Materiality, the 'Reasonable Investor,' and the SEC's New Climate-Related Disclosures Rule

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INTRODUCTION

The touchstone of the Securities and Exchange Commission's (SEC) new rule on climate-related disclosures, *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (the "Rule"),[2] is materiality. As Cyndy Posner pointed out, there are over 1,000 references to material or materiality in the Rule.[3] Such an approach must have pleased those commentators who feared the Rule would result in public companies being burdened with providing costly disclosures of non-material information and investors being overwhelmed with information they do not need or want.[4]

Understanding materiality is not straightforward. Much relies on knowing what a "reasonable investor" finds of importance in a particular context. In the Rule the SEC makes clear that climate-related disclosures will only be required when they provide information on a public company's material "climate-related risks"—"the actual or potential negative impacts of

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[2] Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 11275, Exchange Act Release No. 34,99678, 89 Fed. Reg. 21668 (March 28, 2024) [hereinafter Rule]. Please be aware that the SEC has stayed the Rule until the U.S. Court of Appeals for the Eight Circuit can resolve multiple lawsuits on a consolidated basis. *See* In the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors (Order Issuing Stay), Securities Act Release No. 11280, Exchange Act Release No. 99908, 89 Fed. Reg. 25804 (April 12, 2024).

[3] *See* Cyndy Posner, *Final SEC Climate Disclosure Rules [Updated Part I]*, COOLEY PUBCO (March 11, 2024), https://perma.cc/2SMG-97VC.

[4] Rule, *supra* note 1, at 21850–52.

climate-related conditions and events on a registrant's business, results of operations, or financial condition."[5] Looking only at the impact "on a registrant's business, results of operations, or financial condition" and no further also means that the SEC has determined that in the context of the Rule a "reasonable investor" only attaches importance to climate-related disclosures that helps her evaluate the material financial risks involved in investing in securities, not e.g., the impact on the environment caused by the public company's greenhouse gas ("GHG") emissions.

In this writing the Rule's exclusive focus on climate-related risks will be applied to what appears to be ambiguous language that the Rule uses in its discussion of GHG emissions disclosures. This language appears to expand the basis for GHG disclosures beyond the need to inform investors of climate-related risks. It is argued here that under the U.S. Supreme Court cases of *Auer v. Robbins*[6] and, the more recent, *Kisor v. Wilkie*,[7] this would not be possible.

Part I of this writing presents the SEC's understanding of materiality and "reasonable investor" as it appears in the Rule. Part II identifies the applicable climate-related risk that would require the disclosure of Scope 1 and 2 GHG emissions[8]—material "transition risk." Part III focuses on language in the Rule that appears to expand the basis for requiring Scope 1 and 2 GHG emissions disclosures beyond material transition risk. It is found that the language is not ambiguous under *Kisor* and therefore does not lead to an expanded basis for requiring GHG emissions disclosures. Part IV provides a final comment on the general applicability of the SEC's materiality approach taken in the Rule.

I. Materiality and the Reasonable Investor

Surprisingly, the term "materiality," a term which is mentioned over a hundred times in the operative parts of the statutes that underlie the Rule—the Securities Act of 1933[9] ("33 Act") and the Securities Exchange Act

[5] *Id.* at 21692.

[6] 519 U.S. 452 (1997).

[7] 588 U.S. 558 (2019).

[8] Scope 1 GHG emissions are "direct GHG emissions from operations that are owned or controlled by a registrant" and Scope 2 GHG emissions are "indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by a registrant." Rule, *supra* note 1, at 21674–75, n.67. Disclosure of GHG emissions only apply to large accelerated filers and accelerated filers. *Id.* at 21674.

[9] 15 U.S.C. §§ 77a–77aa.

of 1934[10] ("34 Act"; together the "Acts"),[11] [12] is not defined in the Acts. Instead, the Rule uses the definition of materiality[13] found in SEC Rule 405 (promulgated under the 33 Act) and SEC Rule 12b-2 (promulgated under the 34 Act):[14] "[t]he term material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a *reasonable investor* would attach importance in determining whether to purchase the security registered."[15] This definition is based on the one found in the Supreme Court's *TSC Indus., Inc. v. Northway, Inc.* opinion:

> What the [general] standard [of materiality] does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the *"total mix"* of information made available.[16]

The use of a materiality approach in the Rule requires us to deal with identifying what a "reasonable investor" would find important in this context. In general, this is not an easy task. As Amanda Rose has observed, "the 'reasonable investor' is at best a shadowy figure, described only generically in judicial opinions and—in doctrine if not in practice—someone for the

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[10] 15 U.S.C. §§ 78a–78qq.

[11] Rule, *supra* note 1, at 21683–87. More specifically, this authority is based on language in the Acts that allows the SEC to promulgate disclosure rules when it is "necessary or appropriate in the public interest or for the protection of investors." *Id.*

[12] In the 33 Act, there are currently forty-two references, and in the 34 Act, there are currently one hundred references. *See* Bernard S. Sharfman, *The Ascertainable Standards that Define the Boundaries of the SEC's Rulemaking Authority*, 3 U. OF CHI. BUS. L. REV. 193, 210 (2023).

[13] References to materiality come in many forms. In the 33 Act, references include "be true and complete in all material respects," "how the rights of the securities being offered may be materially limited," "liability for material misstatements and omissions," "incomplete or inaccurate in any material respect," "untrue statement or omission of a material fact," "could cause actual results to differ materially," "not subject to material dispute," "material contract," "material conflict of interest," and "material to the inquiry." 15 U.S.C. §§ 77a–77aa. In the 34 Act, references include "false or misleading with respect to any material fact," "material term," "material anticompetitive burden," "disputed issues of material fact," "direct and material effect on the determination of financial statement amounts," "material to the financial statements," "material effect on the financial statements of the issuer," "material written communications," "material noncompliance of the issuer," "material patent right," "material change," "materially reduce market liquidity," "material loss," "in any material respect," "material, nonpublic information," "material impact," "if any information or document provided therein becomes materially inaccurate," and "material contracts." 15 U.S.C. §§ 78a–78qq.

[14] Rule, *supra* note 1, at 21696, n.381.

[15] 17 C.F.R. § 230.405 (2022); 17 C.F.R. § 240.12b-2 (2022). This definition follows from the "substantial likelihood" approach found in the Supreme Court's *TSC v. Northway* opinion. 426 U.S. 438, 449 (1976) (emphasis added).

[16] 426 U.S. 438, 449 (1976) (emphasis added).

fact-finder to identify case-by-case."[17] To resolve this issue Professor Rose argues that "the identity of the reasonable investor is a policy choice that should be made by the SEC in rulemaking or by Congress in legislation, so that companies understand how to think about their disclosure obligations . . ."[18] But, to the SEC's credit it has uniquely made this policy choice in the Rule—the reasonable investor only attaches importance to climate-related disclosures that helps her evaluate a company's material climate-related risks.

A. Disclosures Providing Information on Material Climate-Related Risks

The Rule requires the following types of climate-related disclosures:

- A description of any *climate-related risks* that have *materially* impacted or are *reasonably likely* to have a *material* impact on the registrant, including on its strategy, results of operations, and financial condition, as well as the actual or potential material impacts of those same risks on its strategy, business model, and outlook;

- Specified disclosures, regarding a registrant's activities, if any, to mitigate or adapt to a *material climate-related risk* or use of transition plans, scenario analysis or internal carbon prices to manage a *material climate-related risk*;

- Disclosure about any oversight by the registrant's board of directors of *climate-related risks* and any role by management in assessing and managing *material climate-related risks*;

- A description of any processes the registrant uses to assess or manage *material climate-related risks*; and

- Disclosure about any targets or goals that have *materially* affected or are *reasonably likely* to *materially* affect the registrant's business, results of operations, or financial condition.

In addition, to facilitate investors' assessment of particular types of risk, the final rules require:

[17] Amanda Rose, *The "Reasonable Investor" of Federal Securities Law: Insights from Tort Law's "Reasonable Person" & Suggested Reforms*, 43 J. Corp. L. 77, 79 (2017).

[18] *Id.* at 80.

• Disclosure of Scope 1 and/or Scope 2 emissions on a phased in basis by certain larger registrants when those emissions are *material*, and the filing of an attestation report covering the required disclosure of such registrants' Scope 1 and/or Scope 2 emissions, also on a phased in basis; and

• Disclosure of the financial statement effects of severe weather events and other natural conditions including costs and losses.[19]

Climate-related risks are divided into *physical* risks and *transition* risks.[20] Physical risks "include both *acute* and *chronic* risks to a registrant's business operations."[21] Acute risks are "defined as event-driven risks and may relate to shorter-term severe weather events, such as hurricanes, floods, tornadoes, and wildfires."[22] Chronic risks are defined "as those risks that the business may face as a result of longer term weather patterns, such as sustained higher temperatures, sea level rise, and drought, as well as related effects such as decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water."[23]

Transition risks are defined as "the actual or potential negative impacts on a registrant's business, results of operations, or financial condition attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate related risks."[24] Or, in more general terms, "risks related to a potential transition to a *lower* carbon economy."[25]

B. Summary

Looking only at the material impact "on a registrant's business, results of operations, or financial condition" and no further means that a "reasonable investor" is only interested in climate-related disclosures that help her evaluate the material financial risks involved in investing in securities, not e.g., the impact on the environment caused by the public company's greenhouse gas ("GHG") emissions. At least in the context of climate-related disclosures it appears that former SEC Commissioner Elad

[19] Rule, *supra* note 1, at 21670 (emphasis added). Severe weather reporting is an explicit and unambiguous exception to the Rule's materiality approach. As explained in the Rule, "the requirement to disclose capitalized costs, expenditures expensed, charges, and losses incurred as a result of severe weather events and other natural conditions remains subject to *a one percent disclosure threshold*." *Id.* at 21793 (emphasis added). Moreover, to help smaller companies who may more easily meet the one percent threshold and therefore face an unreasonable reporting burden, the Rule also allows for "de minimis thresholds that exempt disclosure of amounts that aggregate to less than $100,000 in the income statement or less than $500,000 in the balance sheet, . . ." *Id.*

[20] *Id.* at 21687.

[21] *Id.* (emphasis added).

[22] *Id.* at 21692.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 21687 (emphasis added).

Roisman had it right when he said that "it seems clear that a 'reasonable investor' is someone whose interest is in a financial return on an investment."[26] This means that determining materiality of disclosures must be tied "to a company's financial value."[27]

This understanding of the reasonable investor is supported by Sean Griffith's argument that interest in financial return is the foundational interest in investing, "the one interest that all investors share":[28]

> Because all investors invest with an expectation of a financial return, the interest that investors, as a class, share is the financial return of the investment. Investors, like all people, may have other interests besides financial return. People might care about clean water, breathable air, and puppies. But, given a large enough group, there will be others who are indifferent, opposed, or even if they share the same general preferences, have an ordinal ranking of preferences that renders them opposed to action on a specific issue. In markets, the law of large numbers will operate to cancel out offsetting preferences, leaving the one interest that all investors share—that is, their interest in a financial return.[29]

In the Rule, the SEC has determined that the reasonable investor is solely focused on being informed of the financial risks that it undertakes when it invests in securities. In the context of the Rule's climate-related disclosures this is referred to as "climate-related risks." It does not include disclosures that solely reveal a registrant's climate impacts. This should be considered a textualist or traditionalist approach as there is no mention of a public company being required to make disclosures of its climate impacts in the underlying Acts.[30] Of course, such disclosures were not on Congress' or anyone else's radar back in the 1930s when the Acts were enacted.[31] But most revealing, no such language was added to the Acts over the past 90 years.[32]

Furthermore, the Rule's reasonable investor, an investor focused on the financial risks of securities investment, is consistent with the Acts' focus on *informing* investors of the material risks of securities investment. In the

[26] Elad L. Roisman, *Can the SEC Make ESG Rules that Are Sustainable?, U.S. Sec. and Exch. Comm'n* (June 22, 2021).
[27] *Id.*
[28] Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 Neb. L. Rev. 876, 921 (2023).
[29] *Id.*
[30] Bernard S. Sharfman, *SEC Doesn't Have Legal Authority for Climate Disclosure Rule*, THE FEDERALIST SOCIETY (May 25, 2024), https://fedsoc.org/commentary/fedsoc-blog/sec-doesn-t-have-legal-authority-for-climate-disclosure-rule.
[31] *Id.*
[32] *Id.*

words of Professor Michael Guttentag, the Acts are focused on protecting "investors from fraud, an unlevel informational playing field, the extraction of private benefits from the firm by firm insiders, and investors' propensity to make unwise investment decisions . . ."[33] However, investor protection does not extend to protecting investors from investing in securities that have a level of risk that may result in financial losses.[34]

Therefore, the Rule's exclusive focus on climate-related disclosures that reveal material climate-related risks and its determination that a reasonable investor that only attaches importance to such disclosures falls well within its statutory constraints. It is also not an unreasonable approach under the Administrative Procedure Act's "arbitrary-and-capricious" standard of review.[35] According to the U.S. Supreme Court in *Fed. Commc'ns Comm'n v. Prometheus Radio Project*:

> The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.[36]

II. THE MATERIAL CLIMATE-RELATED RISK THAT REQUIRES GHG EMISSIONS DISCLOSURES

SEC Regulation S-K[37] will be modified to include the disclosure of material GHG emissions under new subpart 229.1505: "A registrant that is a large accelerated filer or an accelerated filer, each as defined in § 240.12b–2 of this chapter, must disclose its Scope 1 emissions and/or its Scope 2 emissions, if such emissions are material, . . ."[38] In the Rule the material climate-related risk that requires the disclosures of GHG emissions is transition risk. According to the Rule:

> As many commenters have indicated, investors view information about a registrant's GHG emissions, including its Scopes 1 and 2 emissions, as a central measure and indicator of the registrant's exposure to *transition risk* as well as a useful tool for assessing its

[33] Michael D. Guttentag, *On Requiring Public Companies to Disclose Political Spending*, 2014 COL. BUS. L. REV. 593, 619 n.92 (2014) (citing Michael D. Guttentag, *Protection from What? Investor Protection and the Jobs Act*, 13 UC DAVIS BUS. L.J. 207, 222–33 (2013)).

[34] Guttentag, *Protection from What? Investor Protection and the Jobs Act*, *supra* note 32, at 232–33.

[35] *See* 5 U.S.C. § 706.

[36] Fed. Commc'ns Comm'n v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021).

[37] 17 CFR Part 229.

[38] Rule, *supra* note 1, at 21916.

> management of transition risk and understanding its progress towards a registrant's own climate-related targets or goals. Because such information can be necessary to inform an investor's understanding of the overall impact of transition risk and related targets and goals on a registrant's business, results of operations, financial condition, and prospects, the final rules include a Scopes 1 and 2 emissions disclosure requirement (Item 1505), . . .[39]

This approach is a far cry from what the SEC originally proposed back in 2022—a GHG emissions disclosure regime that did not include a "materiality standard."[40] The problem with the original approach is that a company's GHG emissions, no matter how much they might impact climate change, may not inform investors of a company's material climate-related risks.

How can a company, especially one with significant GHG emissions, come to the determination that it does not have material transition risk? Professor Eccles, the prominent finance professor, provides the following example:

> Let's take the example of a hypothetical oil and gas company we'll call Carboniferous, Inc. It's a commonly cited statement that oil and gas companies are subject to high *transition risk*. This is shorthand for the view that Carboniferous, Inc. will become less profitable over time and may even go out of business as the transition progresses, leaving it with billions of dollars in stranded assets which have no value at all.[41]

> But transition risk posed to Carboniferous's business over time *does not necessarily neatly translate into material financial risk to Carboniferous's investors*. . . [I]nvestors should acknowledge the reality that demand for fossil fuels may persist for longer than many would like due, at least in part, to lack of government policies, such as a carbon tax. . .[42]

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[39] *Id.* at 21732 (emphasis added).

[40] *Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022).

[41] Robert G. Eccles, *Untangling Climate Risk, Financial Risk, And Climate Impact*, Forbes (April 18, 2024), https://perma.cc/9FS8-JH33 (emphasis added).

[42] *Id.* (emphasis added). *See also* Alon Brav and J.B. Heaton, *Brown Assets for the Prudent Investor*, 12 HARV. BUS. L. REV. ONLINE art. 2 (2021):

> Most commentary on climate-themed investment treats climate change as a one-way risk to brown assets from a hoped-for transition to a low-carbon economy. But the converse holds as well. Brown assets could turn out to be highly valuable if the world fails to transition out of the high-carbon economy. This is true both because sentiment for green assets may cause brown assets to be underpriced (generating higher expected returns) and

> . . . .
>
> Notably, the public conversation on transition risk almost exclusively focuses on the risk that a company is not transitioning fast enough—*equating emissions with financial risk*. As one example, a commonly cited transition risk is the risk that a company is not aligned with government commitments to net zero in the countries where it does business and will be negatively impacted as those governments implement new policy to meet their net zero commitments. . .
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> . . . .
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> I can think of no other topic where we insist that companies are exposed to financial risk if they do not make significant business decisions on *blind faith* that governments will deliver on their stated long-term policy goals. It is also worth questioning whether governments will have the political support to impose policy that will bankrupt key sectors on which their economies are still highly dependent. Transition risk due to shifts in government policy is clearly not as straightforward as it is often made out to be, and we can't use calls to manage transition risk as a proxy for driving net zero outcomes.[43]

If that is correct, then under the Rule it is quite likely that a number of public companies with impactful GHG emissions may make the determination that they do not face material transition risk. As a result, they will not have to disclose information on their GHG emissions.

III. Interpreting the Rule under *Auer* and *Kisor*

As shown below, when the SEC talks about GHG emissions disclosures in the Rule, it appears to use language that may be interpreted to mean that GHG emissions disclosures may be required even when they do not reveal a material transition risk or any type of climate-related risk. This brings up the issue of whether the SEC may be able to interpret the ambiguous appearing language in a way that may require disclosures of GHG emissions even when there is no relationship to such risks. It is argued here

because brown assets may provide a valuable hedge against the costs of climate change in a world that failed to transition to a low-carbon economy. Given the lack of progress to date toward transition to a low-carbon economy, we argue that institutional investors subject to fiduciary duties of prudent investment (including the duty to diversify) cannot yet justify divestment from brown assets.

[43] Eccles, *supra* note 40 (emphasis added).

that under the U.S. Supreme Court cases of *Auer v. Robbins*[44] and, the more recent, *Kisor v. Wilkie*,[45] this would not be possible.

A. Ambiguous Appearing Language

Deep into the Rule the SEC makes a surprising and unexplained move away from GHG emissions disclosures being required only if they inform investors of material climate-related risk. More specifically, material transition risk:

> [W]e intend that a registrant apply traditional notions of *materiality* under the Federal securities laws when evaluating whether its Scopes 1 and/or 2 emissions are *material*. Thus, *materiality* is not determined *merely* by the amount of these emissions. Rather, as with other materiality determinations under the Federal securities laws and Regulation S–K, the *guiding principle* for this determination is whether a *reasonable investor* would consider the disclosure of an item of information, in this case the registrant's Scope 1 emissions and/or its Scope 2 emissions, *important* when making an investment or voting decision or such a *reasonable investor* would view omission of the disclosure as having significantly altered the total mix of information made available.[46]

Here, there is an absence of language that requires such disclosures to be exclusively focused on providing investors with information on climate-related risks or those risks being the exclusive focus of the reasonable investor.[47] If so, can the SEC interpret this language, no matter how inconsistent it is with the rest of the Rule, such that GHG emissions disclosures can be required even when they do not disclose information on a company's climate-related risks? May this also be considered to be of importance to a reasonable investor under the SEC's interpretation of its own rule?[48]

For example, large institutional investors may seek standardized climate-change reporting data such as GHG emissions in order to facilitate

[44] 519 U.S. 452 (1997).

[45] 588 U.S. 558 (2019).

[46] Rule, *supra* note 1, at 21733 (emphasis added).

[47] Being "non-exhaustive," the limited number of examples provided below the quoted language does not help resolve the apparent ambiguity. According to the Rule, "[t]he rules also provide a non-exhaustive list of examples of disclosure items that a registrant should include, if applicable, in providing responsive disclosure rather than specifying more prescriptive set of disclosures, as in the proposal." *See id.* at 21912.

[48] The author first identified this issue in an unpublished writing and then in an amicus curiae brief. *See* Brief of the Manhattan Institute, James R. Copland, and Bernard S. Sharfman as Amici Curiae Supporting Petitioners, Iowa v. SEC (No. 24-1522) (8th Cir. petitions consolidated Mar. 21, 2024), at 18–19.

the creation of ESG mutual funds.[49] This potentially more expansive reading of what a reasonable investor finds of importance needs to be evaluated under *Auer* and *Kisor*.

B. The Rule Under Auer and Kisor

When a court reviews an agency's interpretation of its own regulation, it does so under the *Auer* deference doctrine. In *Auer v. Robbins*[50] the Supreme Court established that the courts will defer to an agency's interpretation of ambiguous language in its own regulation unless the interpretation is found to be "plainly erroneous or inconsistent with the regulation."[51] This means that even if the agency does not provide the best interpretation, so long as it is not unreasonable[52] or "inconsistent with the regulation," the interpretation will be allowed to stand.

But before we can apply the *Auer* deference, we must first ascertain whether or not an ambiguity in the language actually exists. This is where the Supreme Court's ruling in *Kisor v. Wilkie*[53] comes into play. As Justice Kagan explained, in writing for the majority, to determine whether an ambiguity actually exists "the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning."[54]

Therefore, a reviewing court would need to look at the language above regarding the disclosure of GHG emissions to see if the Rule really provides for another reasonable meaning besides informing investors of material transition risk (or any other climate-related risk) or that the SEC has determined that in the context of GHG emissions the reasonable investor is interested in something other than climate-related risks. The text, structure, and purpose of the Rule makes this an impossible task.

It has already been noted that material or materiality is noted over 1,000 times in the Rule. However, based on my own calculations, it must also be noted that "climate-related risk" is referred to over 600 times as well. Most importantly, the terms are almost always talked about in tandem. As has already been pointed out, the Rule is all about material climate-related risks. Moreover, as stated in the summary of the Rule: "The final rules will require information about a registrant's climate-related risks that have materially

[49] The incentive is that mutual funds and ETFs that track indices structured for the ESG investor can typically charge significantly higher fees than investment funds that track plain vanilla indices like the S&P 500. *See* Bernard S. Sharfman, *ESG Investing under ERISA*, 38 YALE J. ON REG. BULLETIN 112, 127–28 (2020).

[50] 519 U.S. 452 (1997).

[51] *Id.* at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))).

[52] *Id.* at 452 ("It is not apparent that the Secretary's interpretation of § 213(a)(1) is rendered unreasonable . . . The Secretary's approach must therefore be sustained, . . .").

[53] 588 U.S. 558 (2019).

[54] *Id.* at 589–90.

impacted, or are reasonably likely to have a material impact on, its business strategy, results of operations, or financial condition."[55] This point is emphasized over and over again in the Rule. In the Rule section that introduces the text of Item 1502(a), the SEC states "[w]e are adopting final rules (Item 1502(a)) to require the disclosure of any climate-related risks that have materially impacted or are reasonably likely to have a material impact on the registrant, including on its business strategy, results of operations, or financial condition, . . ."[56] Thus, the Rule has one overriding purpose, providing investors with disclosures that provide them with information on material climate-related risks.

Moreover, except for the explicit and unambiguous materiality exception for severe weather reporting,[57] there are no other exceptions to the exclusive focus on disclosures that provide information to investors on material climate-related risks. This is the point of the following passage in the Rule:

> As the Commission explained when proposing the climate disclosure rules, while climate-related issues are subject to various other regulatory schemes, our objective is limited to advancing the Commission's mission to protect investors, maintain fair, orderly, and efficient markets, and promote capital formation by providing disclosure to investors of information important to their investment and voting decisions. We are adopting the final rules to advance these investor protection, market efficiency and capital formation objectives, consistent with our statutory authority, and not to address climate-related issues more generally. The final rules should be read in that context. Thus, for example, in those instances where the rules reference *materiality*—consistent with our existing disclosure rules and market practices—*materiality* refers to the importance of information to investment and voting decisions about a particular company, *not* to the importance of the information to climate-related issues outside of those decisions. The Commission has been and remains agnostic about whether or how registrants consider or manage *climate-related risks*. Investors have expressed a need for this information on risks in valuing the securities they currently hold or are considering purchasing.[58]

[55] Rule, *supra* note 1, at 21668.
[56] *Id.* at 21691.
[57] *See supra* note 16.
[58] Rule, *supra* note 1, at 21671 (emphasis added).

In sum, under the Rule, besides the small exception for severe weather reporting, there is no room for disclosures to go beyond informing investors of material climate-related risks or for a reasonable investor to be interested in anything other than such risks. If that is the case, then a reviewing court would never allow the disclosures of GHG emissions to be for the purpose of anything more under than providing investors with information regarding material climate-related risks. More specifically, material transition risk.

C. Interpreting the Rule Under Auer

But even if another reasonable interpretation was identified by a reviewing court, providing that material climate-related risks no longer need to be the sole focus of both materiality and the reasonable investor, it still would not receive *Auer* deference. This is because such an interpretation would clearly be "inconsistent with the regulation."[59] In order to show this, we can use the same argument that was made above to explain why there is not an alternative interpretation. Again, the Rule is all about material climate-related risks, except for the explicit and unambiguous materiality exception for severe weather reporting.[60] There are no other exceptions to the exclusive focus on disclosures that provide information to investors on material climate-related risks. If the Rule provides no room for climate-related disclosures to go beyond informing investors of material climate-related risks, then requiring GHG emissions disclosures for any other purpose is inconsistent with the Rule. Therefore, under *Auer*, a reviewing court would never allow such an interpretation to stand.

IV. Final Comment

Under the Rule, except for one exception, the SEC is explicitly limiting its focus to material climate-related risks. This is being done in the context of what it believes its authority is under the Acts: "our objective is limited to advancing the Commission's mission to protect investors, maintain fair, orderly, and efficient markets, and promote capital formation by providing disclosure to investors of information important to their investment and voting decisions."[61] As a result, the Rule will not require the same standardized climate-related disclosures for all large public companies, making it difficult for an investor to do side-by-side comparisons based on such disclosures, especially those companies which are in different industries.

[59] 519 U.S. 452, 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))).
[60] *See supra* note 16.
[61] Rule, *supra* note 1 at 21671.

It is also important to note that being informed of material climate-related risks is no more than a subset of "being informed of the [material] financial risks of buying, selling, and holding of individual securities ("[material] firm specific investment risk")."[62] If so, why doesn't the SEC, except when the statutory languages says otherwise, explicitly take this general and arguably historic approach in all its disclosure rules? This would also apply to the severe weather exception found in the Rule. Such an approach, which assumes that reasonable investors are only interested in material firm specific investment risk, would not only help to enhance certainty and consistency in what a public company is to disclose but also enhance the ability of investors to accept with certainty that whatever is disclosed will be of importance to them in valuing a company's securities.

[62] Sharfman, *supra* note 11, at 215.