**How the SEC, With Help from the President, Can Bolster Environmental Corporate Social Responsibility**

Avery Aulds

## I. Overview

The issue of climate change has been a long-standing and highly contested debate amongst those in Congress—as well as common citizens—largely centering around whether climate change is actually a real phenomenon.[1] Despite this political controversy, research clearly indicates that the Earth's climate is experiencing intense changes that will undoubtedly lead to catastrophic outcomes.[2] Part of these outcomes stem from the dramatic increase in greenhouse gas ("GHG") emissions coming from corporations.[3] As the effects of climate change become more frequent and the environmental impacts of human behavior become more evident, the interconnectedness between governments and corporations and their effects on the environment come to light.

According to the Natural Resources Defense Council ("NRDC"), 100 energy companies were responsible for 71% of the global industrial emissions in 2017,[4] producing "nearly [one] trillion tonnes of [GHG] emissions."[5] Also in this research, it was found that ten countries,

[1] Ellen Cranley, *These Are the 130 Current Members of Congress Who have Doubted or Denied Climate Change*, BUS. INSIDER (Apr. 29, 2019, 1:29 PM), https://www.businessinsider.com/climate-change-and-republicans-congress-global-warming-2019-2; *see* Andrew Hoffman, *Climate Science as Culture War*, STAN. SOC. INNOVATION REV., Fall 2012, 29–37.
[2] NASA, *Facts: The Effects of Climate Change*, GLOBAL CLIMATE CHANGE: VITAL SIGNS OF THE PLANET, https://climate.nasa.gov/effects/ (Jan. 14, 2021).
[3] Matthew Taylor & Johnathan Watts, *Revealed: The 20 Firms Behind a Third of All Carbon Emissions*, THE GUARDIAN (Oct. 9, 2019), https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions.
[4] Joshua Axelrod, *Corporate Honesty and Climate Change: Time to Own Up and Act*, Expert Blog, NRDC (Feb. 26, 2019), https://www.nrdc.org/experts/josh-axelrod/corporate-honesty-and-climate-change-time-own-and-act.
[5] PAUL GRIFFIN, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT (2017).

including the United States, produce more than 68% of global GHG emissions.[6] In an article published by the World Resources Institute, research shows that the United States is responsible for the second highest amount of GHG emissions of any country, only behind China.[7] Moreover, the NRDC also reported that the top fifteen food and beverage companies from the United States generate nearly 630 million metric tons of GHG emissions each year.[8] Putting this staggering number into perspective, these companies alone emit more GHG emissions than Australia, the fifteenth largest source of annual GHG emissions.[9]

If corporations continue to emit GHGs at their current levels, the Intergovernmental Panel on Climate Change ("IPCC") predicts that global surface temperatures will rise between 2.5 to 10 degrees Fahrenheit over the next 100 years.[10] This temperature rise could positively impact some regions of the globe,[11] but "taken as a whole, the range of published evidence indicates that the net damage costs of climate change are likely to be significant and . . . increase over time."[12]

With environmental trends depicting a problematic future for the planet, it is time for the United States to come up with a more efficient strategy to reduce its GHG emissions, especially since the United States is the second-largest emitter of GHGs behind China.[13] Moreover, the outcome of the 2020 presidential election provides the United States with a promising opportunity to hold corporations accountable and reduce its overall GHG emissions.

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[6] Mengpin Ge & Johannes Friedrich, *4 Charts Explain Greenhouse Gas Emissions by Countries and Sectors*, WORLD RES. INST.: BLOG (Feb. 06, 2020), https://www.wri.org/blog/2020/02/greenhouse-gas-emissions-by-country-sector.
[7] *Id.*
[8] Joshua Axelrod, *Corporate Honesty and Climate Change: Time to Own Up and Act*, NRDC (Feb. 26, 2019), https://www.nrdc.org/experts/josh-axelrod/corporate-honesty-and-climate-change-time-own-and-act.
[9] *Id.*
[10] NASA, *supra* note 2.
[11] *Id.*
[12] *Id.*
[13] Ge & Friedrich, *supra* note 6.

Accordingly, President Joe Biden has the opportunity to implement more rigorous environmental policies. Although Congress might be more willing to accept President Biden's climate agenda[14], Congressional action takes time, particularly in the environmental realm.[15] Consequently, instead of attempting to create pro-environmental policies via Congressional approval, the Biden administration should employ the Securities and Exchange Commission ("SEC") to set forth mandatory standards for corporations to reduce GHG emissions and ultimately combat the effects of climate change. Part I of this paper will examine what companies are doing independent of SEC regulations—specifically, through Social Corporate Responsibility ("CSR")—to address their environmentally harmful activities. Part II will analyze how the SEC's current policies have disincentivized companies to consider their impact on the environment. Part III will suggest avenues President Biden can pursue to persuade the SEC to implement pro-environmental policies. Finally, Part IV will illustrate likely impacts on the environment if such policies were to be adopted.

## II. The Importance and Limitations of Corporate Social Responsibility Policies

Even without SEC intervention, numerous companies have unilaterally taken steps to adopt inter-company policies to address their environmental impacts.[16] This initiative is referred to as Corporate Social Responsibility ("CSR"), "whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders."[17]

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[14] *See* David Malakoff, *Power Shift in Senate Could Bring Major Changes in U.S. Science and Climate Policy*, AM. ASS'N FOR ADVANCEMENT SCI.: SCI. & POLICY (Jan. 6, 2021), https://www.sciencemag.org/news/2021/01/power-shift-senate-could-bring-major-changes-us-science-and-climate-policy.

[15] DeWitt John, *Environmental Stalemate?*, 24 ISSUES IN SCI. & TECH. (Spring 2008), https://issues.org/br_john/.

[16] *See* Britta Wyss Bisang, *Five Key Sustainability Trends for 2018*, REUTERS EVENTS (Mar. 12, 2018), https://www.reutersevents.com/sustainability/five-key-sustainability-trends-2018 ("More than 9,500 companies have joined the UN Global Compact in support of the [UN Sustainable Development Goals].").

[17] UNIDO, *What is CSR?*, https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr (last visited Jan. 21, 2021).

According to an article published by Forbes, "85% of the companies in the S&P 500 Index published sustainability or corporate responsibility reports in 2017,"[18] revealing a 65% increase from 2011 in corporations making an effort to incorporate sustainable practices.[19]

Despite the dramatic increase in CSR, corporations have not seen the positive outcomes they anticipated from the implementation of their pro-environmental policies.[20] One example of this ineffectiveness lies in corporate policies promising to reduce GHG emissions by certain years.[21] The issue with these policies is that most of these targets do not include emissions from the entire life cycle of the product produced.[22] By failing to take into account a product's life cycle, companies are drastically underestimating the amount of GHGs they emit into the atmosphere[23] because product emissions include not only those emissions released during actual production (upstream emissions) but also emissions released during the product's use and disposal (downstream emissions).[24]

Another reason why these pro-environmental policies have fallen short lies in corporations' actual implementation of these CSR policies.[25] Although executive officers support CSR and sustainable practices, executives are not usually the ones actively coordinating CSR policies.[26] Instead, these programs are often run by several independent internal managers, who all may have different methods and goals when it comes to CSR.[27]

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[18] Elizabeth George, *Can Corporate Social Responsibility Be Legally Enforced?*, FORBES (Oct. 11, 2019), https://www.forbes.com/sites/uhenergy/2019/10/11/can-corporate-social-responsibility-be-legally-enforced/?sh=48a84003d449.
[19] *Id.* (reporting that less than 20% of the S&P Index companies reported pro-environmental policies in 2011).
[20] Axelrod, *supra* note 8.
[21] *See e.g.*, *id*.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] V. Kasturi Rangan et al., *The Truth About CSR*, HARV. BUS. REV. (Jan. 2015), https://hbr.org/2015/01/the-truth-about-csr.
[26] *Id.*
[27] *Id.*

Another reason for this inconsistency in implementing CSR policies is due to the fact that public companies are subject to quarterly reports to their stockholders that require them by law to try and maximize profits to their shareholders.[28] However, private companies need not be constrained by such short-term reports and can therefore be more free to implement CSR tactics. For example, "[i]f the CEO of Patagonia wants to buy organic cotton, he can make it happen even if it means lower margins. A public company has to justify that to shareholders" according to Jun Li, a Professor of Technology and Operations at the University of Michigan.[29] This example means that, even if a policy not immediately profitable in the short-term, a private company can adopt said policy based on its long-term positive environmental impact whereas a public company may not be able to do so. The reason focusing on the short-term can be detrimental to CSR is because investing in long-term pro-environmental policies will likely result in short-term losses before those environmental gains are realized. Thus, if a business is solely focused on the losses incurred now—not the potential environmental gains of the future—then the business will likely shy away from adopting environmental programs.

Because of the inherent disincentives and limitations addressed above for corporations to adopt pro-environmental policies via a CSR framework, relying on corporations to embrace these policies might not be enough in the aggregate to reduce the United States' GHG emissions in a way that effectively reduces negative environmental impacts. Instead, promulgating governmental regulations regarding companies' internal environmental policies may be a more effective method to address the issue of companies and allow for industry and environment to coexist in a more sustainable way.

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[28] *Id.*
[29] *Id.*

## III. Current Policies of the SEC that Account for the Environment

The SEC was created by the Securities Exchange Act of 1934 ("Exchange Act").[30] The Exchange Act allows the SEC to "register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities organizations" for the purpose of maintaining fair and efficient markets and facilitating capital formation.[31] The Act sets forth what type of conduct is allowed within the marketplace and the SEC may discipline regulated businesses and persons who violate those regulations.[32] Additionally, the SEC requires quarterly and annual reporting from companies who publicly trade securities.[33]

When it comes to environmental policy, the SEC has been reluctant to enact substantive regulations, largely stemming from the SEC's position on what it refers to as the "materiality standard."[34] In relation to a company's disclosure of its economic or financial impacts, the term "material" refers to information which has a "substantial likelihood that a reasonable investor would attach importance [to the disclosed information] in determining whether to purchase the security registered."[35] The SEC has taken materiality to be understood in relation to a company's disclosure of its economic or financial impacts.[36] In 1977, the SEC released a report, known as the Sommer Report, which introduced a framework later implemented through Regulation S-K Regulation.[37] This regulation adopted the ideology that the SEC "should not try

[30] *See* 15 U.S.C. § 78d.
[31] 15 U.S.C. §§ 78a–mm; SEC, *The Laws That Govern the Securities Industry*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry (last visited Jan. 21, 2021).
[32] SEC, *supra* note 31.
[33] *Id.*
[34] Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L. J. 923–66 (Apr. 2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3000&context=faculty_scholarship.
[35] 17 C.F.R. § 230.405.
[36] Fisch, *supra* note 34, at 934–35.
[37] 17 C.F.R § 229.1201-08 (describing how companies should disclose oil and gas producing activities).

to use its powers to compel disclosure concerning . . . environmental matters . . . unless it could be shown that such matters were material to investors."[38]

Changing societal understandings of what is considered "material" has forced the SEC to re-think its nearly-century old definition of the term. The definition of material appears to be expanding as investors become more aware of companies' practices, thereby pushing the SEC to consider "materiality" more broadly.[39] For example, in 2007 the SEC received a petition from twenty-two investors asking for guidance on climate change disclosure.[40] The investors argued that climate change fell within the Regulation S-K materiality requirements due to the "risks and opportunities many corporations face in connection with climate change."[41] Three years later, the SEC responded, stating that public companies must disclose "material information about their exposure to risks resulting from climate change" per the current Regulation S-K provisions.[42] Investor Advocate Rick Fleming noticed this shift in investor attitudes, believing that "today's investor, and especially the Millennial generation, may place greater importance on environmental, social, and governance aspects of a business, and the Commission should be prepared to respond to those changes."[43] However, in effect, this regulation has only allowed for limited enforcement due to its vagueness and the fact that it is based on issuer discretion.[44] This issue discretion emanates from the fact that the disclosures are based on a "materiality disclosure

[38] Fisch, *supra* note 34, at 935.
[39] *See id.* at 937.
[40] *Id.* at 937.
[41] *Id.*
[42] *Id.*
[43] Rick Fleming, U.S. Sec. & Exch. Comm'n, NASAA Corporation Finance Training: Moving Forward with the Commission's Disclosure Effectiveness Initiative (Nov. 19, 2016) (transcript available at https://www.sec.gov/news/speech/moving-forward-with-the-disclosure-effectiveness-initiative.html).
[44] Fisch, *supra* note 34, at 955.

by management, the disclosures offer management substantial discretion that is often exercised in favor of failing to disclose."[45]

On August 26, 2020, the SEC appeared to respond to investors' realigned values by adopting amendments in Regulation S-K whereby companies must now disclose their environmental *penalties* in addition to their internal environmental policies.[46] These amendments also increase what companies must report in terms of environmental penalties.[47] Specifically, Item 101(c)(1)(xii) of the amendment states:

> Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the[company]. The [company] shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the [company] may deem material.[48]

Although this amendment signifies the SEC's willingness to re-define "materiality" so that corporations must disclose their activities that affect the environment, this amendment is subject to the interpretation of each company.[49] This subjectiveness leaves uncertainty surrounding what the "material" standard should ultimately be for disclosures relating to environmental harms. Thus, with the political climate and public opinion turning more towards transparency when it comes to how corporations interact with the environment, the SEC has an opportunity to expand its regulatory reaches further into environmentally sustainable practices. The SEC has this

[45] *Id.* at 955-56.
[46] Lydia González Gromatzky, *SEC Amends Environmental Disclosure Requirements*, 21 NAT'L L. REV. (Sept. 18, 2020), https://www.natlawreview.com/article/sec-amends-environmental-disclosure-requirements#google_vignette.
[47] *Id.*
[48] Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release Nos. 33-9106, 34-61469, FR-82 (Feb. 2, 2010); 75 Fed. Reg. 6290 (Feb. 8, 2010) (codified at 17 C.F.R. §§ 211, 231, 241).
[49] Tim Horstmann & Erica Wible, *What is Material? The SEC Says You Decide*, MCNEES WALLACE & NURICK LLC: PUBLIC SECTOR BLOG (Dec. 11, 2018), https://www.mcneespublicsector.com/2018/12/material-sec-says-decide/#:~:text=Using%20these%20seminal%20cases%20as,person%20would%20consider%20it%20important%E2%80%A6.

opportunity, but it will need the President to ultimately come up with standards that are effective due to his ability to enact change quicker via executive orders.

## IV. The Influence and Power of the President Over Environmental Policies Via the SEC

With the new presidential term of Joe Biden, there is an expectation that climate change will be at the forefront of his agenda. During his campaign, Biden promised to "lead the world to address the climate emergency and lead through the power of example, by ensuring the U.S. achieves a 100% clean energy economy and net-zero emissions no later than 2050."[50] With an urgent attitude for climate change, President Biden can direct the SEC to create substantive change requiring businesses to report on environmental issues as opposed to simply suggesting it.[51]

President Biden can pass executive orders to begin implementing positive environmental change. For example, one executive order could clarify the definition of "material" to include environmental disclosures, thereby mandating publicly traded companies to release their environmental penalties and internal policies. This policy route is ideal because President Biden can more quickly enact policy changes (via executive orders) than the legislature (through lawmaking). Therefore, the President is currently in the best position to address corporations' relationships with the environment through the SEC's environmental disclosure mandates.

## V. Potential Outcomes of Environmental Policies of the SEC

If President Biden can successfully utilize the SEC to force publicly traded companies to disclose more information regarding their environmental policies and penalties, then these companies might be more incentivized to push for actual positive environmental change. The

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[50] *The Biden Plan for Clean Energy Revolution and Environmental Justice*, BIDEN FOR PRESIDENT, https://joebiden.com/climate-plan/ (last visited Jan. 21, 2021).

[51] *See* Zachary B. Wolf, *15 things a President Can Actually Do to Tackle the Climate Crises*, CNN POLITICS (Sept. 04, 2019), https://www.cnn.com/2019/09/04/politics/presidents-power-day-one-climate-change/index.html.

exposure of companies' actual environmental practices, not just their purported practices, could cause investors to not invest in some companies they deem unethical. It could also cause the general public as a whole to blacklist some companies and support others that they consider to be more environmentally friendly. Due to the whims of capitalism, which is subject to the will of the people, if these companies want to survive in the long run, they will have to alter their policies and create strategies within their business plans that align their businesses with sustainable practices. However, even with corporations engaging in socially (and environmentally) responsible practices, corporations, policymakers, and even common citizens have a long way to go to reinvent the relationship between corporations and the environment so that industries can become environmentally sustainable.