Recent Developments In ESG Investing: An Analysis Of Securities And Exchange Commission Movement And The Department Of Labor's Recent ERISA Fiduciary Rulemaking

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I. Introduction

In the past four years, the Trump administration has undertaken significant efforts to weaken policies aimed at reducing emissions and mitigating human contribution to climate change.[1] While a number of these actions have been overt and via executive action, federal agencies have engaged in rulemaking, sub-regulatory guidance, and inaction in order to advance an anti-climate agenda.[2] Actions by federal regulators with regards to investment products is particularly illustrative of the varying degrees of action taken with regards to addressing climate risks, and the difficulties and opportunities the Biden administration may face as it looks towards increasing U.S. action on climate-related issues.

In recent years, the threat of climate change has received increased attention from federal financial authorities as it relates to investor-risk and the stability of the financial system.[3] The

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[1] *See* Samantha Gross, *What is the Trump Administration's Track Record on the Environment?*, BROOKINGS INST. (Aug. 4, 2020), https://www.brookings.edu/policy2020/votervital/what-is-the-trump-administrations-track-record-on-the-environment/.

[2] *See id.*; Public Statement, Allison Herren Lee, Comm'r, SEC, *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 (arguing that the Securities and Exchange Commission Regulation S-K proposed rule failed to consider including climate risk disclosures, in addition to failing to heed commentators requests to consider climate risk disclosures in its final rule); Memorandum from John Canary, Dir. of Reg'ls & Interpretations, U.S. Dep't of Labor, to Mabel Capolongo, Dir. of Enf't, U.S. Dep't of Labor for Reg'l Dirs. on Field Assistance Bulletin No. 2018-01, (Apr. 23, 2018), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01 (deemphasizing the ability of ERISA fiduciaries to consider ESG metrics when making investment decisions).

[3] B'D OF GOVERNORS OF THE FED. RSRV. SYS., FINANCIAL STABILITY REPORT 58 (2020) ("Climate change adds a layer of economic uncertainty and risk that we have only begun to incorporate into our analysis of financial stability."), https://www.federalreserve.gov/publications/files/financial-stability-report-20201109.pdf; CLIMATE-RELATED MKT. RISK SUBCOMM., U.S. COMMODITY FUTURES TRADING COMM'N, MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM iii (2020) ("While some early adopters have moved faster than others in recent years, regulators and market participants around the world are generally in the early stages of understanding and experimenting with how best to monitor and manage climate risk."), https://www.cftc.gov/sites/default/files/2020-

private-sector asset management industry—and thus 401k investors, pensioners, and all who depend on equity markets for capital and investment returns—faces losses between $4.2 trillion and $13.8 trillion by 2100 as a result of climate change inaction.[4] Moreover, severe climate change would significantly reduce the scope of potential investment opportunities, jeopardizing retirement incomes across the world.[5] These facts indicate the material impact that climate change will have on investors.

This paper will first describe environmental, social, and governance ("ESG") factors and their significance in financial systems, followed by a brief history of Securities and Exchange Commission and Department of Labor consideration of ESG. Section III will detail the Trump Administration's 2020 rule proposal and adoption restricting fiduciary considerations of ESG. Lastly, this paper provides an outlook on how the Biden Administration may address ESG.

II. The Rise of ESG and Sustainable Investing Policies

As the financial world has begun to grapple with climate change, there has been a significant increase in the utilization of environmental, social, and governance ("ESG") policies among companies.[6] ESG factors may include issues such as climate change, human capital and labor management, corporate governance, gender diversity, and privacy.[7] There is a positive correlation between ESG-metrics and corporate performance and profits: a 2015 aggregation of the results of 2,200 individual studies on the relation between ESG criteria and corporate

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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.

[4] ECONOMIST INTELL. UNIT, THE COST OF INACTION: RECOGNIZING THE VALUE AT RISK FROM CLIMATE CHANGE 2 (2020), https://eiuperspectives.economist.com/sites/default/files/The%20cost%20of%20inaction.pdf.

[5] *Id.*

[6] Jenn-Hui Tan, *Analyst Survey 2020: A Watershed Year for ESG*, FIDELITY INT'L (Feb. 13, 2020), https://www.fidelityinternational.com/editorial/article/analyst-survey-2020-a-watershed-year-for-esg-5fe27e-en5/#:~:text=Analyst%20Survey%202020%3A%20A%20watershed%20year%20for%20ESG,but%20are%20shooting%20up%20corporate%20agendas%20in%202020.

[7] *ESG 101: What is ESG?*, MSCI, https://www.msci.com/what-is-esg (last visited Dec. 22, 2020).

financial performance ("CFP") found that approximately ninety percent of studies show a nonnegative relation between utilization of ESG factors and CFP, and between 47.9% and 62.6% of studies find that ESG criteria has a positive impact on CFP.[8] The COVID-19 pandemic has further demonstrated the resilience and outperformance of funds incorporating ESG factors, with Morningstar data from Q1 2020 finding that seventy percent of sustainable equity funds ranked in the top half of their respective Morningstar categories,[9] and BlackRock finding that in Q1 2020 "94% of a globally-representative selection of widely-analyzed sustainable indices outperform[ed] their parent benchmarks."[10] However, in spite of the evidence indicating a need for addressing climate risks and the positive correlation between corporate performance and consideration of ESG factors, there exists no standardization of ESG metrics or definitions.[11]

A. Securities and Exchange Commission Action on ESG Factors

In 2010, the SEC issued Commission Guidance Regarding Disclosure Related to Climate Change ("2010 Guidance") establishing its "principles-based approach" to climate change disclosures.[12] The 2010 Guidance identifies several previously existing disclosure rules which may require disclosure related to climate change, and provides four topics as examples of climate change related issues which may be material to registrants: (1) the "[i]mpact of [l]egislation and [r]egulation," for example if the registrant is particularly sensitive to greenhouse gas emissions; (2) "[i]nternational [a]ccords" relating to climate change which may affect the registrants

[8] Gunnar Friede, Timo Busch, & Alexander Bassen, *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210, 217 (2015).
[9] Jon Hale, *Sustainable Funds Weather the First Quarter Better Than Conventional Funds*, MORNINGSTAR (Apr. 3, 2020), https://www.morningstar.com/articles/976361/sustainable-funds-weather-the-first-quarter-better-than-conventional-funds.
[10] BLACKROCK, SUSTAINABLE INVESTING: RESILIENCE AMID UNCERTAINTY 3 (2020), https://www.blackrock.com/corporate/literature/investor-education/sustainable-investing-resilience.pdf.
[11] Jennifer Laidlaw, *Lack of Standardized ESG Data may Hide Material Risks, OECD says*, S&P GLOB. (Oct. 2, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/lack-of-standardized-esg-data-may-hide-material-risks-oecd-says-60541261.
[12] 17 C.F.R. pt. 211, Subpt. A (2020) (listing "Commission Guidance Regarding Disclosure Related to Climate Change" at 75 Fed. Reg. 6297).

business; (3) "[i]ndirect [c]onsequences of [r]egulation or [b]usiness [t]rends," such as increased demand for goods that result in lower emissions; and (4) potential "[p]hysical [i]mpacts of [c]limate [c]hange," such as floods or hurricanes.[13] Despite increasing recognition of the material risks posed to investors by climate change, and evidence of the outperformance of funds which take ESG factors into account, the SEC has not updated the 2010 Guidance.[14]

There is, however, evidence of increased focus within the SEC on the topic of ESG. The SEC Office of Compliance Inspections and Examinations ("OCIE") 2020 Examination Priorities states that OCIE "has a particular interest in the accuracy and adequacy of disclosures provided by [Registered Investment Advisors]s offering clients new types or emerging investment strategies, such as strategies focused on sustainable and responsible investing, which incorporate environmental, social, and governance (ESG) criteria."[15] In her statements on a recent rulemaking with regards to Regulation S-K—which lays out qualitative reporting requirements for public companies—SEC Commissioner Allison Lee Herren expressed her disapproval of the rule for lack of consideration and inclusion of ESG factors, saying, "[i]t's time for the SEC to lead a discussion—to bring all interested parties to the table and begin to work through how to get investors the standardized, consistent, reliable, and comparable ESG disclosures they need to protect their investments and allocate capital toward a sustainable economy."[16] In May of 2020, the SEC Investor Advisory Committee recommended that the SEC incorporate ESG reporting in its integrated disclosure regime in order to, among other things, provide investors with "material,

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[13] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6297, 6295–97 (Feb. 2, 2010).
[14] Public Statement, Jay Clayton, Chairman, SEC, *Statement on Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure* (Jan. 30, 2020), https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30#_ftn9.
[15] OFF. OF COMPLIANCE INSPECTIONS AND EXAMINATIONS, U.S. SEC. & EXCH. COMM'N, 2020 EXAMINATION PRIORITIES 15, https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf.
[16] Lee, *supra* note 2.

comparable, consistent information" needed to make investment and voting decisions, provide companies with a consistent and reliable framework, and level the playing field among reporting companies of all sizes.[17] The continued focus indicates that various levels of the SEC have a strong understanding of the nuances in potential ESG-regulation and are likely ready to address them.

B. Department of Labor Rule on Financial Factors in Selecting Plan Investments

The Trump-era Department of Labor ("DOL") has taken significant steps to prevent the consideration of ESG factors by decisionmakers in worker retirement plans under the Employee Retirement Income Security Act of 1974 ("ERISA").[18] Whereas previous administrations have engaged in flip-flopping of sub-regulatory guidance aimed at pursuing—or preventing—increased options for investors, the Trump-era DOL has gone a step further via the formalized rulemaking process.[19] Under ERISA, any individual who has discretionary control or authority over worker retirement plans, provides investment advice to a plan for compensation, or has any authority or responsibility to do so are subject to fiduciary responsibilities.[20] ERISA Sections 404(a)(1)(A) and (B) set forth the duties owed by fiduciaries of retirement funds.[21] These fiduciary duties have largely remained the same, but have been influenced at the margins with

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[17] SEC INV. ADVISORY COMM., RECOMMENDATION FROM THE INVESTOR-AS-OWNER SUBCOMMITTEE OF THE SEC INVESTOR ADVISORY COMMITTEE RELATING TO ESG DISCLOSURE 2 (May 14, 2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf.
[18] *See* Christine Matott, Lawrence Hass, & Josh Sternoff, *DOL Proposes Rule Restricting ESG Investing*, PAUL HASTINGS: INSIGHTS (July 17, 2020), https://www.paulhastings.com/publications-items/details/?id=3863ae6f-2334-6428-811c-ff00004cbded.
[19] News Release, U.S. Dep't of Labor, U.S. Department of Labor Announces Final Rule to Protect Americans' Retirement Investments (Oct. 30, 2020), https://www.dol.gov/newsroom/releases/ebsa/ebsa20201030 ("The Department has issued different iterations of sub-regulatory guidance during this period that may have created confusion about these investment issues.").
[20] 29 U.S.C. § 1104(a)(1).
[21] *Id.*

regards to the flexibilities which fiduciaries are allowed in the consideration of non-financial, or non-pecuniary, factors.

Starting with the Clinton administration, and continuing with each successive administration since, the Department of Labor has issued sub-regulatory guidance on the application of Sections 404(a)(1)(A) and (B) emphasizing the principal fiduciary duty of investing with a focus on pecuniary factors, but modifying the contours of consideration of non-pecuniary factors, with several having a direct focus on the topic of ESG. The Clinton-era DOL issued Interpretive Bulletin 94-1 ("IB 94-1") guidance on the application of Sections 404(a)(1)(A) and (B), addressing the ability of pension plan fiduciaries to promote non-pecuniary benefits.[22] IB 94-1 clarified that economically targeted investments ("ETIs") are not prohibited under 404(a)(1)(A) and (B) so long as the ETI has an expected rate of return commensurate to rates of return of alternative investments with similar risk characteristics that are available to the plan: the "all things being equal" test.[23]

The Bush-era DOL de-emphasized the ability to invest in ETIs by issuing Interpretive Bulletin 2008-01 ("IB 2008-01"), replacing IB 94-1.[24] IB 2008-01 claimed not to alter the basic principles of IB 94-1, but emphasized that consideration of non-economic factors by an ERISA fiduciary is acceptable, but should be rare, only used in cases "in which two or more investment alternatives are of equal economic value to a plan," and when utilized must be documented in a manner that demonstrates compliance with ERISA's fiduciary standards.[25]

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[22] 29 C.F.R. § 2509.94-1 (2008); Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. (June 23, 1994), https://www.govinfo.gov/content/pkg/FR-1994-06-23/html/94-15162.htm.
[23] Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg.; *see* Matott et al., *supra* note 18.
[24] Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61734, 61734 (Oct. 17, 2008).
[25] *Id.* at 61735.

The Obama-era DOL somewhat directly rebuked the previous administration's actions on ETI's by issuing Interpretive Bulletin 2015-01 ("IB 2015-01") claiming to be an "effort to correct the misperceptions that have followed publication of IB 2008-01 . . . withdraw[ing] IB 2008-01 and . . . reinstat[ing] the language of IB 94-1."[26] IB 2015-01 also clarified that the Obama-era DOL did not believe that ERISA prohibits a fiduciary from utilizing ESG factors in investment policy statements or integrating ESG-related tools, metrics, and analyses to evaluate an investment's returns and risks.[27] Removing the previous emphasis on documentation, IB 2015-01 stated that "consideration of ETIs or ESG criteria [does not] presumptively requir[e] additional documentation or evaluation beyond that required by fiduciary standards applicable to plan investments generally[,]" and that a facts and circumstances test applied to determine the appropriate level of documentation.[28]

The Trump-era DOL issued Field Assistance Bulletin 2018-01 ("FAB 2018-01"), stating that in IB 2015-01 "the Department merely recognized that there could be instances when ESG issues present material business risk or opportunities to companies that company officers and directors need to manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories."[29] FAB 2018-01 further cautioned fiduciaries to "not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision."[30]

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[26] Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65135, 65136 (Oct. 26, 2015).
[27] *Id.*
[28] *Id.*
[29] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39113, 39115 (June 30, 2020) (to be codified 29 C.F.R. § 2550).
[30] *Id.*

III. 2020 Proposal to Restrict ERISA Fiduciary's Abilities to Select Investments Based Upon ESG Factors

On June 23, 2020, the DOL released a proposed rule to amend the Department's "[i]nvestment duties" regulation at 29 C.F.R. 2550.404a-1, with the express aim of "establishing clear regulatory guideposts for plan fiduciaries in light of recent trends involving ESG investing that the Department is concerned may lead ERISA plan fiduciaries to choose investments or investment courses of action to promote environmental, social, and public policy goals unrelated to the interests of plan participants."[31] Specifically, the proposed rule outlined five additions to the regulation:

(1) Regulatory text stating that ERISA requires plan fiduciaries "to select investments and investment courses of action based on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action";[32]

(2) A "provision stating that compliance with the exclusive purpose (loyalty) duty in ERISA section 404(a)(1)(A) prohibits fiduciaries from subordinating the interests of plan participants and beneficiaries in retirement income and financial benefits under the plan to non-pecuniary goals";[33]

(3) A requirement that fiduciaries "consider other available investments to meet their prudence and loyalty duties under ERISA in furthering the purposes of the plan";[34]

(4) Acknowledgment that ESG factors can be pecuniary factors, but only if they there are material economic considerations that qualified investment professionals would treat

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[31] *Notice of Proposed Rulemaking on Financial Factors in Selecting Plan Investments Amending "Investment Duties" Regulation at 29 CFR 2550.404a-1*, U.S. DEP'T OF LABOR (June 23, 2020), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/financial-factors-in-selecting-plan-investments.
[32] *Id.*
[33] *Id.*
[34] *Id.*

as such under generally accepted investment theories.[35] In addition, there are increased documentation requirements "intended to provide a safeguard against the incentive for fiduciaries to improperly find economic equivalence and make decisions based on non-pecuniary benefits without a proper analysis and evaluation";[36]

(5) A provision that would restrict 401(k) plans from using a fund with any ESG mandates as a default investment alternative for non-electing participants.[37]

A. Response to 2020 Proposed Rule

The proposal received immense pushback during the thirty-day comment period, with eighty-one percent of firms, organizations, and professionals with academic or legal credentials opposing it, and in particular ninety-four percent of investment-related firms and organizations opposing it.[38] In addition to individual comment letters,[39] notable asset managers including BlackRock, Fidelity Investments, and State Street Global Advisors, and trade associations representing a significant portion of the industry submitted a joint-comment letter stating that although the DOL, "may believe that the Proposal does little more than reiterate ERISA's statutory fiduciary standards, 'codify' existing sub-regulatory guidance, and require actions that it believes plan fiduciaries should already be taking," it in fact "would not only make substantial

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Julie Gorte *et al.*, Comment Letter on Proposed Rule titled Financial Factors in Selecting Plan Investments Under the Employee Retirement Income Security Act of 1974, 4 (Aug. 20, 2020), https://www.ussif.org/Files/Public_Policy/DOL_Comments_Reporting_FINAL.pdf.
[39] *See* BlackRock, Comment Letter on Proposed Rule titled Financial Factors in Selecting Plan Investments Under the Employee Retirement Income Security Act of 1974 (July 30, 2020), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00701.pdf; Fidelity Investments, Comment Letter on Proposed Rule titled Financial Factors in Selecting Plan Investments Under the Employee Retirement Income Security Act of 1974 (July 30, 2020), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00673.pdf; State Street Global Advisors, Comment Letter on Proposed Rule titled Financial Factors in Selecting Plan Investments Under the Employee Retirement Income Security Act of 1974 (July 30, 2020) https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00593.pdf.

changes to the application of ERISA to investments that incorporate [ESG] factors, but the changes made to the Investment Duties regulation would have extensive impacts far beyond ESG investments."[40] The joint-letter went on to request an extension, stating that while other proposals recently issued by the department with similarly short comment periods had received significant amounts of prior input, the proposed rule had not.[41]

B. Final Rule

On November 13, 2020, the DOL published its final rule, amending ERISA at 29 C.F.R. 2550.404a-1, in the Federal Register.[42] Most notably, the final rule removes discussion of ESG considerations, noting that the term itself is not well-defined, and instead focuses on the need for pecuniary factors as a sole consideration.[43] The final rule requires the consideration of alternatives in order to meet the fiduciaries duty of prudence under ERISA, but the text is modified "in order to avoid suggesting that fiduciaries must *scour* the marketplace or look at an infinite number of possible alternatives as part of their evaluation."[44] The requirement of documentation and investment analysis for the use of non-pecuniary factors in the result of a "tie" between two options that cannot be distinguished based upon pecuniary factors remained from the proposed rule, but the DOL removed the requirement that they be "economically indistinguishable."[45] The final rule also modified the regulations with regards to default

[40] American Bankers Association, Comment Letter on Proposed Rule titled Financial Factors in Selecting Plan Investments Under the Employee Retirement Income Security Act of 1974, at 1(July 20, 2020), https://www.aba.com/-/media/documents/comment-letter/dol-extension-07212020.pdf?rev=96f91901bf454722bf66b111e3ce688d.
[41] *Id.* at 3.
[42] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72851.
[43] *Id.*
[44] *Final Rule on Financial Factors in Selecting Plan Investments*, U.S. DEP'T OF LABOR (Oct. 30, 2020), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-rule-on-financial-factors-in-selecting-plan-investments (emphasis added); Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72858.
[45] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72860–61.

alternative investment options for 401(k) plans, prohibiting plans from including funds whose objectives, goals or principal investment strategies include non-pecuniary factors.[46]

IV. Potential Trends in the Biden Administration

The incoming Biden administration is widely expected to pursue a pro-climate strategy with regards to investment regulation.[47] Due to the continual focus by staff and committees, the SEC has existing materials and proposals from which to work.[48] It is expected that the SEC staff will issue guidance quickly after the Biden administration enters office, and pursue rulemakings thereafter.[49] In particular, it is expected that the SEC will pursue mandatory ESG reports.[50]

The Department of Labor Rule limiting fiduciary's ability to invest in ESG-oriented funds will require a subsequent rulemaking in order to reverse.[51] Significantly, there is a long list of items which the Biden administration will likely want to address via the DOL, such as health care, minimum wage, and commissions paid to fiduciaries of retirement funds.[52] Because of the requirement of notice-and-comment rulemaking in order to replace a DOL rulemaking, the COVID-19 pandemic and its many related labor issues, and a plethora of additional items the

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[46] *Id.* at 72864.
[47] Abby Schultz, *How a Biden Administration Will Boost ESG and Impact Investing*, BARRON'S (Nov. 9, 2020, 5:34 PM) https://www.barrons.com/articles/how-a-biden-administration-will-boost-esg-and-impact-investing-01604961238.
[48] *See supra*, Section II(a).
[49] *See* Deborah R. Meshulam et al., *SEC 2021 and Beyond: What to Expect*, DLA PIPER (Dec. 7, 2020) https://www.dlapiper.com/en/us/insights/publications/2020/12/sec-2021-and-beyond--what-to-expect/.
[50] *See* Ether Whieldon & Declan Harty, *Biden Plan to Make Cos. Disclose Climate Risks Key to Decarbonization*, S&P GLOB. MKT. INTEL. (Nov. 2, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/biden-plan-to-make-companies-disclose-climate-risks-key-to-decarbonization-60975902.
[51] OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS 10 (Jan. 2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf ("If an agency decides to amend or revoke a rule, it must use the notice-and-comment process to make the change.").
[52] Leslie P. Norton, *Expect a New World for Investing Rules Under Biden*, BARRON'S (Nov. 20, 2020, 7:30 AM) https://www.barrons.com/articles/how-bidens-labor-department-could-shake-up-investing-rules-51605875400.

Biden administration will need to address,[53] it is likely that the current rule will be in place for some time.

V. Conclusion

The Trump administration's actions impeding the efforts of stakeholder's attempts at a clear, concise, and harmonized ESG disclosure regime have significantly impeded the ability for investors to consider material risks posed by climate change in their investment decisions. The bifurcated approach of ringing alarm bells via government and industry reports and statements while simultaneously pursuing inaction or actively roadblocking efforts to implement a regulatory regime which reflects the recommendations contained within said reports will be felt for the first years of the Biden administration. The DOL has demonstrated the least understanding for the issues at hand by implementing a regulatory regime which flies in the face of the desire of nearly all stakeholders in the regulatory process. However, with strong public and industry support, there is potential for significant action out of the gate, particularly with regards to the SEC, which has a demonstrated a strong understanding of the issues as they relate to their regulatory mandate.

[53] Elena Moore, *Biden's First 100 Days: Here's What to Expect*, NPR (Nov. 9, 2020, 9:00 AM) https://www.npr.org/2020/11/09/932190347/bidens-first-100-days-here-s-what-to-expect.