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# ACCOUNTING FOR ENVIRONMENTAL STANDARDS

Malori M. McGill\*

*Abstract:* A meaningful percentage of the regulation that companies in the United States must follow concerns two distinct topics: accounting and the environment. The values underlying the regulatory framework of securities and the environment are distinct, but they are not wholly opposite. This Comment responds to growing trends of private governance in the area of environmental regulation. Besides federal regulation, a significant portion of environmental regulation touching U.S. companies today remains sourced from and enforced by private standard-setters. Federal accounting regulations are now governed by the Financial Accounting Standards Board (FASB)—a private entity recognized by the Securities and Exchange Commission (SEC)—but almost all federal accounting regulations once found their authority solely in private sources. Mirroring accounting regulation’s history, the federal government may choose to outsource environmental standard-setting to one or more of these already-operating private standard-setters in exchange for their expertise, resources, and recognition.

Drawing on parallels from the regulatory history of the accounting industry, this Comment cautions that the purposes of environmental regulation demand a more democratic process. Beginning with an overview of government-created and -outsourced corporations, and turning to a dissection of FASB’s structure under the federal government, this Comment concludes that private environmental standard-setters will face potential legal issues if the government adopts them in a manner similar to FASB’s delegation as the authoritative standard setter. The broad implications of environmental standards and regulations—and the prominent and diverse social values driving them—demand a process more deeply rooted in democracy before they become authoritative law at federal levels.

## INTRODUCTION

Despite broad federal regulation of the environment, scholars suggest that environmental preferences—historically exposed, recognized, and enforced through political processes—are increasingly expressed and derived from “private interactions in social settings and the marketplace.”<sup>1</sup> So-called “private environmental governance” is on the rise,<sup>2</sup> meaning environmental objectives and preferences are being addressed through private contract. For example, companies are now commonly subjecting

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1. Michael P. Vanderbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133 (2013).

2. *See, e.g., id.* at 135 (noting that U.S. corporations spend more “on private environmental investigations” than the annual enforcement budget of the EPA).

themselves to environmental standards, not because of government regulation or tax purposes, but because of the preferences of their customers and shareholders.<sup>3</sup> Some examples of these private environmental standard-setters include: Forest Stewardship Council (FSC), the Marine Stewardship Council, Equator Principles, the U.S. Green Building Council (USBG), Leadership in Energy and Environmental Design (LEED), and the Clean Development Mechanism Gold Standard.<sup>4</sup>

The presence and rise of these private environmental regulators can be attributed in some part to a lack of governmental action in regulating the environment paired with the broad reach of environmental priorities:

Government may not be able to act because [some] problem[s] occur[] outside of any national boundary (e.g., open oceans) or occur[] inside the boundary of another nation. National governments have little ability to regulate environmental behavior in other countries, and the international trade regime makes it difficult to impose requirements on goods[.]<sup>5</sup>

Other reasons for private governance may be that it costs less—both financially and in what it requires of both resources and collective action—than other types of governance.<sup>6</sup>

This trend towards private standard-setting in environmental regulations suggests it is time to think more methodically about the wisdom of the trend. This Comment suggests that the history of the creation of accounting regulations can shed some valuable light. To that end, this trend in the environmental world is not wholly unlike the long-lost history of accounting standards. Throughout the history of accounting regulation, the use of private entities to address industry-wide change and standard-setting has been commonplace. Accounting regulation in the United States was largely privatized from inception.<sup>7</sup> Over time, however, the federal government began outsourcing to private entities for public, and legally authoritative, accounting standards. Now, although the SEC holds the authority to set financial regulations for U.S. companies, it adopts

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3. *Id.*

4. *Id.* at 148–56.

5. *Id.* at 169 (“Private governance could fill gaps where public governance cannot reach because of political, territorial, or expertise gaps. It also could undermine, enhance, delay, accelerate, or complement government action in situations where government can act.”). *But see* Jyoti Madhusoodanan, *What Do Sustainability Labels Really Mean?*, THE WEEK (Sep. 21, 2019), <https://theweek.com/articles/861742/what-sustainability-labels-really-mean> [<https://perma.cc/P6RG-UNRZ>].

6. Vandenbergh, *supra* note 1, at 133 (noting that “[p]rivate market behavior may be less costly to individuals than political behavior and may require little or no collective action”).

7. Omar Ochoa, *Accounting for FASB: Why Administrative Law Should Apply to the Financial Accounting Standards Board*, 15 TEX. REV. L. & POL. 489, 498 (2011).

accounting standards (i.e. U.S. Generally Accepted Accounting Principles (GAAP)) as they are created by the Financial Accounting Standards Board (FASB), a private entity.<sup>8</sup>

Because the area of setting accounting standards has a rich history of balancing government regulation with private governance, it is prudent to consider whether this history is pertinent to the upward trend in private governance in environmental regulation. And so, while the genesis of these seemingly disconnected standards are seldom compared—in legal scholarship or elsewhere—the history of the creation of accounting regulations sheds a light on the recent increase in private governance in environmental regulation. This Comment explores the paralleled developments of these two spaces and makes two primary observations: (1) there are both similarities and differences in the values and expertise that shape accounting and environmental policies; and (2) because of the differences, the anti-democratic concerns that surround private standard-setting in accounting may be even more problematic for environmental regulations.

In order to exchange its stock on any U.S. public stock exchange, a company must periodically present its financial statements to the public according to GAAP—accounting standards as dictated by the Securities and Exchange Commission (SEC).<sup>9</sup> GAAP includes over 2,000 standards for companies to follow,<sup>10</sup> relating to everything from physical assets, to receipts of sale, to executive employee compensation. U.S. public companies adhere to GAAP to avoid severe liability.<sup>11</sup>

In recent years, scholars have noted that despite murky, slow, and controversial waters within the federal government, private governance regarding environmental standards is steadily rising.<sup>12</sup> Instead of being

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8. SEC Release No. 34-47743 (2003), No. 33-8221 (2003).

9. See, e.g., Regulation S-X, 17 C.F.R. § 210.4-01 (2019) (requiring financial statements of issuers to be “prepared in accordance with generally accepted accounting” principles or otherwise be presumably misleading or inaccurate); AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, AT A GLANCE: GUIDE TO THE AICPA FOR STATE BOARD OF ACCOUNTANCY EXECUTIVE DIRECTORS 38–58 (2014), <https://www.aicpa.org/content/dam/aicpa/advocacy/state/documents/stateboardhandbook-final.pdf> [<https://perma.cc/27Y9-8SNB>] (defining common terms used in the public accounting practice).

10. Thomas C. Pearson, *Creating Accountability: Increased Legal Status of Accounting and Auditing Authorities in the Global Capital Markets (U.S. and EU)*, 31 N.C.J. INT’L L. & COM. REG. 65, 85 (2005).

11. *What We Do*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Article/whatwedo.html> [<https://perma.cc/2ZMN-H2N3>] [hereinafter *What We Do*, U.S. SECURITIES & EXCHANGE COMMISSION] (“Crucial to the SEC’s effectiveness . . . is its enforcement authority. Each year the SEC brings hundreds of civil enforcement actions against individuals and companies for violation of the securities laws. Typical infractions include insider trading, accounting fraud, and providing false or misleading information about securities and the companies that issue them.”).

12. Vandenberg, *supra* note 1, at 133. Private standard-setters are not only becoming more prominent in the environmental regulation field. For example, the regulation of commercial privacy standards is often assessed through private auditing and consulting companies. See generally Daniel

subjected to more public regulation, U.S. public companies are, more often than ever, voluntarily signing up for more private regulation to address their consumers' demands for greater attention to environmental concerns.<sup>13</sup> As opposed to using the democratic process, the public is voicing their concerns for the environment through private channels. As a result, private entities are responding to public concerns directly—bypassing traditional democratic processes—and setting standards to address environmental issues ranging from building classifications to water quality to forest management practices; and the adoption of these standards is becoming widespread.<sup>14</sup>

A common trend for the federal government historically has been to outsource governmental functions to such private standard-setters. This type of outsourcing or adopting from private entities comes with certain benefits. When the federal government outsources to private entities who in turn follow traditional government channels to create regulation, the resulting structure embodies administrative and constitutional law principles. For example, better and more closely-linked input from experts, potential cost cutting, and uniform standards across an industry are prioritized.<sup>15</sup> Many of these benefits are aims of administrative law in general. In the case of accounting standards, drawing upon experts in private standard-setting entities has long helped the SEC promote its overall purpose—to protect investors, the financial markets, and the formation of capital.<sup>16</sup> Because science is generally a strong driver in environmental policy, closely-linked input from experts is also a positive factor for creating environmental regulation. Finally, following traditional governmental channels to regulate promotes constitutional principles, such as the non-delegation doctrine, to ensure that the public's lawmaking concerns are properly directed through elected officials.

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J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 618 (2014) (summarizing the required “[a]ssessments by [i]ndependent [p]rofessionals” in FTC consent orders); Verne Kopytoff, *Privacy Audits Required of Internet Firms*, SF GATE (Mar. 10, 2013), <https://www.sfgate.com/technology/article/Privacy-audits-required-of-Internet-firms-4343921.php%3b> [<https://perma.cc/UL9T-PNTJ>].

13. Vandenberg, *supra* note 1, at 133. See also ERIC F. LAMBIN & TANNIS THORLAKSON, SUSTAINABILITY STANDARDS: INTERACTIONS BETWEEN PRIVATE ACTORS, CIVIL SOCIETY, AND GOVERNMENTS, ANNUAL REVIEW OF ENVIRONMENT AND RESOURCES 369, 379–80 (2018), <https://doi.org/10.1146/annurev-environ-102017-025931> [<https://perma.cc/ATE2-6L86>] (“[G]overnments rely on a private governance initiative to implement their public regulations” and in some cases private standards are “a precursor to mandatory regulations, preparing the ground for more stringent public policies.”).

14. See, e.g., Vandenberg, *supra* note 1, at 148–56.

15. Stephen M. Maurer, *Public Problems, Private Answers: Reforming Industry Self-Governance Law for the 21st Century*, 12 DEPAUL BUS. & COMM. L.J. 297, 336 (2014); Sarah B. Schindler, *Following Industry's LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285, 315, 328 (2010).

16. See *infra* note 57.

However, these benefits to outsourcing to private standard-setters are met with several costs—costs which could be most detrimental to a regulatory scheme for the environment. These costs include less certainty in the public’s ability to provide input into the public entity’s decision-making process and a decreased ability for the public’s values to be recognized through a democratic process. Relatedly, private standard-setters often have a lesser degree of accountability between their decision-makers—who are usually not federally appointed or elected—and members of the public.<sup>17</sup> One scholar has noted in the context of accounting regulation: “private standard setters . . . [don’t] bear a legal duty or responsibility to establish rules that are socially beneficial.”<sup>18</sup> As a result, the public can often be confused, and companies may have a greater ability to act selfishly.<sup>19</sup> Private standard setters to whom government functions are outsourced, however, are not restricted by protections against these costs, such as the Constitution’s Appointments Clause and removal doctrine.<sup>20</sup>

As in accounting regulation, socially beneficial regulations in the environmental field are increasingly important. As private governance in the area of environmental regulation increases, the question of whether and when governmental entities will begin adopting private regulations as their own becomes increasingly relevant.<sup>21</sup> Over time, the government may consider outsourcing—as the SEC did with FASB—to already-operating private standard-setters to create its regulations. One scholar has already reported some municipal-level adoption of private building quality standards.<sup>22</sup> Though unexpected corollaries, this anticipated trend within the environmental regulatory sector bears strong resemblance to the history of U.S. accounting regulation.<sup>23</sup>

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17. See, e.g., Maurer, *supra* note 15, at 330.

18. Arthur Acevedo, *The Fox and the Ostrich: Is GAAP a Game of Winks and Nods?*, 12 TRANSACTIONS: TENN. J. BUS. L. 63, 105 (2010).

19. *Id.* at 65 (highlighting “the SEC’s failure to create and actively regulate accounting standards,” and opining that this failure has caused “public confusion and allow[s] companies to manipulate financial results”).

20. See, e.g., Susan L. Martin, *The Appointments Clause and the SEC’s Administrative Law Judges: Protecting the Separation of Powers, Political Accountability, and Investors*, 12 VA. L. & BUS. REV. 287, 291 (2018) (noting the Appointments Clause represents a “careful separation and balancing of power” and serves to “allow citizens to know who is responsible for appointments, so they can react politically if they either approve or disapprove of those appointments”).

21. For discussion of countries and areas in which government adoption of private standards is already occurring, see LAMBIN & THORLAKSON, *supra* note 13, at 379–80 (2018) (noting as one example, the authors discuss that “[t]he US Lacey Act . . . includes a public recognition of private certification schemes for timber” and later note that Bolivia’s forest management standards were influenced by private FSC standards).

22. See generally Schindler, *supra* note 15.

23. Ochoa, *supra* note 7, at 498.

This Comment cautions that private environmental standard-setters will face potential legal issues, and a decrease in democratic accountability, if the government adopts them in a manner similar to the Financial Accounting Standard Board's (FASB) delegation as the authoritative GAAP standard-setter in the 1970s. Despite the substantive differences between accounting and environmental regulation, the issues are worth discussing together. Beginning with a broad and overarching history of U.S. accounting regulation, specifically through the lens of the quasi-public entity FASB, this Comment seeks to lay a foundation of the relevant considerations for the federal adoption of private environmental standards.<sup>24</sup> Specifically, this Comment seeks to address what environmental regulators should expect if they choose to adopt private standards in a similar manner to the SEC's adoption of FASB's standards, and offers one perspective on the potential road ahead.

This Comment will proceed as follows: Part I seeks to identify some of the differing social values driving regulation in both the accounting and environmental fields. Part II includes a background of the history and trends of outsourcing functions of the U.S. federal government, as well as discussion of the benefits of public recognition of private standard-setters. Part III explains the role of FASB and its structure as a private standard-setter with public governance authority. In Part IV, both the judicial and potential constitutional treatments of FASB are considered. Finally, Part V concludes by suggesting that if private environmental-standard setters are to become publicly authoritative, they should follow a path unlike that of FASB.

## I. VALUES IN ACCOUNTING AND ENVIRONMENTAL REGULATION

At first blush, comparing accounting and environmental regulations is admittedly odd. We don't generally think of the policies for recognizing the present value of leases, for example, in the same breath as the policies for promoting water-conscious farming practices. However, the values informing decisionmaking within the regulatory world of each are not wholly beyond compare. This Part outlines the similarities—and important distinctions—between the types of values driving standards in the accounting and environmental regulatory schemes. Despite differences between them, environmental regulation and accounting regulation, are similar enough in their embodiment of social values such

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24. The federal government's adoption of private environmental standards could take many forms. For example, Congress could give authority to a private entity's standards through statute or the Environmental Protection Agency (EPA), or another agency, could use its rulemaking authority with influence from private standards. *See generally* LAMBIN & THORLAKSON, *supra* note 13.

that both require a democratic process through which people's values can be represented.

Stemming from the SEC's mission to promote the reliability of financial information for the U.S. public, the primary purpose of GAAP is "to increase investor confidence by ensuring transparency and accuracy in financial reporting."<sup>25</sup> As one scholar noted, "[s]hareholders, managers, accountants, courts, legislators, and the public rely on GAAP as the financial yardstick by which to measure financial performance."<sup>26</sup> Values underlying accounting standards include transparency, accuracy, accountability, and fairness.<sup>27</sup> Accounting standards reflect the public's interest in limiting fraud and otherwise manipulated financial results.<sup>28</sup> They are generally based on the judgments of standard setters<sup>29</sup> to ensure financial information is "fair[ly] present[ed] in accordance with generally accepted accounting practice."<sup>30</sup> And once established, one accounting rule versus another can affect "stock prices, investment decisions, and executive compensation."<sup>31</sup> Those effects, in turn, can impact the economy more broadly. There are, in other words, policy choices embedded in something as seemingly mundane as accounting standards.

In the environmental context, the stakes for ensuring democratically acceptable standards are even higher. The values informing decisions and standards in environmental regulation are also even broader. Depending on one's perspective and the type of environmental standard, "religious, philosophical, morality-based, aesthetic, scientific, and more" can form the basis for how environmental standards are developed and enforced.<sup>32</sup> One author notes that environmental policy often reflects both "human-centered" (i.e. decisions aimed at human benefit) and "nature-centric" (i.e. decisions aimed at benefiting the environment or protecting its resources)

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25. *In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 478 (S.D.N.Y. 2005) (quoting *In re Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 339 (S.D.N.Y. 2004)).

26. Acevedo, *supra* note 18, at 92.

27. *Id.* at 127 (arguing why "[t]ransparency, disclosure, and confidence building" are diminished when the SEC allows private standard setters to enforce its policies).

28. *Id.* at 71–72.

29. William W. Bratton, *Private Standards, Public Governance: A New Look at the Financial Accounting Standards Board*, 48 B.C. L. REV. 5, 8 (2007) ("[N]o hard science of financial reporting exists to import definitive justification to a given standard . . . The standard setter, no matter how well informed, makes a judgment call.").

30. Bruce Bennett, Michael Bradbury & Helen Prangnell, *Rules, Principles, and Judgments in Accounting Standards*, 42 ABACUS, 189, 191 (2006).

31. Bratton, *supra* note 29 (providing a wide-range of reasons why FASB has been critiqued).

32. Zygmunt J.B. Plater, *Human-Centered Environmental Values Versus Nature-Centric Environmental Values: Is This the Question?*, 3 MICH. J. ENVTL. & ADMIN. L. 273, 277 (2014) (naming the potential social values underlying the "policies of environmental protection").



ideals.<sup>33</sup> And often, political values undermine any other stakeholder's values in environmental regulation.<sup>34</sup> With the plethora of values underlying environmental policy, "public discussion of environmental values and of values that may conflict with environmental protection" should be encouraged.<sup>35</sup>

With that fundamental aspect of environmental regulation in mind—namely that the policy and choice that public, democratic processes offer are even more important in the environmental context because varying values drive people's preferences for regulation—the remainder of this Comment will use FASB as its primary lens. It will address whether private standard-setters are the appropriate mechanism for the future of environmental standard-setting. In the course of this exploration of private standard-setters, an understanding of accounting regulation is informative because of the primary role private standard-setters have played throughout U.S. accounting history. Though accounting and environmental regulation are distinct—and though they are driven by unique policy and social values—the recent development of private environmental standard-setters makes these two schemes comparable.

## II. HISTORY OF OUTSOURCING FEDERAL GOVERNMENTAL FUNCTIONS

Having established the similarities between accounting and environmental regulation, it is worth pausing to understand the history of standard-setting in accounting, which reflects a broader tradition of outsourcing certain governmental functions to private entities. As alluded to above, accounting's history within that broader history of outsourcing may inform future decisions regarding private standard-setting in environmental regulation.

As early as the 1910s, the federal government—and interestingly some states—began creating and acquiring corporations to act as government agents.<sup>36</sup> The purpose of government-created corporations was largely to

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33. See generally *id.* The author also notes there is a third realm of influence on environmental policy, which is politically centered. *Id.* at 277–80.

34. *Id.* at 277–78, 289 (“[I]n the realms of public health and environmental protection, even pragmatic invocation of the human-centric importance of these issues and initiatives does not guarantee the attention and support of our current mechanisms of governance. . . . The particular form of politico-centricity that characterizes current national governance proceeds without consistent regard for the actual public merits of the issues before it.”).

35. Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233, 256 (2003).

36. See, e.g., *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 388 (1995) (noting that “[t]he first large-scale use of Government-controlled corporations came with the First World War” followed by “the next major group of Government corporations” during and after the Great Depression

fill gaps in the federal government's responses to certain events, and to do so with some level of expertise, bipartisanship, and outsourcing.<sup>37</sup> Up until the Great Depression and the end of World War II, the government created these entities rapidly, and in the views of many, eventually it "had gotten out of hand, in both their number and their lack of accountability."<sup>38</sup> In response, many World War II-era government-created entities were dissolved.<sup>39</sup> In the decades to follow, the federal government instead relied on more private-like entities "with Government-conferred advantages."<sup>40</sup> Today, we are left with a mix of characters in government-created corporations.<sup>41</sup>

The legal treatment of these entities has been mixed, but in most instances, at the very least, constitutional limits and protections are said to apply to these types of entities.<sup>42</sup> For example, in 1995, the Supreme Court held that Amtrak—an entity expressly recognized by Congress as nongovernmental, but created by statute and controlled by executive-branch appointees—was not relieved from upholding First Amendment restrictions.<sup>43</sup> Except for its title as "nongovernmental," Amtrak was fulfilling a governmental purpose—by statute—and therefore subject to the same restrictions as any governmental entity.<sup>44</sup> The Supreme Court remanded the case for the district court to apply First Amendment principles to Amtrak's refusal to display the plaintiff's advertisement.<sup>45</sup>

For the most part, "[c]ourts have been receptive to the inclusion of government agencies and government corporations as part of the

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"primarily directed to stabilizing the economy and to making distress loans to farm, homeowners, banks, and other enterprises").

37. See, e.g., *id.* (discussing the creation of the Reconstruction Finance Corporation during the Great Depression to essentially make and funds loans to banks and struggling companies; later the RFC would be authorized to create its own entities).

38. *Id.* at 389.

39. *Id.* at 390.

40. *Id.*

41. DAVID E. LEWIS & JENNIFER L. SELIN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 58 (2012) ("Many also claim that the promises of expertise and bipartisanship have not been realized, arguing that these agencies no longer attract the very best persons, and the moderate and bipartisan composition of boards has been undermined by the increasing appointment of strong partisans or ideologues.").

42. See, e.g., *Lebron*, 513 U.S. at 397 ("That Government-created and -controlled corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself. It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.").

43. *Id.* at 392.

44. *Id.* at 397–98.

45. *Id.* at 399.

government,”<sup>46</sup> when the corporation is created by law and where the government (i.e. Congress) “retains for itself permanent authority to appoint a majority of the directors of that corporation.”<sup>47</sup> For example, most government corporations were (and are) “headed by single administrators selected by the President.”<sup>48</sup> The Appointments Clause, which plays some role in why most government corporations were constructed this way, will be discussed in Part III below. At its broadest interpretation, this constitutional underlay helps ensure proper oversight and accountability of public agencies. As this Comment will show, the lack of this and other protections in some forms of governmental entities raises potential concern.

A. *The History of Federal Accounting Regulation Includes Elements of Outsourcing*

Of a similar strain to the government-created corporations of the twentieth century is the federal government’s outsourcing of rulemaking bodies and standard setters to private entities.<sup>49</sup> Scholars have noted this outsourcing to experts as a widespread theme used “[t]o address the increasing challenges of legislating that governments face in modern societies,”<sup>50</sup> and one way in which governments can hand off the struggle to balance the competing interests among private entities and individuals.<sup>51</sup>

One both economically and politically charged area in which the outsourcing of rules and standards has played a role is accounting and financial reporting.<sup>52</sup> “Throughout most of history, accounting standards

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46. Margit Cohn, *Tension and Legality: Towards a Theory of the Executive Branch*, 29 CAN. J.L. & JURIS. 321, 331 (2016) (citing *Lebron*, 513 U.S. 374 and *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010) as but two examples of this sort of inclusion). In 1998, the Office of Management and Budget (OMB) under President Clinton updated and revised its OMB Circular A-119 on the “federal use and development of voluntary standards.” OMB, Circular No. A-119, 63 Fed. Reg. 8546 (Feb. 19, 1998). In relevant part it stated, “All federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical.” *Id.* at 8554. This circularity may have some impact on the courts’ treatment of these entities as well.

47. *Lebron*, 513 U.S. at 400.

48. Selin, *supra* note 41, at 57.

49. Walter Mattli & Tim Büthe, *Accountability in Accounting? The Politics of Private Rule-Making in the Public Interest*, 18 GOVERNANCE: AN INT’L J. POL’Y, ADMIN., & INSTITUTIONS 399 (2005) (“[P]ublic authority and regulatory functions have been delegated to (or effectively been acquired by) highly specialized *private* actors, creating new forms of public-private governance.”).

50. Andreas M. Fleckner, *FASB and IASB: Dependence Despite Independence*, 3 VA. L. & BUS. REV. 275, 276–77 (2008) (arguing that one “idea of [] democracy is that an individual is vested with power because she is elected by the people, not because she is the most knowledgeable”).

51. Mattli & Buthe, *supra* note 49, at 403.

52. *Id.* at 400.

[were] a product of self-regulation.”<sup>53</sup> With the enactment of the landmark legislation in 1933 and 1934—the Securities Exchange Act—however, Congress “directed the SEC to determine the form and content of financial statements.”<sup>54</sup> In doing so, Congress delegated the authority to the SEC—an independent public agency—to create financial reporting standards.<sup>55</sup> The resulting standards are called GAAP. GAAP tells companies how, where, and when to record and disclose financial transactions in their financial statements. Then—in theory—“[i]nvestors, lenders, and other users of financial information rely on financial reporting based on GAAP to make decisions about how and where to provide financing, and to help financial markets operate as efficiently as possible.”<sup>56</sup>

It is worth noting here that the SEC is the federal agency tasked with regulating financial statements because of its general role and purpose in the federal government. The SEC’s stated mission “is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”<sup>57</sup> In serving this mission, the SEC regulates financial statements by recognizing GAAP and by requiring audits of public company financial statements.<sup>58</sup>

Beginning in 1938, the SEC decided to hand over its authority to create financial statement standards to private entities in the accounting profession, recognizing the previously private standards as critical elements of the government’s control over financial regulation.<sup>59</sup> Instead of using its rulemaking authority to craft accounting standards, the SEC would—and continues to—recognize private standard-setters as authoritative and enforce their standards accordingly.

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53. Ochoa, *supra* note 7, at 498.

54. *Id.*; Securities Act of 1934, Pub. L. No. 73–291, 48 Stat. 881.

55. *Id.*; see also Mattli & Buthe, *supra* note 49, at 407.

56. *About GAAP*, FIN. ACCT. FOUND., [https://www.accountingfoundation.org/jsp/Foundation/Page/FAFBridgePage&cid=1176164538898#section\\_2](https://www.accountingfoundation.org/jsp/Foundation/Page/FAFBridgePage&cid=1176164538898#section_2) [<https://perma.cc/87E6-N42Q>].

57. *What We Do*, U.S. SECURITIES & EXCHANGE COMMISSION, *supra* note 11.

58. See Bart H. Ward, *The Intensification of Federal Oversight of the Accounting Profession*, 28 OKLA. CITY U. L. REV. 211, 214 (2003) (“Since its inception, the SEC has attempted to assist investors by working to assure the reliability of the financial information produced by entities that issue publicly traded securities. In pursuit of this purpose, the SEC requires independent audits of registrants’ financial statements and related matters. This process requires that the registered entity produce financial statements prepared in accordance with generally accepted accounting principles. The financial statements and related disclosures must be accompanied by an independent auditor’s opinion about the fairness of the issuer’s financials. This opinion must be issued by a CPA.”); *In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 478 (S.D.N.Y. 2005) (quoting *In re Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 339 (S.D.N.Y. 2004) (calling the “‘single unified purpose’ of GAAP ‘to increase investor confidence by ensuring transparency and accuracy in financial reporting’”).

59. Mattli & Buthe, *supra* note 49, at 408.

For decades to follow, the SEC's recognition of private accounting standard-setters would mirror the chaos of a hastily-planned family reunion.<sup>60</sup> While the players largely stayed the same, the official "authority" recognized by the SEC continued to change. The Committee on Accounting Procedure (CAP), a rulemaking body within the American Institute of Professional Accountants (AICPA), was the first private entity chosen by Congress to set financial regulation and accounting standards.<sup>61</sup> It was followed about twenty years later by the Accounting Principles Board (APB), another entity under the AICPA, which remained in place until 1972.<sup>62</sup> But, by 1971, the SEC had become aware of the need for a new structure—the accounting industry, its professionals, and those relying on financial statements regulated by the SEC demanded more independence and "constituent representation" from the accounting standard setter.<sup>63</sup> On the recommendation of a committee of private individuals and professionals, the modern state of accounting standards was born.<sup>64</sup> Though established as an entirely private entity (i.e. no government funding or role in the appointment process), FASB was adopted by the SEC in 1973 as the third accounting standard setter for U.S. financial statements.<sup>65</sup> The SEC was apparently mindful that a structure better aligned with democratic ideals was necessary.

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60. The SEC's website states that one of its primary responsibilities is to "oversee private regulatory organizations in the securities, accounting, and auditing fields." *What We Do*, U.S. SECURITIES & EXCHANGE COMMISSION, *supra* note 11. Besides the FASB, the SEC also oversees the Securities Investor Protection Corporation (SIPC), a private, non-profit corporation. *Id.*

61. Mattli & Buthe, *supra* note 49, at 408. *See also* Adam I. Stein et al., *Against Convergence: Mounting a Legal Challenge to FASB's Adoption of International Accounting Standards*, in 6 BLOOMBERG LAW REPORTS—SECURITIES LAW 2, 2 (2002) ("The Committee on Accounting Procedure, . . . was hampered by inadequate research and insufficient credibility.").

62. Mattli & Buthe, *supra* note 49, at 408; *see also* Ochoa, *supra* note 7, at 499 (noting the demise of the APB was "both because of standards promulgated and because of the perception that the APB was dominated by large accounting firms."). *See generally* Stein et al., *supra* note 61 (noting the committee's focus on "one-off questions rather than overarching principles and standards" led to its demise).

63. Ochoa, *supra* note 7, at 499 ("A conference of auditors, preparers, and financial statement users . . . resulted in the creation" of FASB.).

64. Mattli & Buthe, *supra* note 49, at 408.

65. Ochoa, *supra* note 7, at 498; *see also* Bratton, *supra* note 29, at 31–35 (suggesting an entity such as FASB was needed because "absent a centralized standard setter producing user-directed and mandated GAAP, reporting would suffer from the structural imbalances that otherwise impair the corporate governance system," and noting that FASB's structure relative to the SEC "works in practice because the FASB's appointment structure and rules of independence assure that its members pursue its formal mission [e.g. and not politics] rather than constituent or personal interests").

### III. STRUCTURE OF THE FINANCIAL ACCOUNTING STANDARDS BOARD

Given the history of accounting standards, it is not surprising that at least one scholar has noted that FASB should be a model for other industries in terms of using private standards as public regulations.<sup>66</sup> Whether the FASB model is appropriate or wise to follow is a question largely unanswered. Therefore, this Comment seeks to draw on the history of accounting regulation in order to shed light on best practices for pursuing environmental standard-setting should the trend of private standards continue.

The FASB is structured under the Financial Accounting Foundation (FAF), a not-for-profit board originally made up of nine members which describes itself as “the independent, private-sector organization with responsibility for, [amongst other things,] [e]stablishing and improving financial accounting and reporting standards.”<sup>67</sup> FAF was created in 1972, but in 1973 delegated authority to promulgate accounting standards to FASB. “The [original] premise” of the structure of FAF and FASB “was to promote independence in the hopes that this would ground decisions in objective data.”<sup>68</sup> Though the federal government was central to its recognition, independence from Congress also remained an important focus.<sup>69</sup> Since its creation, FAF has remained responsible for appointing seven full-time members to FASB,<sup>70</sup> while the SEC, Congress, and the President have no role in appointing FASB members.<sup>71</sup> In contrast to the volunteer and part-time members of the CAP and APB, FASB members are paid and “are required to sever connections with the firms or institutions they served before joining the Board.”<sup>72</sup> The Board members serve up to two five-year terms.<sup>73</sup> Today, the seven-member board

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66. Bratton, *supra* note 29, at 6 (“It commends a more relaxed approach, both reminding us that private actors, properly incented and deployed, can regulate successfully, and asking us to think of governance as a cooperative undertaking among public and private actors jointly confronting problems needing solutions.”).

67. *Financial Accounting Foundation*, FIN. ACCT. STANDARDS BOARD, [https://www.fasb.org/faf/faf\\_info.shtml](https://www.fasb.org/faf/faf_info.shtml) [<https://perma.cc/DD8W-VTDV>]. Note that today’s FAF includes fourteen to eighteen trustees responsible for direction, oversight, and the appointment of members to, amongst its other bodies, the FASB. See *FAF Trustees and Committees*, FIN. ACCT. FOUND., <https://www.accountingfoundation.org/trustees> [<https://perma.cc/8PR2-ZCX7>].

68. Ochoa, *supra* note 7, at 500.

69. *Id.* at 501.

70. *About the FASB*, FIN. ACCT. STANDARDS BOARD, <https://www.fasb.org/facts/> [<https://perma.cc/4Q7D-TVTR>] [hereinafter *About the FASB*].

71. Ochoa, *supra* note 7, at 500.

72. *About the FASB*, *supra* note 70.

73. *Id.*

contains two former public accounting professionals, one academic, two “financial statement user[s],” and one “public company preparer.”<sup>74</sup>

As alluded to above, U.S. GAAP is the set of accounting principles to which U.S. public company financial statements must conform.<sup>75</sup> In order to be listed on a securities exchange in the United States, a company must present its periodic financial statements in U.S. GAAP<sup>76</sup>—in other words, GAAP is a common financial language.<sup>77</sup> To understand its reach and impact, consider that as of 2005, U.S. GAAP “consist[ed] of over 2,000 individual accounting and reporting pronouncements.”<sup>78</sup> Companies must conform their financial statements to each of these, covering a broad range of topics from how to record revenues,<sup>79</sup> to how to account for leases,<sup>80</sup> to how to record service contracts for intangible assets such as assets used for cloud computing.<sup>81</sup>

To illustrate the breadth and impact of GAAP, consider that GAAP dictates the manner in which companies must depreciate their physical assets (such as buildings, equipment, property, etc.) for presentation on their balance sheets (the value of the asset) and income statements (the “expense” each period for depreciation).<sup>82</sup> Commonly, GAAP requires straight-line depreciation.<sup>83</sup> That means, every company to which GAAP applies must calculate a monthly depreciation expense for each of its assets as follows: (Purchase cost of the

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74. *Id.*

75. Israel Klein, *The Gap in the Perception of GAAP*, 54 AM. BUS. L.J. 581, 595 (2017); Pearson, *supra* note 10, at 84.

76. Pearson, *supra* note 10, at 84.

77. Klein, *supra* note 75, at 582 (noting one “legal perception that sees GAAP as a ‘dictionary’”).

78. Pearson, *supra* note 10, at 85.

79. FIN. ACCOUNTING STANDARDS BD., ACCOUNTING STANDARDS UPDATE NO. 2017-14, INCOME STATEMENT—REPORTING COMPREHENSIVE INCOME (TOPIC 220), REVENUE RECOGNITION (TOPIC 605), AND REVENUE FROM CONTRACTS WITH CUSTOMERS (TOPIC 606) (2017), [https://www.fasb.org/jsp/FASB/Document\\_C/DocumentPage?cid=1176169471253&acceptedDisclaimer=true](https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176169471253&acceptedDisclaimer=true) [<https://perma.cc/A39V-ZJ68>].

80. FIN. ACCOUNTING STANDARDS BD., ACCOUNTING STANDARDS UPDATE NO. 2018-10, CODIFICATION IMPROVEMENTS TO TOPIC 842, LEASES (2018), [https://www.fasb.org/jsp/FASB/Document\\_C/DocumentPage?cid=1176170939898&acceptedDisclaimer=true](https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176170939898&acceptedDisclaimer=true) [<https://perma.cc/4C7Z-QYMK>].

81. FIN. ACCOUNTING STANDARDS BD., ACCOUNTING STANDARDS UPDATE NO. 2018-15, INTANGIBLES—GOODWILL AND OTHER—INTERNAL-USE SOFTWARE (SUBTOPIC 350-40): CUSTOMER’S ACCOUNTING FOR IMPLEMENTATION COSTS INCURRED IN A CLOUD COMPUTING ARRANGEMENT THAT IS A SERVICE CONTRACT (2018), [https://www.fasb.org/jsp/FASB/Document\\_C/DocumentPage?cid=1176171138858&acceptedDisclaimer=true](https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176171138858&acceptedDisclaimer=true) [<https://perma.cc/BB6V-PU43>].

82. *See, e.g.*, FIN. ACCOUNTING STANDARDS BD., ACCOUNTING STANDARDS UPDATE NO. 2014-08, PRESENTATION OF FINANCIAL STATEMENTS (TOPIC 205) AND PROPERTY, PLANT, AND EQUIPMENT (TOPIC 360) (2014); Howard B. Levy, *Depreciable Asset Lives*, CPA J. (Sept. 2016), <https://www.cpajournal.com/2016/09/08/depreciable-asset-lives/> [<https://perma.cc/QK5R-FWUW>].

83. Levy, *supra* note 82.

asset—any expected salvage value) / expected useful life of the asset.<sup>84</sup> For example, assume public company A purchases a laptop for its newest employee for \$1000. It expects the laptop to be useful for five years, and worth \$100 in salvage value after five years of use. GAAP would require the company to record monthly for five years an expense of \$15  $((\$1000 - \$100) / (5 \text{ years} \times 12 \text{ months}))$ , and to decrease the laptop's "book value" by a corresponding \$15 each month so that at the end of five years, the laptop's book value is \$100. While physical depreciation is (most of the time) one of GAAP's most straightforward standards, keep in mind that GAAP requires depreciation to be recorded in this manner for *every* asset, and similarly dictates recording standards for nearly any other type of activity carried out by a company. Hopefully, this short and simple example shows the broad latitude of U.S. GAAP for American companies.

#### A. *The Sarbanes-Oxley Act Leads to the SEC's Acceptance of FASB*

Today, more than fifty years since its initial recognition by the SEC, the "FASB is *the* standard-setter for U.S. GAAP; unless and until the SEC says otherwise, U.S. public companies must report financial information prepared using U.S. GAAP."<sup>85</sup> In 2002, the SEC passed the Sarbanes-Oxley Act of 2002 (SOX)—another landmark act for public companies and financial regulation.<sup>86</sup> The Act came in response to multibillion dollar accounting scandals by Enron and WorldCom, and in the simplest terms, "required public companies to make sure their internal controls against fraud were not full of holes."<sup>87</sup> Despite its broad sweeping regulatory changes, the law was passed, nearly unanimously by the House and Senate, and signed by President George W. Bush.<sup>88</sup> For auditors of public companies, SOX meant not only would auditors continue to opine on their clients' financial statements, but would now also issue an opinion on their clients' internal controls over financial reporting though could play no role in enacting or enforcing such internal controls.<sup>89</sup>

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84. *Id.*

85. Stein et al., *supra* note 61, at 3; *see also* Ward, *supra* note 58, at 214 ("The determination and definition of generally accepted accounting principles rest with the Financial Accounting Standards Board (FASB), which is an independent private sector body.").

86. The Sarbanes-Oxley Act, Pub. L. No. 107-204 (2002).

87. Floyd Norris, *Goodbye to Reforms of 2002*, N.Y. TIMES (Nov. 5, 2009), <https://www.nytimes.com/2009/11/06/business/06norris.html> [<https://perma.cc/NSL6-99N5>].

88. *Id.*

89. Daniel L. Goelzer, *Sarbanes-Oxley and the Post-Enron Environment: Auditor Oversight, Address at Columbia University Law Center*, CTR. JAPANESE LEGAL STUD. (Aug. 2, 2005), [https://pcaobus.org/News/Speech/Pages/08022005\\_GoelzerSOXAuditorOversight.aspx](https://pcaobus.org/News/Speech/Pages/08022005_GoelzerSOXAuditorOversight.aspx) [<https://perma.cc/62QT-E4RV>]. SOX section 203 also added an audit partner rotation requirement for public companies to achieve "a fresh look to the independence of the audit function." SEC Strengthening the Commission's Requirements Regarding Auditor Independence, 17 C.F.R. pts.



Additionally, SOX established formal oversight over the accounting profession via the PCAOB—the Public Company Accounting Oversight Board.<sup>90</sup> Similar to the SEC’s authority to recognize accounting standards in the 1930s, the creation of the PCAOB put the government in a more authoritative role within the accounting industry.<sup>91</sup> SOX also required a “private entity” be recognized as the accounting standards setting body,<sup>92</sup> and required the board of said entity to be funded under the Act—which meant it would be funded by the public companies themselves.<sup>93</sup> Interestingly, at the time, FASB was “the only standard-setting body that . . . fulfill[ed] [the] requirements” of the law.<sup>94</sup>

In 2003, the FASB was again adopted by the SEC as the private accounting standards entity—an entity the SEC was required to name by

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210, 240, 249, 274 (2003). Under the rule, “the lead and concurring partners [are required] to rotate after five years and, upon rotation, [are] subject to a five-year ‘time out’ period.” *Id.* This rotation requirement appears to be a commitment of at least the Big Four public accounting firms. *See, e.g.*, KPMG, ENHANCING AUDIT QUALITY AND TRANSPARENCY 9 (2017), <https://home.kpmg/content/dam/kpmg/us/pdf/2018/01/734095-enhancing-audit-quality-v6web.pdf> [<https://perma.cc/UQA8-KMV2>] (discussing the SEC’s requirements and “its Partner Rotation System, which assists in monitoring assignments of certain personnel and initiating personnel changes on entities” it audits).

90. Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1007 (2005).

91. *Id.*

92. Pub. L. No. 107-204 § 108 (2002). The statutory requirements for the SEC to follow in recognizing an accounting standard setting body under SOX are that it:

- (i) [I]s organized as a private entity;
  - (ii) has, for administrative and operational purposes, a board of trustees (or equivalent body) serving in the public interest, the majority of whom are not, concurrent with their service on such board, and have not been during the 2-year period preceding such service, associated persons of any registered public accounting firm;
  - (iii) is funded as provided in section 109 of the Sarbanes-Oxley Act of 2002;
  - (iv) has adopted procedures to ensure prompt consideration, by majority vote of its members, of changes to accounting principles necessary to reflect emerging accounting issues and changing business practices; and
  - (v) considers, in adopting accounting principles, the need to keep standards current in order to reflect changes in the business environment, the extent to which international convergence on high quality accounting standards is necessary or appropriate in the public interest and for the protection of investors; and
- (B) that the Commission determines has the capacity to assist the Commission in fulfilling the requirements of subsection (a) and section 13(b) of the Securities Exchange Act of 1934, because, at a minimum, the standard setting body is capable of improving the accuracy and effectiveness of financial reporting and the protection of investors under the securities laws.

93. 15 U.S.C. § 77s(b)(1)(A)(iii) (2012).

94. Fleckner, *supra* note 50, at 286 (noting that when SOX was passed, and still today, “[t]he only standard-setting body that currently fulfills these requirements is the FASB”); *see also id.* at 295 (noting a letter from the Chairman and President of the Financial Accounting Foundation to the Commissioner of the SEC commenting on \$64,000 spent by FASB for lobbying to Congress).

SOX.<sup>95</sup> FASB remains the sole entity today to fulfill SOX's requirements, and remains the SEC's recognized accounting standard setter for purposes of U.S. public companies.<sup>96</sup> "U.S. public companies must report financial information prepared using U.S. GAAP, as set by FASB."<sup>97</sup> As it turns out, the 2003 policy statement recognizing FASB effectively means "FASB standards are authoritatively considered to be U.S. GAAP without the SEC taking any affirmative action."<sup>98</sup> The SEC has read broadly its authority to adopt a private entity's standards, and does so "wholesale, not on a standard-by-standard basis after analyzing each FASB pronouncement on its merits."<sup>99</sup> What's resulted is a "highly deferential attitude" of the SEC with respect to FASB.<sup>100</sup>

To highlight the SEC's "wholesale adoption" of FASB standards as authoritative, one scholar has made the observation that in contrast to the European Union's accounting standard-setter—which find no authority for their standards "*unless* the European Commission expressly adopts them"—FASB standards "are given authority *unless* the Securities and Exchange Commission intervenes."<sup>101</sup> This contrast, in addition to many other points which will be raised later in this Comment, is one reason why, despite FASB's claim to be a "private entity," FASB is subject to constitutional and administrative law limits.<sup>102</sup>

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95. Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Securities Act Release No. 33-8221, Exchange Act Release No. 34-47743, 70 Fed. Reg. (Apr. 25, 2003); *see also* Bratton, *supra* note 29, at 24 (arguing that with the recognition of FASB's as the SEC's chosen private entity and with FASB's public funding, it became more fit for government as the SEC is doing the funding, not private parties).

96. *See* Fleckner, *supra* note 50, at 286.

97. Stein et al., *supra* note 61, at 3; *see* SEC Regulation S-X, 17 C.F.R. § 210.4-01(a)(1) (2019) (Rule 4-01(a)(1) requiring financial statements filed with the SEC to follow generally accepted accounting principles, i.e. GAAP, or otherwise "presumed to be misleading or inaccurate.").

98. Stein et al., *supra* note 61, at 3 (emphasis omitted).

99. *Id.* at 4.

100. Ochoa, *supra* note 7, at 514. The SEC's "What We Do" page of its website states that its Office of the Chief Accountant "works closely with the Financial Accounting Standards Board, whose accounting standards the Commission has recognized as generally accepted for purposes of the federal securities laws" as one of its main roles. *What We Do*, U.S. SECURITIES & EXCHANGE COMMISSION, *supra* note 11.

101. Fleckner, *supra* note 50, at 291 (the author goes on to argue that the U.S. approach is better insulated from unnecessary political pressures: "it is much easier to lobby the European Commission to not adopt a standard than to lobby the Securities and Exchange Commission to reject a standard").

102. *See supra* note 42 (demonstrating the courts' treatment of private governmental entities with an example concerning Amtrak).

#### IV. CONSTITUTIONAL AND JUDICIAL TREATMENT OF FASB AND GAAP

Despite its recognition by the SEC and the role of its standards, minimal constitutional claims have been mounted against FASB, its structure, and its function as a quasi-governmental agency. To date, there has only been one “challenge to FASB on the basis that it is subject to federal agency requirements.”<sup>103</sup> Additionally, “[w]hether the Administrative Procedure Act (APA) and other administrative law tools apply to FASB has received only minimal treatment in legal scholarship.”<sup>104</sup> Because the unconstitutionality of FASB depends on the existence of a harm “sufficiently imminent”<sup>105</sup> the minimal legal challenges and scholarship to FASB could mean that such harm has yet to exist (or to last long enough to warrant a judicial challenge).<sup>106</sup> However, certain legal doctrines, as will be explored in this section, are worth considering with regard to FASB to foreshadow potential legal challenges for private environmental standard-setters.

##### A. *FASB’s Structure Raises Appointment and Removal Concerns*

One potential constitutional issue with FASB—and often with other entities of its kind—arises under the Appointments Clause of the Constitution. This clause gives the President the power to appoint “Officers of the United States” and Congress the power to appoint “inferior Officers.”<sup>107</sup> FASB’s seven-member board, as mentioned, is appointed solely by the FAF—an entity whose own board is *not* appointed by the SEC, President, or any government official. FASB members may be considered “officers” of the United States for Appointments Clause purposes if (1) the scope of their powers gives them legal authority of the federal government, and (2) their role can be fairly considered “continuing” employment.<sup>108</sup>

In regard to the second prong, the FASB board members almost surely enjoy employment that is continuing because their five-year term is more

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103. Ochoa, *supra* note 7, at 497.

104. *Id.* at 496.

105. Stein et al., *supra* note 61, at 6.

106. *See, e.g.*, Ochoa, *supra* note 7, at 506 (pointing to challenges in bringing suit against FASB).

107. U.S. CONST. art. II, § 2, cl. 2 (“[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

108. *Lucia v. S.E.C.*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 2044, 2051 (2018).

than “temporary” or “episodic.”<sup>109</sup> Whether FASB members’ powers give them “legal authority” in the government, however, is a debatable question.<sup>110</sup> To illustrate, in *Lucia v. S.E.C.*,<sup>111</sup> the Supreme Court considered SEC administrative law judges’ (ALJs’) abilities to take testimony, conduct trial, enforce compliance orders, and make binding and final decisions as indicative of the power to exercise legal authority.<sup>112</sup> The Court held the administrative hearing led by the SEC ALJ for Mr. Lucia was unconstitutional because the ALJ had not been appointed in a manner dictated by the Appointments Clause.<sup>113</sup> It is uncertain what functions of FASB would matter should a court be faced with deciding whether its entire board is subject to the language of the Appointments Clause, but at least its seven-member board may be considered.

A related consideration to the President’s appointment power is their removal power, which concerns the President’s ability to fire members of the Executive Branch at will or for cause.<sup>114</sup> This power is not expressly mentioned in the Constitution, but is inferred from the Vesting and Take Care Clauses.<sup>115</sup> Under the Supreme Court’s decision in *Morrison v. Olson*,<sup>116</sup> any limit on the President’s ability to remove “Officers” in the Executive Branch must not trample on his ability to “faithfully execute[]” the laws.<sup>117</sup> In practice, this means many officers of the U.S. are not directly removable by the President, but are, properly, directly removable by other high-level governmental actors,<sup>118</sup> and therefore indirectly removable by the President through the threats of removal.

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109. *Id.* at 2052 (2018).

110. *See, e.g.*, Ochoa, *supra* note 7, at 522–23 (noting “potential challengers could take a cue from *Free Enterprise Fund* and challenge the appointment and removal of FASB members,” and continuing to assert that “[i]f FASB is a federal agency subject to administrative law doctrines, its current member selection and removal process is unconstitutional”).

111. \_\_\_ U.S. \_\_\_, 138 S. Ct. 2044 (2018).

112. *Id.* at 2053.

113. *Id.* at 2049–56 (their appointment was not within the Appointments Clause’s criteria because the SEC’s ALJs were selected by “other staff members” of the SEC, as opposed to the SEC’s Commissioner, for example, or another officer).

114. *See* Martin, *supra* note 20, at 293–94.

115. U.S. CONST. art. II, §§ 2–3; *see also* *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (“The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.”).

116. 487 U.S. 654 (1988).

117. *Id.* at 689–93.

118. *Id.*

In *Free Enterprise Fund v. PCAOB*,<sup>119</sup> the Supreme Court considered the removal structure of the PCAOB—a related entity to FASB.<sup>120</sup> Therein, it held the PCAOB’s “double for-cause” structure of removal violated the constitutional removal principles.<sup>121</sup> Whereas PCAOB members were removable “for cause” by members of the SEC (who themselves were also removable by the President “for cause”), none of the seven members of FASB’s Board are even directly removable by the SEC or the President.<sup>122</sup> Scholars have said that the lack of the ability for the President to directly appoint, control, or remove any member of FASB—despite their ability to set authoritative GAAP for U.S. public companies, a form of both legal and “continuing” authority—raises appointment and removal concerns.<sup>123</sup>

### B. *FASB’s Structure Raises Questions of the Non-Delegation Doctrine*

A second potential constitutional issue with FASB comes from Congress’s all but explicit recognition of it as the authoritative standard-setting body for U.S. public companies.<sup>124</sup> The nondelegation doctrine is a product of Article I of the Constitution, which states: “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”<sup>125</sup> Though the Supreme Court recognizes that Congress may not pass its strictly legislative powers to another branch, it has also recognized that “the Constitution does not ‘deny[] to the Congress the necessary

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119. 561 U.S. 477 (2010).

120. *Id.* at 485.

121. *Id.* at 495–508.

122. *About the FASB*, FIN. ACCT. STANDARDS BOARD, <https://www.fasb.org/facts/> [<https://perma.cc/4Q7D-7VTR>] (stating that the FAF Board of Trustees appoint Board members, who are eligible to serve up to ten years).

123. *See generally* *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (suggesting that FASB may present similar appointment and removal concerns as those held to exist with the closely-related agency, PCAOB); Stein et al., *supra* note 61, at 5 (“The FASB members are neither appointed nor removable by the President, yet the SEC treats FASB as wielding greater sovereign authority than the PCAOB, with FASB’s pronouncements having automatic legal effect.”). *But see* Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J.L. & BUS. 485, 490–91 (2009) (understanding a broad and liberal reading of the Constitution to mean that, in understanding the PCAOB specifically, “[t]he Constitution permits Congress to create administrative agencies with diverse structures, including entities that function under the control and authority of these agencies. The separation of powers and the Appointments Clause limit Congress in only one particular way: Congress cannot retain any legal right to participate *itself* directly in the appointment or removal of officials who execute and implement federal law, nor can Congress retain any right to veto (or in any other way directly participate in) an agency’s policymaking or adjudication decision. Because Congress has granted itself none of these powers over the Board or the SEC, the Act is constitutional”).

124. *See* Ochoa, *supra* note 7, at 516.

125. U.S. CONST. art. I § 1. *See also* *Gundy v. United States*, \_\_ U.S. \_\_, 139 S. Ct. 2116, 2123 (2019).

resources of flexibility and practicality [that enable it] to perform its functions.”<sup>126</sup>

With this flexibility and practicality in mind, Congress has long been allowed to delegate to the executive branch (i.e. agencies), via statute, the ability to implement and enforce the laws, while it must retain its ability to *make* law.<sup>127</sup> According to the Court, a statutory delegation from Congress to an administrative agency is constitutional so long as it includes an “intelligible principle” under which the agency can act.<sup>128</sup> In practice, this principle means “a delegation is permissible if Congress has made clear to the delegee ‘the general policy’ he must pursue and the ‘boundaries of [his] authority.’”<sup>129</sup> In other words, so long as the statute—under which Congress transfers powers from itself to a part of the executive branch—includes a “general policy” by which the executive branch should implement and enforce the laws passed by Congress, the statute, and the transfer of power, pass constitutional muster. Since 1935, the Court has applied this standard, but has never shut down a statute for lack of an intelligible principle.<sup>130</sup> In 2019, a plurality of the Court—albeit a very thin plurality because Justice Kavanaugh took no part in the decision—said it was “clear” that the standard is “not demanding.”<sup>131</sup>

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126. *Gundy*, 139 S. Ct. at 2123 (internal quotations omitted); see also *United States v. Grimaud*, 220 U.S. 506, 520 (1911) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1982)) (internal quotations omitted) (“The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.”).

127. *Gundy*, 139 S. Ct. at 2123.

128. See, e.g., *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 475 (2001) (applying the “intelligible principle” doctrine and remanding to the court of appeals “for reinterpretation that would avoid a supposed delegation of legislative power”); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (finding Congress wrongly delegated legislative power because there was “no policy,” “no standard,” and “no rule . . . of circumstances and conditions in which the transportation” regulations were to be applied).

129. See *Gundy*, 139 S. Ct. at 2129 (quoting *Am. Power & Light Co. v. Sec. & Exch. Comm’n.*, 329 U.S. 90, 105 (1946)). The uncertainty of the future of the Court’s position on the non-delegation doctrine should not be understated. See, e.g., Jeannie S. Gersen, *The Supreme Court is Now One Vote Away from Changing How the U.S. is Governed*, NEW YORKER (July 3, 2019), <https://www.newyorker.com/news/our-columnists/the-supreme-court-is-one-vote-away-from-changing-how-the-us-is-governed> [<https://perma.cc/CTB4-YBAL>] (commenting that because of the thin plurality, Justice Kavanaugh’s absence from any decision, and Justice Alito’s concurrence, “[w]e are now explicitly on notice that the Court will likely abandon its long-standing tolerance of Congress delegating broadly to agencies”).

130. See *Gundy*, 139 S. Ct. at 2129 (2019) (“Only twice in this country’s history (and that in a single year) have we found a delegation excessive—in each case because ‘Congress had failed to articulate *any* policy or standard’ to confine discretion.” (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

131. *Id.* This belief was also emphasized by the dissent in *Gundy*, wherein Justice Gorsuch, with whom Chief Justice Roberts and Justice Thomas joined, chose to revisit—and seemingly redefine—

Commonly, the non-delegation doctrine is studied and used in the context of Congress's delegation to clearly public agencies. However, the nondelegation doctrine similarly applies in the context of Congress's delegation to private entities with governmental authority.<sup>132</sup> In fact, some scholars suggest these types of delegations "raise issues that are even more troubling than those stemming from congressional delegations to administrative agencies."<sup>133</sup> Delegation by Congress to private entities has been challenged under the nondelegation doctrine before, but not in the context of FASB.<sup>134</sup> Although the SEC recognizes FASB as a "private entity" for purposes of accounting standards, that label is not necessarily controlling, or indicative of any outcome under a test of the nondelegation doctrine.<sup>135</sup> And in any case, the statute that controls the authority for FASB to issue accounting standards gives the SEC at least some guidelines for how to choose such an entity.<sup>136</sup>

The United States Supreme Court has applied the doctrine in distinct forms to both public and private entities.<sup>137</sup> However, the lack of muster to the doctrine since 1935 means challenges under it—even challenges to

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the Court's long-standing precedent on the nondelegation doctrine. In discussing the development of the doctrine, he plainly stated, "[t]his mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution." *Id.* at 2139. Justice Alito, though concurring with the plurality, wrote that if a majority of the Court were willing to reconsider its "extraordinarily capacious standards," he would "support that effort." *Id.* at 2131. Whether a future Court—or future case—may spur a majority of the Court to revisit its standards under the nondelegation doctrine is a question outside the scope of this Comment.

132. *See, e.g.,* Stein et al., *supra* note 61, at 3 (noting in the case of FASB, "[t]here is a strong argument that the SEC's policy of *prospectively* granting blanket recognition to future FASB accounting rule changes violates Article I of the Constitution and the private non-delegation doctrine by impermissibly delegating rulemaking authority to a private, unaccountable body without sufficient oversight by either the SEC or Congress").

133. Nagy, *supra* note 90, at 1058–59 (noting that "even nebulous phrases such as 'in the public interest' and 'just and reasonable' qualify as standards that are 'intelligible,'" and cautioning that "court decisions, including by the Supreme Court, demonstrate that governmental oversight of private decisionmaking will generally insulate Congress's private delegations from constitutional challenge").

134. *See* United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975); Noblecraft Indus., Inc. v. Sec'y of Labor, 614 F.2d 199 (9th Cir. 1980) (OSHA adopts *some* private standards); Todd & Co, Inc. v. Sec. & Exch. Comm'n, 557 F.2d 1008 (3d Cir. 1977); R.H. Johnson & Co. v. Sec. & Exch. Comm'n, 198 F.2d 690 (2d Cir. 1952).

135. Nagy, *supra* note 90, at 1040.

136. *See supra* note 92.

137. *See, e.g.,* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (holding that the authority to regulate hours and wages of coal industry works conferred from Congress to a majority of coal producer's and miners was "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business"); *see also* Nagy, *supra* note 90, at 1058–59 (highlighting differences in the application of the nondelegation doctrine to private and public entities).

Congress's delegation of power to private agencies—are, for lack of a better word, challenging.<sup>138</sup>

One scholar has noted the dangers of delegations to private entities—even those that do pass the test of an “intelligible principle.”<sup>139</sup> In her analysis of the PCAOB, the sister entity to the FASB and similarly born out of SOX, she writes,

The greater risks posed by Congress ceding public power to private entities have prompted some scholars to speculate that federal courts may be less reluctant to invalidate private delegations, particularly if the congressional delegation involved “core” governmental powers. But court decisions, including by the Supreme Court, demonstrate that governmental oversight of private decisionmaking will generally insulate Congress's private delegations from constitutional challenge.<sup>140</sup>

Congress did not create an intelligible principle for FASB to follow, and arguably, neither has the SEC.<sup>141</sup> Instead, with SOX, Congress delegated to the SEC to adopt a private entity to be the authoritative standard-setter for public company financial reporting.<sup>142</sup>

In the minds of some, FASB created its own sort of “intelligible principles” in its adoption of its Conceptual Framework.<sup>143</sup> Since adopting the Conceptual Framework in 1978, FASB has amended the Framework's “Concepts Statements” a handful of times.<sup>144</sup> Per its website, the purpose of the Framework's “Concepts” is,

to serve the public interest by setting the objectives, qualitative characteristics, and other concepts that guide selection of economic phenomena to be recognized and measured for

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138. Nagy, *supra* note 90, at 1058 (noting that in the Court's recent history, “even nebulous phrases such as ‘in the public interest’ and ‘just and reasonable’ qualify as standards that are ‘intelligible’” under the doctrine).

139. *Id.* at 1057.

140. *Id.* at 1059.

141. Bratton, *supra* note 29, at 15 (“The constituents needed to come to a basic agreement, if not on the terms of particular standards, then at a more general level on the substantive mission of the enterprise. The founders left this constitutional task to the agency itself.”).

142. Pub. L. No. 107-204 § 108 (2002) (directing for the adoption of a private entity); *see supra* note 65.

143. *The Conceptual Framework*, FIN. ACCT. STANDARDS BOARD, <https://www.fasb.org/jsp/FASB/Page/BridgePage&cid=1176168367774> [<https://perma.cc/L5T9-B3YM>]; *see also* Bratton, *supra* note 29, at 29–30 (suggesting that the Framework is the way by which FASB can “proceed above politics” because “it made a political decision” of its own via the Framework); Ochoa, *supra* note 7, at 509 (“FASB, on its own, created the Conceptual Framework as to mirror the intelligible principle required by the nondelegation doctrine.”).

144. *Concept Statements*, FIN. ACCT. STANDARDS BOARD, <https://www.fasb.org/jsp/FASB/Page/PreCodSectionPage&cid=1176156317989> [<https://perma.cc/77QP-CM6S>].



financial reporting and their display in financial statements or related means of communicating information to those who are interested. . . . [And to] guide the Board in developing sound accounting principles and provide the Board and its constituents with an understanding of the appropriate content and inherent limitations of financial reporting.<sup>145</sup>

If the purpose of the nondelegation doctrine, as many say, is to ensure public agencies have a guiding principle by which to adopt policy, the FASB's Framework may be a step in the right direction. It proclaims to be a "guide" to FASB and "to serve the public interest" in providing a measuring stick by which the public can judge FASB's work. The issue in terms of the non-delegation doctrine, however, seems to be that FASB's Framework is entirely self-created; "intelligible principle[s]" under constitutional principles are created by Congress and created by statute, suggesting under this doctrine, FASB is ripe for challenge.<sup>146</sup> The issue, it seems, may be finding the proper plaintiff to challenge the SEC's "delegation" to FASB.<sup>147</sup>

### C. *FASB May be Subject to the APA*

Beyond the question of the constitutionality of Congress's delegation of governmental status—or at least recognition—to a private entity comes the question of what governmental limits and restraints apply to private entities with public authority. One of the biggest, if not the biggest, influences on federal agency action is the Administrative Procedure Act. Amongst other matters, the APA impacts an agency's rulemaking abilities, disciplinary proceedings, and the way by which the agency interacts with the public and other functions of the Executive branch.<sup>148</sup>

Whether the Administrative Procedure Act and other administrative law tools apply to FASB has received only minimal treatment in legal scholarship, and as referenced above, virtually no direct treatment by the courts.<sup>149</sup> That the APA may apply to FASB, however, is not an unthinkable premise. In *Lebron*,<sup>150</sup> the Court addressed whether the APA could apply to non-governmental entities, (such as the government-

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145. *Id.*

146. See generally Stein et al., *supra* note 61.

147. Ochoa, *supra* note 7, at 506. The hurdles for plaintiffs to bring suit challenging the FASB is beyond the scope of this article.

148. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 303–09 (West Acad. Pub., 7th ed., 2016).

149. Ochoa, *supra* note 7, at 496.

150. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

created corporations discussed in Part I), and held it could.<sup>151</sup> However, it found the application of the APA to a non-governmental entity was a matter “within Congress’s control,” because it was a matter that “impose[d] obligations or confer[red] powers upon Government entities.”<sup>152</sup> However, this holding diverged from its holding on whether Congress could determine whether constitutional limits would apply to nongovernmental agencies.<sup>153</sup>

In contemplating the applicability of the APA to the PCAOB, scholars have suggested that Congress’s recognition of the nongovernmental board, via the SEC, could be enough to warrant applicability of the APA.<sup>154</sup> Whether the formal application of the APA to FASB would be enough to bring about legal challenges, or any sort of substantial changes, however, remains questionable.<sup>155</sup> Because FASB does not yet clearly fall under the APA, judicial review may differ when a court is faced with challenges to FASB (for better or for worse).<sup>156</sup>

## V. RECOMMENDATION FOR FUTURE PUBLIC ENVIRONMENTAL STANDARD-SETTING

As noted, since the early 1900s, the federal government has recognized the benefits of outsourcing elements of its regulatory, rulemaking, and standard-setting roles to private players.<sup>157</sup> Its reasons for doing so generally come from a place of good faith, and in some cases, an honest recognition that in the particular arena, the government “really does have limited resources and attention span.”<sup>158</sup> Aside from any good intentions

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151. *Id.* at 393.

152. *Id.* at 392.

153. *Id.* at 391–93 (holding that, although Amtrak’s organic statute expressed it would “not be an agency” or establishment of the government, it was not within the power for “Congress to make the final determination of Amtrak’s status as a Government entity for purposes of determining the constitutional rights of citizens affected by its action. . . . The Constitution constrains governmental action . . . under whatever congressional label”). The Court held that “Government-created and -controlled corporations are (for many purposes at least) part of the Government itself” not merely because of “past practice and understanding,” but because of “reason itself.” *Id.* at 397. And going on to say, “[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.” *Id.*

154. Nagy, *supra* note 90, at 1062–65.

155. *See, e.g.,* Ochoa, *supra* note 7, at 511–14 (analyzing, under a variety of approaches, whether FASB could be a governmental entity).

156. The scope of judicial review over administrative agencies is outside the scope of this comment. *See, e.g.,* Ochoa, *supra* note 7, at 510 (“FASB has enjoyed the respect and deference due to an expert agency, but to date it has not been subject to the oversight requirements that attempt to ensure accountability for agency decision making.”).

157. *See supra*, Part I; Maurer, *supra* note 15, at 302 (“American industry has practiced self-governance since the Nineteenth Century.”).

158. Maurer, *supra* note 15, at 336.

in outsourcing, there are identifiable benefits of recognizing private entities as authoritative. These should not be ignored. In the case of FASB, for example, the SEC's recognition of its standards as U.S. GAAP promotes reliability and consistency across U.S. public company financial reporting.<sup>159</sup> Reliable and consistent financial statements, in turn, support the SEC's overall mission of protecting investors and ensuring fairness in financial markets.

However, the accompanying costs and consequences, including legal ones, overwhelm the prospect of outsourcing governmental authority in some scenarios. This Comment argues that environmental regulations may present one of those scenarios. Drawing upon the costs and consequences of the SEC's wholesale adoption of FASB as the authoritative accounting standards setter in the U.S., the federal government should be cautious before wholesale adopting any current private environmental standards.

#### *A. There are Reasons for Public Recognition of Private Regulations*

As stated, there are both costs and benefits of the government's recognition of private standard-setting bodies as authoritative. The benefits of the public recognition of private regulations include better input from experts,<sup>160</sup> potential cost cutting,<sup>161</sup> and uniform standards across an industry.<sup>162</sup> In the case of FASB, for example, the SEC was able to draw upon the experience, knowledge, and expertise of a well-established and widely-recognized private body by simply issuing a policy statement recognizing FASB as the authoritative private entity under SOX.<sup>163</sup> In other words, it did not have to recruit, establish, or adopt any of the experience, knowledge, and expertise itself, nor did it have to appoint the body's members or source its funding.

Additionally, it had been recommended to the SEC that the accounting standard-setter remain private to "draw on private sector expertise and

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159. Andrew F. Kirkendall, *Filling in the GAAP: Will the Sarbanes-Oxley Act Protect Investors from Corporate Malfeasance and Restore Confidence in the Securities Market*, 56 SMU L. REV. 2303, 2307 (2003) ("To ensure comparability, reliability, and materiality of the financial statements of a company, the statements must be prepared in accordance with GAAP.").

160. *See, e.g.*, Schindler, *supra* note 15, at 315 (referencing the better input of experts in the context of municipal adoption of LEED standards).

161. *See, e.g., id.* at 328 (discussing how "[p]rivate organizations have an incentive to" achieve lower costs).

162. *Id.* at 289 (the widespread adoption of LEED standards is creating "a uniform, nationally promulgated *private* regulatory scheme," but the author highlights many problems).

163. Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Securities Act Release No. 33-8221, Exchange Act Release No. 34-47743, 70 Fed. Reg. (Apr. 25, 2003).

avoid susceptibility to political pressure.”<sup>164</sup> And to FASB’s benefit, the SEC’s recognition of its standard-setting authority gave it increased fiscal independence from its supporters.<sup>165</sup> Finally, it almost goes without saying that without the recognition of FASB, the SEC would be without its uniform standards, and arguably without a feasible way to create U.S. GAAP—the uniform standard for U.S. public companies.<sup>166</sup>

*B. There are Significant Issues with Private Regulations Being Wholesale Adopted by the Federal Government*

The benefits of the SEC’s adoption of a private entity to be the authority for U.S. GAAP are not without consequence. Though few legal challenges have been posed against FASB, the potential for said challenges is, if nothing else, mounting.<sup>167</sup> As the need for, and the breadth of, U.S. GAAP increases, so too do the potential conflicts with the FASB’s current structure within the broader federal government. First, FASB’s structure raises appointment and removal concerns within broader separation of powers doctrines. As scholars have noted, that FASB members are not appointed by the SEC, the President, or any government official raises concern that the President’s ability to control any member of FASB is more attenuated than the Constitution allows for.<sup>168</sup> It was a structure similar to this that caused the Supreme Court to reject the PCAOB’s appointment and removal structure in *Free Enterprise*.<sup>169</sup>

Second, FASB’s position within the SEC’s broad regulatory scheme raises concern that despite its claim to be a “private entity,” FASB enjoys much deference and all-but-automatic legal recognition when it comes to its standards.<sup>170</sup> As one scholar has noted: “private standard setters bear no responsibility to the public and, therefore, are free to advocate for the commercial interests of their members and their clients, all at a great

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164. Bratton, *supra* note 29, at 13.

165. *See, e.g.*, Bratton, *supra* note 29, at 24 (“Upon the SEC’s approval of the application, the FASB became publicly funded and ceased collecting contributions. Technically speaking, it is no longer beholden to its constituents.”).

166. Stein et al., *supra* note 61, at 3.

167. The strategies for mounting successful litigation against FASB, as well as reasons for why challenges have been limited at this point are outside the scope of this Comment. *See generally*, Stein et al., *supra* note 61.

168. *See, e.g.*, Stein et al., *supra* note 61, at 5, (“The FASB members are neither appointed nor removable by the President, yet the SEC treats . . . FASB’s pronouncements [as] having automatic legal effect.”).

169. *See supra* notes 120–123. *See also* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

170. Fleckner, *supra* note 50, at 291 (noting that FASB’s standards are given automatic and legal effect *unless* the SEC decides otherwise).

public expense.”<sup>171</sup> While this may allow some beneficial insulation from normal political lobbying,<sup>172</sup> it veers awfully close to violating the “intelligible principle” standard of the nondelegation doctrine.<sup>173</sup> This means that individuals and other private entities wanting to challenge FASB or certain standards within U.S. GAAP face not only high burdens in federal court,<sup>174</sup> but uncertainty about whether the standard political process can address their concerns. Instead of this uncertainty, there should be adoption by elected or appointed officials—through what one scholar has called a “legitimate process.”<sup>175</sup>

Finally, despite FASB’s attempts to craft Rules of Procedure in line with APA requirements, its creation of standards “inherently involves very different elements than does the creation of a law or statute to be imposed upon that industry by the government.”<sup>176</sup> FASB’s “Rules of Procedure” require public “notice and comment” when FASB promulgates a new standard and make FASB’s meetings “open” to the public—both common features to the APA’s requirements.<sup>177</sup> However, scholars have noted that FASB “has essentially been allowed to . . . cherry pick from agency requirements in its operations” and, in turn, “it has not been subject to the oversight requirements that attempt to ensure accountability for agency decision making.”<sup>178</sup> The APA—one tool to ensure accountability—prescribes a public and open process by which individuals can observe, play roles in, and voice opinions about the creation of regulations.<sup>179</sup> Despite FASB’s attempt to model the APA’s

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171. Acevedo, *supra* note 18, at 65.

172. *Id.*

173. Nagy, *supra* note 90, at 1058.

174. Ochoa, *supra* note 7, at 506.

175. *See, e.g.*, Schindler, *supra* note 15, at 291–92 (defining “legitimate process” as a “regime . . . [to] ensure that the regulations implemented by local governments are subject to a promulgation and enforcement process that contains elements of transparency, democracy, and openness to public participation or that provides notice and an opportunity for voice and exit” and noting that such a process “better address[es] process concerns, including democracy, transparency, notice, voice, and exit”).

176. *Id.* at 289–90, 325 (“[C]aution[ing] against local requirements that force private developers to comply with nationally promulgated, private, voluntary LEED standards as opposed to publicly created ones.”).

177. Ochoa, *supra* note 7, at 509.

178. *Id.* at 510.

179. TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1973) (noting two of the four purposes of the Administrative Procedure Act include (1) “To require agencies to keep the public currently informed of their organization, procedures and rules,” and (2) “To provide for public participation in the rule making process”). For excellent discussion of the need for a democratically public process in promulgating regulation, see Nina A. Mendelson, *Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 747 (2014) (“[R]egulatory beneficiaries need notice, since they are affected by and may make choices based on the content of the standards.

public and open process, without the *formal* and *required* applicability of that process, an element of accountability for the quasi-private entity is—or at least has the potential to be—lost.<sup>180</sup>

C. *The Same Issues Will Exist if the Federal Government Adopts Private Environmental Standards*

The observable consequences of the SEC's wholesale adoption of (1) a private entity as authoritative and (2) its standards as legally binding shed light into potential consequences should private environmental standards be adopted in a similar manner. In some instances, governmental adoption of private standards and enforcement is already well-established.<sup>181</sup> For example, the early adopters of the private regulatory scheme, LEED (Leadership in Energy and Environmental Design) green building standards have been overwhelmingly municipalities.<sup>182</sup> In another recently studied example—Congress's adoption of portions of the Food Safety Act in response to concerns about lettuce safety—one scholar noted some primary reasons why an industry may support federal action of that kind.<sup>183</sup> These included goals to (1) “restore consumer confidence,” (2) “preempt the ongoing development of potentially stricter . . . standards,” and (3) “extend the same requirements . . . to level the playing field.”<sup>184</sup>

Despite these encouraging goals, some scholars who have studied the municipal and broader government adoption of these, and other, private standards have noted that the resulting ordinances “are fraught with practical and legal problems.”<sup>185</sup> For example, private standards do not always allow for full, public participation in creating and implementing standards, and remain voluntary for companies, individuals, and

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And law needs to be widely, publicly accessible so that the public can invoke important mechanisms of accountability, including voting, contacting Congress, participating in agency procedures, and seeking judicial review.”).

180. Ochoa, *supra* note 7, at 510 (“FASB has enjoyed the respect and deference due to an expert agency, but to date it has not been subject to the oversight requirements that attempt to ensure accountability for agency decision making.”).

181. *But see* Madhusoodanan, *supra* note 5 (discussing examples of government adoption of private standards including Bolivia's recent adoption of Forest Stewardship Council (FSC) standards when reforming its forestry code).

182. Schindler, *supra* note 15, at 289, 312 (“Cities have begun to incorporate or refer to the LEED standards in their municipal codes.”).

183. Margo J. Pollans, *Regulating Farming: Balancing Food Safety and Environmental Protection in a Cooperative Governance Regime*, 50 WAKE FOREST L. REV. 399, 417 (2015).

184. *Id.* at 417.

185. Schindler, *supra* note 15, at 290 (“[C]aution[ing] against local requirements that force private developers to comply with nationally promulgated, private, voluntary LEED standards as opposed to publicly created ones.”).

organizations to follow, despite being widespread.<sup>186</sup> These reflections indicate that even initially, adopting a national, one-size-fits-all model from an established private entity can address the difficulties of enforcing different regulations based on the state or locality, but doing so right off the bat can ignore “the diverse range of political, environmental, and socioeconomic conditions found at the state and local levels.”<sup>187</sup> For example, one set of standards may not wholly address the needs of a jurisdiction with severe weather conditions or a jurisdiction whose economy is centered upon one industry.<sup>188</sup> These diverse conditions are what formal processes like that of the APA seek to recognize. When a government—federal, state, or local—adopts a private entity’s standards and processes for establishing standards, the ability for individuals to challenge and add input to the process lessens significantly.<sup>189</sup>

Besides these broader issues of private standard adoption, the same core issues with the SEC’s recognition of FASB will threaten any adoption of private environmental standard-setters by the federal government. First, adoption of private authorities will overlook the Constitution’s appointment and removal standards. Without effective Executive branch oversight on the otherwise-private standard-setters, the President’s, and their Executive branch’s, power is left too attenuated from the private standard-setter’s power. As commentators have noted in the accounting world, private standard-setters may be insulated from elected officials on whom the public can place their reliance. Second, the adoption of already-created standards (which haven’t gone through a formal political process), assumes the private entity’s standards address all of the federal government’s, and public’s, concerns. Without a more “legitimate process”<sup>190</sup> for adopting standards, the broad implications of environmental regulation and policy may be difficult to recognize—especially when the social concerns and values underlying environmental policy are so diverse.

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186. *Id.* at 290.

187. David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1848–50 (2008) (arguing for an adaptive model of federalism where automatic federal preemption is unfavorable to the “unique virtues . . . [of] a dynamic system of overlapping federal-state jurisdiction has for environmental policymaking”).

188. *See, e.g., id.* at 1848–49 (illustrating how varying economic, climate, and political values may be addressed by an adaptive federalism structure).

189. Maurer, *supra* note 15, at 330 (“We argue that many private standards are designed to please a shadow electorate of consumers and employees.”).

190. Schindler, *supra* note 15, at 291–92.

## CONCLUSION

The federal government has outsourced functions for over one hundred years, and it has done so in a variety of fashions for a variety of topics. One such fashion of outsourcing is its adoption of existing private standards, which in turn gives public authority to otherwise private standard-setting entities. Within the regulation of accounting, the government has historically relied on private standard-setters to do the majority of its work since this kind of regulation became a federal priority. More recently, and arguably more notably, environmental regulations have become a priority, both publicly and privately. This Comment predicts the government may consider adopting environmental regulations in a manner similar to the regulation of accounting. Said differently, it may consider the wholesale adoption of existing private regulations to become public, legally binding regulations. If it considers doing so, this Comment raises the legal considerations in taking that route. The necessity for environmental regulations—which will reach as many, if not more, companies and persons as accounting regulations—demands a more legitimate governmental process to become legally binding. This Comment points to the democratic elements that may be missing should another path be taken.