).

[75] *See* Chris Butera, *New Jersey Making Big Push on ESG Investing,* CHIEF INVESTMENT OFFICER (July 10, 2018), https://www.ai-cio.com/news/new-jersey-making-big-push-esg-investing/ (last viewed Sept. 9, 2020).

[76] *See* Emily Chasan, *New York State Pension Fund Makes $800 Million Bet on ESG Credit,* BLOOMBERG GREEN (Feb. 13, 2020), https://www.bloomberg.com/news/articles/2020-02-13/new-york-state-pension-fund-makes-800-million-bet-on-esg-credit (last viewed Sept. 9, 2020).

[77] Or. State Treas., *Sustainable Investing,* https://www.oregon.gov/treasury/invested-for-oregon/Pages/Sustainable-Investing-governance.aspx (last viewed Sept. 3, 2020).

[78] Wash. State Inv. Bd., *Environmental, Social, and Governance Report: Asset Stewardship & Sustainability for the Long Term* (Apr. 2020), https://www.sib.wa.gov/information/pdfs/esg_2020.pdf (last viewed Sept. 9, 2020).

[79] 81 Del. Laws 1320 (2018), https://legis.delaware.gov/BillDetail/26606 (last viewed Sept. 9, 2020).

[80] 81 Del. Laws 279 (2018), https://legis.delaware.gov/BillDetail?LegislationId=26304 (last viewed Sept. 9, 2020).

[81] Global Covenant of Mayors for Climate & Energy, https://www.globalcovenantofmayors.org/ (last viewed Sept. 2, 2020).

[82] *Id.*

[83] *See* Science Based Targets, *Methods,* https://sciencebasedtargets.org/methods/ (last viewed Sept. 3, 2020).

gas industry, with a particular focus on emissions from the fuel supplied and well as direct methane and carbon dioxide emissions.[84] The comment period ends on October 30, 2020.

When adopting voluntary goals, companies have considered using third-party verification to help determine when and whether the goals are met. Verification is often a requirement of a mandatory program. For example, California's cap and trade system requires third-party verification of emission reduction representations.[85] Third-party resources, including Verra (formerly the Verified Carbon Standard) and the Climate Action Reserve, can help companies verify the achievement of voluntary goals in a way that translates across industries and geographic markets. Such verification can assist the public in understanding and appreciating the steps a particular company is taking.[86]

2. Disclosure Regimes

Companies have increasingly turned to voluntary reporting as the main tool for communicating about ESG goals. Among the many options, some voluntary reporting regimes have become particularly noteworthy for the oil and gas sector as well as other industries.[87] They are GRI, SASB, TCFD, and CDP (formerly Carbon Disclosure Project).[88]

GRI is an international organization that has been developing sustainability reporting metrics for several decades.[89] GRI, through the Global Sustainability Standards Board, opened a public comment period on its first ever GRI Sector Standard focused on the oil and gas sector. The comment period ended on October 6, 2020. The proposed standard is designed to identify the most critical sustainability topics for the oil and gas industry — including climate change, health and safety, governance, and communities — with the goal of bringing consistency to the industry in reporting on these topics. In its draft form, the standard describes the oil and gas sector to include upstream and downstream oil and gas activities and "*related project lifecycle phases,*" from exploration to use of products as inputs to chemicals manufacturing.[90] Ultimately, the standard would assist companies in the industry support U.N. Sustainable Development Goals and the goals of the Paris Agreement.[91]

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[84] *See* Science Based Targets, *Oil & Gas,* https://sciencebasedtargets.org/oil-and-gas/ (last viewed Oct. 11, 2020).
[85] E.g., Cal. Air Res. Bd., *Offset Verification,* https://ww2.arb.ca.gov/our-work/programs/compliance-offset-program/offset-verification (last viewed Sept. 3, 2020).
[86] *See,* e.g., Cal. Air Res. Bd., *Offset Project Registries,* https://ww2.arb.ca.gov/our-work/programs/compliance-offset-program/offset-project-registries (last viewed Sept. 3, 2020).
[87] *See Sustainability Reporting Guidance for the Oil & Gas Industry,* IPIECA, Am. Petrol. Inst., Int'l Ass'n of Oil & Gas Producers (4th ed. 2020), https://www.ipieca.org/media/5115/ipieca_sustainability-guide-2020.pdf (highlighting various regimes, including GRI, TCFD, and CDP) (last viewed Sept. 9, 2020).
[88] In response to the numerous different voluntary disclosure regimes that have emerged, the International Organization of Securities Commissions recently announced that it would "*work to identify "commonalities" among the vast range of sustainability disclosure standards from across the world in order to make it easier to compare information.*" Siobhan Riding, "*Global regulatory body to harmonise 'plethora' of ESG standards"*, FINANCIAL TIMES (Sept. 7, 2020).
[89] *See* GRI, *About GRI,* https://www.globalreporting.org/Information/about-gri/Pages/default.aspx (last viewed Sept. 3, 2020).
[90] GRI, *GRI Sector Standard: Oil and Gas Exposure Draft* at 8 (July 8, 2020), https://r1.dotmailer-surveys.com/690cde57c672a9674j5cdfbed4f1397a6ef-d87bf6b5ca3471904pn72c019b8fcd34ca3e (last viewed Sept. 9, 2020).
[91] *Id.* at 10.

SASB, a sustainability standards board, focuses on industry-specific standards to identify sustainability-related risks most likely to affect a company's financial condition.[92] Its Oil & Gas Midstream Sustainability Accounting Standard provides disclosure topics and accounting metrics for the industry. For example, under the standard, GHG emissions should be accounted for as gross global "Scope 1" emissions in metric tons, and the disclosure should include a discussion of strategies for managing these emissions and performance against targets.[93] The standard has similar provisions for air quality, ecological impacts, competitive behavior, operational safety, and emergency preparedness and response.[94] SASB and GRI recently announced that they would collaborate to produce harmonized standards.[95]

TCFD focuses on companies' ability to respond to risks arising from climate change and to align their disclosures with investor needs.[96] It has issued recommendations[97] that have been applied to oil and gas, methane, and other climate change disclosures.[98] The TCFD Oil and Gas Preparer Forum, which includes input from various major oil and gas companies and the World Business Council for Sustainable Development, has provided examples of how to effectively implement TCFD's recommendations to the oil and gas sector, including: providing explanations about whether and how the Board and management integrate processes relating to climate change into overall governance structures, and information that allows readers to understand why a company made certain governance choices and how polices are actually executed.[99]

CDP (formerly the Climate Disclosure Project)[100] is another popular voluntary disclosure mechanism, focused primarily on GHG emissions, though it also has disclosures relating to other environmental sustainability topics, such as water security and forestation. Notably, CDP is one of the most widespread reporting mechanisms, used across industries and beyond the United States, so its results can translate to different audiences.[101]

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92 *See* SASB, *Promoting Clarity and Compatibility in the Sustainability Landscape: GRI and SASB announce collaboration* (July 12, 2020), https://www.sasb.org/blog/gri-and-sasb-announce-collaboration-sustainability-reporting/ (last viewed Sept. 9, 2020).

93 SASB, *Oil & Gas Midstream Sustainability Accounting Standard* at 7 (Oct. 2018) https://www.sasb.org/wp-content/uploads/2018/11/Oil_Gas_Midstream_Standard_2018.pdf (last viewed Sept. 9, 2020).

94 *Id.*

95 *See* SASB, *Promoting Clarity and Compatibility in the Sustainability Landscape: GRI and SASB announce collaboration* (July 12, 2020), https://www.sasb.org/blog/gri-and-sasb-announce-collaboration-sustainability-reporting/ (last viewed Sept. 9, 2020).

96 *See* TCFD, *About the Task Force: Our Mission,* https://www.fsb-tcfd.org/about/# (last viewed Sept. 3, 2020).

97 *See* TCFD, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017), https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf (last viewed Sept. 9, 2020).

98 E.g., *Setting the Bar: Implementing the TCFD Recommendations for Oil and Gas Methane Disclosure,* PRI, Envtl. Def. Fund, Ceres (Oct. 2018), https://www.tcfdhub.org/wp-content/uploads/2019/07/CeresEDFPRImethaneFINAL.pdf (last viewed Sept. 9, 2020).

99 World Bus. Council for Sustainable Dev., *Climate-related financial disclosure by oil and gas companies: implementing the TCFD recommendations* at 17 (2018), https://docs.wbcsd.org/2018/07/Climate_related_financial_disclosure_by_oil_and_gas_companies.pdf (last viewed Sept. 9, 2020).

100 *See* https://www.cdp.net/en (last viewed Sept. 3, 2020).

101 *See* Emily Holbrook, *CDP Reports a 24% Jump in Companies Asking their Suppliers for Environmental Transparency,* ENV'T + ENERGY LEADER (May 19, 2020), https://www.environmentalleader.com/2020/05/cdp-reports-a-24-jump-in-companies-asking-their-suppliers-for-environmental-transparency/ (last viewed Sept. 9, 2020).

V. Future Developments

The strong interest in ESG among investors and other stakeholders in U.S. companies does not show signs of abating. Whether and how the United States will enact a comprehensive and national approach to the environmental component of ESG will depend, in the near term, on the results of the November 2020 elections. President Donald Trump's campaign has been silent about that component. In contrast, the Biden campaign has proposed a US$2 trillion clean energy and infrastructure plan and a clean energy and environmental justice plan.[102] Under these plans, the U.S. would recommit to the Paris Agreement and aim for net-zero emissions by 2050. A Biden administration would also require public companies to disclose climate risks and GHG emissions in their operations and supply chains.[103] Particularly relevant to the oil and gas industry is that a Biden administration would require federal permitting decisions to consider the effects of GHG emissions and climate change, and would set methane limits for the oil and gas sector.[104] Of course, much of what can or will be done after November 2020 under federal law will depend on Congress.[105]

To the extent the federal government decides after the upcoming elections to take new action about the environmental component of ESG, the extent to which it will consider approaches recently being pursued in other countries is unknown. In the European Union, the Sustainability-Related Disclosure Regulation will become applicable in mid-2021, and will require certain financial market participants and advisers to provide investors with ESG-related information in making investment decisions.[106] The Middle East and North Africa (MENA) region has taken a market-based approach through the S&P ESG index for the MENA region, which ranks the top 50 companies in 11 markets of the region based on their ESG practices.[107] In China, the China Securities Regulatory Commission and the Ministry of Environmental Protection this year began requiring listed companies and bond issuers to disclose ESG risks.[108]

In light of the current uncertainty about how the environmental component of ESG will be handled at the federal level, U.S. companies in the oil and gas industry will want to consider how best to position themselves. Their business goals, and input from important stakeholders, will remain important in shaping corporate environmental strategy. Activities companies can take in furtherance of that strategy include submitting comments about proposed voluntary and mandatory standards and becoming involved in the legislative process. Trade

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[102] Joe Biden & Kamala Harris, *The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future,* https://joebiden.com/clean-energy/ (last viewed Sept. 3, 2020); Joe Biden & Kamala Harris, *The Biden Plan for a Clean Energy Revolution and Environmental Justice,* https://joebiden.com/climate-plan/# (last viewed Sept. 3, 2020); *see also* Alana Wise, *Biden Outlines $2 Trillion Climate Plan,* NPR.ORG (July 14, 2020), https://www.npr.org/2020/07/14/890814007/biden-outlines-2-trillion-climate-plan (last viewed Sept. 9, 2020).

[103] Joe Biden & Kamala Harris, *The Biden Plan for a Clean Energy Revolution and Environmental Justice,* https://joebiden.com/climate-plan/# (last viewed Sept. 3, 2020).

[104] *Id.*

[105] In the past, member of Congress considered or discussed, but did not enact, a cap-and-trade program for GHG and a carbon tax.

[106] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019.

[107] S&P Dow Jones Indices, *S&P/Hawkamah ESG Pan Arab Index,* https://www.spglobal.com/spdji/en/indices/equity/sp-hawkamah-esg-pan-arab-index/#overview (last viewed Sept. 3, 2020).

[108] *See* Patrick Temple-West & Nian Liu, *Chinese companies get to grips with tougher ESG disclosures,* FINANCIAL TIMES (Jan. 13, 2020), https://www.ft.com/content/b06291aa-3251-11ea-9703-eea0cae3f0de (last viewed Sept. 9, 2020).

associations may be helpful advocates in addressing issues about proposed requirements. Informing and educating lawmakers, regulators, investors, customers, and employees of considerations particular to the realities of a specific industrial sector, and individual businesses within it, can be crucial. With science, law, politics, and stakeholder interests evolving regarding the environmental component of ESG, flexibility in a company's near- and long-term approach to the environmental component of ESG is clearly important now.