

# Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure

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## Introduction

March 21, 2022, represented a watershed moment in the history of the Securities and Exchange Commission (the SEC). On that day, for the first time in its history, the SEC proposed specific mandated disclosure rules related to climate change.<sup>1</sup> Among other things, the proposed rules would require companies to include climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that “are reasonably likely to have a material impact on [their] business, results of operations, or financial condition.”<sup>2</sup> The proposed rules are remarkable, first and foremost, because many in the business community continue to vehemently insist that environmental and climate change information is not material.<sup>3</sup> Indeed, as one SEC Commissioner notes,

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1. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21335 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249); Press Release, Sec. & Exch. Comm’n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46> [<https://perma.cc/F9NQ-E79P>].

2. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21334 (summarizing the newly proposed climate-related disclosure requirements).

3. See Nicola M. White, *SEC Drops Hints About ESG Rule in Retorts to Vague Disclosures*, BLOOMBERG L. (Mar. 18, 2022, 3:45 AM), <https://news.bloomberglaw.com/securities-law/sec-scrutiny-of-big-companies-sheds-light-on-climate-priorities> [<https://perma.cc/RD7W-8YMS>] (noting that in correspondence between the SEC and a select group of major companies, “almost all the companies—25 out of 26—said climate risk wasn’t a material issue”); Nicola M. White, *Companies Resist SEC Climate-Disclosure Requests as Rules Stall*, BLOOMBERG L. (Feb. 14, 2022, 3:56 PM), <https://news.bloomberglaw.com/securities-law/companies-resist-sec-climate-disclosure-requests-as-rules-stall?context=article-related> [<https://perma.cc/CF8N-MRHJ>] (noting company

corporations that responded to the SEC's most recent requests for enhanced climate-related disclosure "generally have stated that the requested disclosures by SEC staff were largely immaterial and inappropriate for inclusion in SEC filings."<sup>4</sup> The proposed rules are also remarkable because historically the SEC has been resistant to mandating disclosure around climate and environmental issues based on the view that such information strayed beyond strictly financial concerns and thus should not be the subject of mandated disclosure.<sup>5</sup> This resistance is exemplified by the current lack of any SEC disclosure mandates for climate change.<sup>6</sup> The proposed rules have sparked considerable controversy and pushback including allegations that the rules violate the First Amendment, impose too many costs on public corporations, and focus on "social" or "political" issues beyond the SEC's mission.<sup>7</sup> Thus, it is not entirely clear whether a final rule will emerge and, if a final rule emerges, what form such a rule will take. Nonetheless, the proposed rules represent a significant and historical occurrence in the lifecycle of the SEC's disclosure regime.

The proposed rules reflect the dramatic increase in investor and other stakeholder attention on environmental, social, and governance (ESG) matters in which climate matters are prominently featured.<sup>8</sup> On the one hand,

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pushback around SEC request for more climate-related disclosure); *see also* Hester M. Peirce, *We Are Not the Securities and Environment Commission—At Least Not Yet*, SEC. & EXCH. COMM'N (Mar. 21, 2022), <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321> [<https://perma.cc/AHH5-3F9J>] (arguing existing disclosure rules cover material climate-related risks and that the proposed rule will undermine the SEC's regulatory framework).

4. Peirce, *supra* note 3.

5. *See infra* note 155 and accompanying text.

6. The existing rules require companies to disclose material information, and thus, to the extent companies believe certain climate-related risks are material, such rules can be viewed as requiring climate-disclosure. *See* Peirce, *supra* note 3 (positing that because companies are already required to disclose material risks, the existing rules encompass climate-related information that is material). However, this general materiality requirement is distinct from a mandate that requires disclosure of specific climate-related issues. *See id.* (noting this difference and criticizing the specific mandate as imposing a "preset checklist based on regulators' prognostication of what should matter").

7. *See, e.g.,* Peirce, *supra* note 3 (arguing that the climate change disclosure proposal exceeds the SEC's statutory authority, implicates First Amendment concerns, and raises issues of costs, and that the proposed disclosure could inspire "more socially and politically contentious disclosures"); Letter from Julia D. Mahoney and Paul G. Mahoney, Univ. of Virginia Sch. of L., to Chair Gensler, U.S. Sec. and Exch. Comm'n (June 1, 2021), <https://www.sec.gov/comments/climate-disclosure/cl112-8855236-238441.pdf> [<https://perma.cc/6WPP-MWZA>] (noting that ESG disclosures may reflect an effort to achieve political and social goals); Jay Clayton & Patrick McHenry, *The SEC's Climate-Change Overreach*, WALL ST. J. (Mar. 20, 2022, 4:37 PM), <https://www.wsj.com/articles/the-secs-climate-change-overreach-global-warming-risks-lawmakers-investors-market-data-11647801469> [<https://perma.cc/BG3M-THCR>] (criticizing the proposed rule as a policy proposal and arguing the SEC lacks authority to set policy).

8. For a definition of ESG, *see infra* note 35 and accompanying text. The term ESG first arose in a 2004 study facilitated by the U.N. Global Compact and was endorsed by a group of twenty financial institutions. Lily Lieberman, *Why Your Company Should Be Paying Attention to ESG*,

calls for corporations to attend to ESG matters are not new.<sup>9</sup> However, historically such calls primarily were associated with a relatively small group of investors and special interests groups, enabling many in corporate law to characterize the notion that corporations should focus on ESG as aberrational or out of step with conventional corporate law principles.<sup>10</sup> Today, calls for corporations to focus on ESG increasingly come from a broad range of influential and decidedly mainstream members of the corporate and investment communities, including investors previously unaligned with, if not outright opposed to, advocating for a corporate focus on ESG.<sup>11</sup> Members of that community increasingly use their voting power and engagement efforts to pressure corporations to demonstrate a concrete commitment to ESG.<sup>12</sup> While there continue to be critics of ESG, such behavior reflects the

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C2FO (Apr. 1, 2021), <https://legacy-site.c2fo.com/en-in/resources/why-your-company-should-be-paying-attention-to-esg/> [<https://perma.cc/CQD2-72BG>].

9. See *infra* notes 34–41 and accompanying text.

10. See David M. Silk, Sabastian V. Niles & Carmen X.W. Lu, *ESG, Sustainability, and CSR: Governance and the Role of the Board*, in *THE LAWYER'S CORPORATE SOCIAL RESPONSIBILITY DESKBOOK* 9, 9 (Alan S. Gutterman, Margaret M. Cassidy, Travis Miller & Ashley C. Winter eds., 2019) (noting that interest in ESG issues has increased in recent years); Rick A. Fleming & Alexandra M. Ledbetter, *Making Mandatory Sustainability Disclosure a Reality*, 50 ENV'T L. REP. 10647, 10648 (2020) (noting that historical demand for ESG disclosure was viewed as part of the agenda of specific interest groups or groups on the periphery).

11. See *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334, 21340–21341 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (detailing increased investor demand for climate disclosure); Evie Liu, *Fund Companies Are Paying More Attention to ESG Matters, Survey Shows*, BARRON'S (July 22, 2021, 5:15 AM), <https://www.barrons.com/articles/fund-companies-are-paying-more-attention-to-esg-matters-survey-shows-51626914577> [<https://perma.cc/JP3N-9ME3>] (same); *Why ESG Is Here to Stay*, MCKINSEY & CO. (May 26, 2020), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/why-esg-is-here-to-stay> [<https://perma.cc/2LX3-LFNB>] (same).

12. See Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1322–33 (2019) (discussing the normative shift toward increased shareholder activism and engagement); see also Liu, *supra* note 11 (noting the ability of large investors to pressure corporations to focus on ESG issues); Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT'L L. 249, 261 (2019) (observing that “[m]ainstream investors are . . . beginning to view ESG information as material to voting decisions” and as part of sound corporate governance); Era Anagnosti, Colin J. Diamond, Maia Gez, Danielle Herrick, Seth Kerschner, Laura Mulry, Henrik Patel, Victoria Rosamond, Clare Connellan & Emily Holland, *ESG Disclosure Trends in SEC Filings*, WHITE & CASE (Aug. 13, 2020), <https://www.whitecase.com/insight-alert/esg-disclosure-trends-sec-filings#takeaways> [<https://perma.cc/9PGW-DE3M>] (noting that investor pressure for ESG disclosure has resulted in a pronounced trend towards greater ESG disclosure). In the 2021 proxy season, there were a record number of shareholder proposals, the majority of which focused on ESG matters. See *2021 Proxy Season Review Part 1: Rule 14a-8 Shareholder Proposals*, SULLIVAN & CROMWELL LLP 1 (July 27, 2021) [hereinafter *SC 2021 Proxy Report*], <https://www.sullcrom.com/files/upload/sc-publication-2021-Proxy-Season-Review-Part-1-Rule14a-8.pdf> [<https://perma.cc/GYY9-PET5>] (reporting that in the first half of 2021, shareholders submitted the highest number

growing consensus around the importance of ESG within the corporate and investment communities.<sup>13</sup>

The recent rise in corporate focus on ESG has inevitably coalesced into demands for greater ESG disclosure. Our federal securities laws are premised on the value of disclosure.<sup>14</sup> Timely, accurate, and meaningful disclosure provides valuable information to investors and other corporate stakeholders, enabling them to make informed voting and investment decisions while also shaping corporate behavior, albeit indirectly.<sup>15</sup> Disclosure also serves as an important mechanism for oversight related to disclosed activities and thus for holding corporations accountable for the commitments they make with respect to those activities.<sup>16</sup> It is no surprise, therefore, that increased

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of proposals since the firm began following this data, and noting that for the first time a majority were environmental and social/political proposals). Not only did shareholder support for such proposals increase, but many ESG proposals were withdrawn and implemented due to investor pressure, particularly pressure from the big three asset managers. *See id.* at 7, 21 (reporting an increase in the rate of withdrawal for social/political and environmental proposals, and noting that for environmental proposals, companies have preferred to work directly with proposal advocates given interest by BlackRock, Vanguard, and State Street in climate-related issues).

13. *See* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 *GEO. L.J.* 923, 932 (2019) (describing increased support in ESG proposals by mainstream investors); Jill E. Fisch, Keith L. Johnson & Cynthia A. Williams, *Why Corporate Sustainability Disclosure Has Become a Mainstream Demand* (unpublished manuscript) (on file with New York University School of Law), <https://www.law.nyu.edu/sites/default/files/Corporate%20Sustainability%20Disclosure%20by%20Fisch%20Johnson%20Williams%209.18.pdf> [<https://perma.cc/6M74-TXL3>] (noting that the world's largest asset manager has recognized the value of ESG disclosure and advocated for required ESG disclosure); *Corporations' New Purpose—To Serve All Stakeholders Not Just Shareholders*, *INDUS. WK.* (Aug. 20, 2019) [hereinafter *All Stakeholders Not Just Shareholders*], <https://www.industryweek.com/leadership/article/22028107/corporations-new-purpose-to-serve-all-stakeholders-not-just-shareholders> [<https://perma.cc/K8HB-UGLL>] (noting that “[i]t seems the corporate world is all in”); Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, *HARV. BUS. REV.*, May–June 2019, at 107, 108, <https://hbr.org/2019/05/the-investor-revolution> [<https://perma.cc/9H8K-F5M8>] (observing that ESG issues are “almost universally” at the top of the minds of executives); *see also* Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 *YALE J. ON REGUL.* 625, 633–34 (2019) (analyzing the effect of environmental disclosure on stock price of polluters and how that disclosure, and price impact, can act as a pressure to reduce emissions).

14. *See* *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477–78 (1977) (noting that the fundamental purpose of the federal securities laws rest on a “philosophy of full disclosure”); *LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 62 (1914) (suggesting that information on a corporation is important to assessing its value).

15. *See* *BRANDEIS, supra* note 14, at 62 (describing value of access to company information); *ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY* 293–94 (1934) (noting the importance of disclosure to the market’s ability to assess company value); Donald C. Langevoort, *Seeking Sunlight in Santa Fe’s Shadow: The SEC’s Pursuit of Managerial Accountability*, 79 *WASH. U. L.Q.* 449, 453 (2001) (detailing ways in which securities disclosure promotes accountability); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 *HARV. L. REV.* 1197, 1212 (1999) (noting disclosure was advocated as a solution to banker-accountability concerns).

16. *See* Hillary A. Sale, *Disclosure’s Purpose*, 107 *GEO. L.J.* 1045, 1065–66 (2019) (discussing the effect external observation has on internal corporate decision-making).

attention on ESG has prompted investor and other stakeholder pressure for ESG disclosure. Disclosure advocates believe that ESG disclosure will not only provide valuable information about a corporation's ESG activities, but also will better enable investors and other stakeholders to monitor corporations' ESG activities and hold corporations accountable for their behavior related to ESG.<sup>17</sup>

ESG disclosure demands have translated into a dramatic rise in voluntary ESG disclosure.<sup>18</sup> The most recent Governance & Accountability Institute study revealed that 90% of S&P 500 companies voluntarily published stand-alone ESG reports in 2019, up from 86% in 2018 and 20% in 2011.<sup>19</sup> Another study found that more than 90% of S&P 500 companies voluntarily disclosed some type of ESG information on their websites.<sup>20</sup>

However, dissatisfaction with voluntary ESG disclosures has prompted a strenuous push for mandated ESG disclosure.<sup>21</sup> This dissatisfaction centers around two primary concerns: (1) the lack of comparability associated with voluntary ESG disclosures resulting from the fact that too many corporations publish different ESG information in different formats using different terminology and different metrics, and (2) the lack of accuracy and overall reliability of voluntarily disclosed ESG information.<sup>22</sup> Rather than seek to address these shortcomings within the context of the voluntary disclosure regime, the dominant response to the shortcomings of voluntary ESG disclosure is to use them as *the* rationale for the need to mandate ESG disclosure.<sup>23</sup> The SEC's proposed rules mandating climate-related

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17. See *infra* note 85 and accompanying text.

18. See *infra* subpart I(B).

19. GOVERNANCE & ACCOUNTABILITY INST., INC., 2020 FLASH REPORT RUSSELL 1000 4 (2020), <https://www.ga-institute.com/research/ga-research-collection/flash-reports/2020-russell-1000-flash-report.html> [<https://perma.cc/4KXL-NJGD>]; see also *90% of S&P 500 Index Companies Publish Sustainability Reports in 2019, G&A Announces in Its Latest Annual 2020 Flash Report*, GLOBENEWSWIRE (July 16, 2020), <https://www.globenewswire.com/news-release/2020/07/16/2063434/0/en/90-of-S-P-500-Index-Companies-Publish-Sustainability-Reports-in-2019-G-A-Announces-in-its-Latest-Annual-2020-Flash-Report.html> [<https://perma.cc/L653-H2HE>] (noting that in 2011, only 20% of companies were publishing sustainability information) Fisch, *supra* note 13, at 944 (noting that in 2016, 82% of S&P 500 companies published sustainability reports).

20. SOL KWON, STATE OF INTEGRATED AND SUSTAINABILITY REPORTING 2018 27 (Heidi Walsh ed., 2018), [https://siinstitute.org/special\\_report.cgi?id=77](https://siinstitute.org/special_report.cgi?id=77) [<https://perma.cc/H4DD-3ZCU>].

21. See *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334, 21343 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (noting that other jurisdictions are reforming their disclosure regimes to require more mandatory reporting).

22. See *infra* notes 121–146 and accompanying text.

23. See Fisch, *supra* note 13, at 929–30 (proposing a mandated “‘Sustainability Discussion and Analysis’ . . . as part of an issuer’s annual report to shareholders” and requiring directors to certify the accuracy of those disclosures); Virginia Harper Ho, “*Comply or Explain*” and the Future of Nonfinancial Reporting, 21 LEWIS & CLARK L. REV. 317, 321 (2017) (arguing for the SEC to adopt a “comply or explain” approach for ESG disclosure).

disclosures therefore represent a “win” for ESG and climate change advocates who believe disclosure is vital for ensuring better ESG information and accountability but have found fault with voluntary ESG disclosure.

This Article argues that the potential for some form of mandatory ESG disclosure should not cause us to dismiss the continued importance of voluntary ESG disclosure. Importantly, this Article agrees with those who assert that some form of mandatory ESG disclosure is vital for ensuring better corporate accountability around ESG, and for ensuring that investors and stakeholders have the information they need to understand, evaluate, and monitor ESG issues, including the veracity of a corporation’s commitment to ESG.<sup>24</sup> However, this Article strenuously insists that the advent of mandatory ESG disclosure must not be used as a basis for ESG advocates to dismiss the continued importance of voluntary ESG disclosure.

This Article situates the current ESG disclosure discourse in the context of the broader debate about public disclosure and then advances a novel reconceptualization of that debate. Indeed, there is a long-standing and robust debate about the benefits of voluntary versus mandated disclosure.<sup>25</sup> That

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24. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21335 (noting that the proposed climate mandate is aimed at providing “consistent, comparable, and reliable—and therefore decision-useful—information to investors to enable them to make informed judgements about the impact of climate-related risks on current and potential investments”).

25. Compare Colleen Honigsberg, Robert J. Jackson, Jr. & Yu-Ting Forester Wong, *Mandatory Disclosure and Individual Investors: Evidence from the JOBS Act*, 93 WASH. U. L. REV. 293 (2015) (finding that less disclosure results in less trading immediately after an IPO but that difference quickly disappears, and thus positing that mandates on disclosure after an IPO are less likely to have significant impacts on individual investor participation), Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81 (2007) (arguing that mandatory disclosure results in socially beneficial effects such as increased competition and concluding that “the case for mandatory disclosure is strong for virtually all countries around the world”), Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335 (1999) (arguing for rejection of issuer choice systems because they would reduce disclosure levels to significantly below a socially optimal level), Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 564–65 (1984) (discussing information’s role in resolving uncertainty and noting that traders seek information to reduce uncertainty), and John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984) (proposing that mandatory disclosure increases market efficiency and reduces corporate agency costs), with Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998) (suggesting the mandatory federal securities regime is ineffective and arguing for a competitive federalism approach to securities regulation, including a market-oriented approach to disclosure requirements), Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047 (1995) (contending that the purpose of mandatory disclosures is to fill agency gaps that arise between corporate promoters and investors and between managers and shareholders), and S.J. Grossman & O.D. Hart, *Disclosure Laws and Takeover Bids*, 35 J. FIN. 323 (1980) (suggesting that the disclosure requirements of the Securities and Exchange Act impede the takeover bid process and decrease managerial efficiency). See also Frank H. Easterbrook &

debate pits mandatory disclosure against voluntary disclosure.<sup>26</sup> This Article argues that this historical debate misses the mark and sets up a false disclosure choice, at least in the context of the modern public disclosure environment. By treating disclosure as static and invariable, that debate fails to appropriately recognize the dynamic, evolving, and connected nature of the modern disclosure environment. In that environment, all publicly available disclosure is a part of a disclosure continuum; voluntary disclosure and mandatory disclosure are inextricably linked on that continuum.<sup>27</sup> Moreover, in the modern disclosure environment, voluntary disclosure supplements and extends mandatory disclosure, creating an important feedback loop between voluntary and mandatory disclosure.<sup>28</sup> Thus, recognizing and embracing the value of mandatory disclosure does not render voluntary disclosure superfluous or inconsequential.

This Article's disclosure reconceptualization seeks to shift the discourse around disclosure from a misguided binary debate<sup>29</sup> towards a recognition of the inextricable link between mandatory and voluntary disclosure and the corresponding need to value and embrace both forms of disclosure. To advance this thesis, this Article coins the phrase "dynamic disclosure" to refer to the notion that disclosure is interconnected and exists on a continual and contemporaneous feedback loop. This Article uses the concept of dynamic disclosure to highlight the folly of dismissing the importance of voluntary disclosure simply because some form of mandatory disclosure may materialize.

Although novel, normative support for this Article's reconceptualization of disclosure can be found in recent scholarship regarding the impact of the Internet and the modern social media environment on public corporations.<sup>30</sup> Such scholarship explains that this environment creates a unique form of corporate "publicness" precisely because the environment ensures that all publicly disclosed information is continuously and readily accessible to the public.<sup>31</sup> Viewed from this lens,

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Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984) (critiquing both proponents and opponents of mandatory disclosure requirements, but contending that the current system is favorable to state or judicially run alternatives).

26. See, e.g., Coffee, *supra* note 25, at 752 (suggesting that while there would still be substantial disclosure without mandatory disclosure, mandatory disclosure should also reduce corporate governance agency costs); Fox, *supra* note 25, at 1340–41 (refuting arguments in favor of issuer choice and advancing argument for mandatory disclosure); Easterbrook & Fischel, *supra* note 25, at 683–85 (suggesting that mandating disclosure is redundant because self-interested firms will provide disclosure to resolve investor concerns).

27. See *infra* Part III.

28. See *infra* section III(D)(1).

29. See *infra* subpart II(B).

30. See *infra* notes 305–21 and accompanying text.

31. See *infra* notes 299–325 and accompanying text.

the phrase dynamic disclosure reflects a recognition that the modern publicness of corporate information has eroded the walls between voluntary and mandated disclosure, making it impossible *not* to consider voluntary disclosure as an integral aspect of mandated disclosure and the overall disclosure regime in which corporations operate.<sup>32</sup>

Support for this Article's reconceptualization can also be found in SEC guidance and enforcement behavior as well as the behavior of the corporate community. That guidance and behavior reveals that the SEC and corporate community have come to view voluntary and mandatory disclosure as interwoven, which clearly supports this Article's thesis around the connected nature of voluntary and mandatory disclosure and the modern disclosure environment.<sup>33</sup>

By emphasizing the connectedness of disclosure, this Article's assertions have important repercussions for the narrative around disclosure and our treatment of the disclosure landscape. This Article uses ESG disclosure to illuminate those repercussions. The experience with ESG disclosure supports this Article's claims around dynamic disclosure and the interconnected nature of mandatory and voluntary disclosure. That experience reveals the manner in which voluntary ESG disclosure provides benefits that cannot be fully replicated by mandatory ESG disclosure. That experience also reveals that voluntary ESG disclosure has served as an important springboard for mandatory ESG disclosure and likely will serve as a vital gap-filler for mandatory ESG disclosure, both complimenting and extending such disclosure. By emphasizing dynamic disclosure in the context of ESG disclosure, this Article underscores the importance of ensuring that we maintain a robust voluntary ESG disclosure regime even as we push for mandatory ESG disclosure. In the context of ESG disclosure, this Article's assertions around dynamic disclosure mean we must not only continue to rely on voluntary ESG disclosure, but also that we must take affirmative steps to ameliorate any shortcomings associated with voluntary ESG disclosure because such disclosure will remain a critical part of the overall ESG disclosure landscape.

Part I of this Article examines the rise in ESG and the corresponding push for ESG disclosure, along with the rise in voluntary ESG disclosure and the dissatisfaction with such disclosure. Part II illuminates the historical conceptualization of disclosure as a tug-of-war between voluntary and mandatory disclosure. Part II then situates the debate about ESG disclosure within this framework, exploring the manner in which mandatory ESG disclosure has been advanced in response to the dissatisfaction with voluntary ESG disclosure. Part II also discusses the manner in which pending

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32. See *infra* notes 299–325 and accompanying text.

33. See *infra* Part III.



mandatory disclosure may trigger a potential to dismiss the importance of voluntary ESG disclosure. Part III introduces the concept of dynamic disclosure and sets forth this Article's core thesis around the interconnectedness of disclosure. Part III links this Article's thesis to recent scholarship around publicness and the impact of the modern social media on public consumption of information, corporate dissemination of information, and the overall disclosure environment. Part III then relies on the concept of dynamic disclosure to explain why the effort to advance mandatory ESG disclosure should not be used to shift attention away from voluntary ESG disclosure. Part IV concludes.

### I. The ESG Imperative and Push for Disclosure

The term "ESG" covers a range of different groups and activities.<sup>34</sup> As I have indicated elsewhere, the term has three distinct strands: (1) "E" for environmental, which includes issues such as climate change, water usage, recycling, and greenhouse gas emissions, (2) "S" for social, which includes workplace culture and safety, employee demographics and diversity, employee retention, promotion, and turnover, other human capital management issues, political spending, pay equity, human rights, child labor, vendor relations, and supply chain, and (3) "G" for governance, which includes board diversity and composition, majority voting and voting processes, proxy access, special meetings, independent board chair, shareholder engagement and participation, and executive compensation.<sup>35</sup> ESG can be viewed both as a set of metrics for measuring impact and investment, and as a set of issues around which corporations should focus. Irrespective of which view you endorse, the term ESG focuses on issues impacting groups beyond shareholders, including employees, customers, consumers, vendors, community, and broader society.<sup>36</sup> Moreover, while

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34. There is some disagreement around the appropriate label for corporate activities in this area, with some focusing on "EESG" based on the notion that issues concerning employees should not be grouped with other social issues, and others focusing only on "ES" based on the notion that governance issues are not commensurate with environmental and social issues.

35. See Lisa M. Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. (forthcoming 2022) (manuscript at 4) (on file with author) (defining ESG); *Environmental, Social, and Governance Disclosures in Proxy Statements: Benchmarking the Fortune 50*, SIDLEY AUSTIN LLP 2 (Aug. 31, 2021) [hereinafter Sidley Report], <https://inpdf11.onenorth.com/pdfrenderer.svc/v1/abcpdf11/GetRenderedPdfByUrl/Environmental%20Social%20and%20Governance%20Disclosures%20in%20Proxy.pdf?url=https%3a%2f%2fwww.sidley.com%2fen%2finsights%2fnewsupdates%2f2021%2f08%2fenvironmental-social-and-governance-disclosures-in-proxy%3fpdf%3d1%26type%3dletter> [https://perma.cc/A5XP-9VAX] (same).

36. See *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019) [hereinafter *Business Roundtable Statement*], <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [https://perma.cc/2SQE-9DNW]

ESG clearly covers a broad range of issues, the common denominator is a focus on issues beyond strict financial concerns.<sup>37</sup>

The focus on ESG issues is, and has been, uneven. Indeed, in the first part of the decade we witnessed intense investor focus on the “G,” and thus significant pressure for corporations to alter their governance rules and adopt measures such as majority voting, board declassification, elimination of supermajority provisions, and say-on-pay.<sup>38</sup> The past few years have seen renewed focus on the “E” and thus significant attention on climate change, greenhouse gas emissions, and other environmental matters.<sup>39</sup> The summer 2020 racial reckoning that stemmed from police shootings of unarmed Black people, along with COVID-19 and the global pandemic, has led to increased focus on the “S,” and thus increased corporate attention on racial equity, employee demographics, workplace culture, workplace health and safety, and supply chain issues.<sup>40</sup> While the focus on issues connected to ESG has not been uniform, the overarching focus on the collective issues embedded in ESG has risen dramatically.

#### A. *Green as the New Green*

1. *ESG on Mainstreet.*—Interest in ESG has finally migrated to mainstream investors.<sup>41</sup> There is a long history of investor interest in the

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(announcing a Business Roundtable Statement on the Purpose of Corporation, which was updated with a new commitment to all stakeholders in addition to shareholders); Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 432 (2002) (explaining the social entity model conception of corporations, which suggests that corporations have a duty to consider interests besides those of shareholders).

37. See Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 651 (2016) (analyzing how ESG is now being used to encompass all nonfinancial fundamentals that can impact financial performance).

38. See *Sidley Report*, *supra* note 35, at 1 (noting investors electing three directors to ExxonMobil board exemplifies increased SEC and investor focus on ESG); *SC 2021 Proxy Report*, *supra* note 12, at 15 (identifying that “structural governance measures have become widely adopted among S&P 500” over the decade).

39. See *Sidley Report*, *supra* note 35, at 3 (noting that 90% of Fortune 50 companies made climate change disclosures in recent proxy statements); *SC 2021 Proxy Report*, *supra* note 12, at 20–22 (reporting that shareholder environmental proposals increased alongside an increase in shareholder support for such proposals that were put to a vote).

40. See *Sidley Report*, *supra* note 35, at 1 (stating that in the 2021 proxy season there were a record number of environmental and social shareholder proposals); *SC 2021 Proxy Report*, *supra* note 12, at 20 (summarizing recent actions by public companies to increase board diversity).

41. Fisch, *supra* note 13, at 932 (observing that ESG interest has increased among mainstream investors); Ho & Park, *supra* note 12, at 261 (2019) (stating that mainstream investors now consider ESG information “material to voting decisions” because of its relation to governance and profitability); Fleming & Ledbetter, *supra* note 10, at 10648 (noting a “critical mass” of investors view ESG information as important to investment and voting decisions). The calls for increased

issues associated with ESG.<sup>42</sup> However, previously much of that interest either stemmed from a small segment of the investment community or members of the community directly connected to social issues such as religious organizations, charitable institutions, and pension funds.<sup>43</sup> Today, interest in ESG is coming from an ever-widening portion of the investment community, including members previously unaligned with advancing social issues.<sup>44</sup> Indeed, it has become routine for the largest and most influential investors and asset managers to issue statements outlining their expectations around corporations' commitments to ESG.<sup>45</sup> A 2019 study of top global

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focus on ESG are inextricably linked to the debate about corporate purpose and investor interest in a corporate purpose that focuses on social and environmental issues. See Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK [hereinafter Fink, *Reshaping of Finance*], <https://www.blackrock.com/hk/en/insights/larry-fink-ceo-letter> [<https://perma.cc/ZDD2-ZYZG>] (writing on the importance of an investment approach that centers sustainability); Larry Fink, *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/WX3G-NWYP>] (explaining that corporations must operate with a view towards benefitting all stakeholders); *Business Roundtable Statement*, *supra* note 36 (redefining corporate purpose to promote an economy that serves all Americans); Ira T. Kay, Chris Brindisi, Blaine Martin, Soren Meiseid & Gagan Singh, *The Stakeholder Model and ESG*, PAY GOVERNANCE (Sept. 1, 2020), <https://www.paygovernance.com/viewpoints/the-stakeholder-model-and-esg> [<https://perma.cc/LT9Y-NCNZ>] (citing Fortune survey demonstrating that 63% of CEOs agreed with the Business Roundtable Statement).

42. See, e.g., Fairfax, *supra* note 36, at 432 (discussing how some corporations espoused a responsibility to the public and not just shareholders even during the early 1900s); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 82–99 (2002) (tracing the historical corporate social responsibility debate “between the legal scholars Adolf A. Berle and E. Merrick Dodd over whom directors should serve”); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999) (proposing that the “team production model” of corporations suggests that boards exist to guide investments to serve the entire corporate team, which includes other actors, such as employees and other groups, in addition to shareholders); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 54 (1999) (describing stakeholder theory, the most popular business ethics theory at the time, as focusing on the effects of corporate action on the public); Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 184–86 (1997) (examining the development of stakeholder theory and noting it derives from “a Kantian principle that all human beings should be treated as ends, not as means to ends”); William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 208–15 (1992) (examining theories that contend with the complexities of the corporate structure and its composition of individuals).

43. See LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION 77–78 (2011) (noting that shareholder proposals in the 1950s were used to bring attention to racial discrimination and segregation); Fleming & Ledbetter, *supra* note 10, at 10648 (observing that there has been a shift in demand for ESG information disclosure from primarily special-interest groups to a critical mass of investors).

44. See Eccles & Klimenko, *supra* note 13, at 108 (remarking on ESG's increased importance to senior executives of investment firms, asset owners, and government pension funds).

45. See Fink, *Reshaping of Finance*, *supra* note 41 (stating that “purpose is the engine of long-term profitability”); STATE STREET, 2016 CORPORATE RESPONSIBILITY REPORT 4–6 (2016), [http://www.statestreet.com/content/dam/statestreet/documents/values/StateStreet\\_2016\\_Corporate](http://www.statestreet.com/content/dam/statestreet/documents/values/StateStreet_2016_Corporate)

institutional investing firms revealed that ESG is “almost universally top of mind” for executives at those firms.<sup>46</sup> A 2021 survey revealed that investment funds not only have increased their focus on ESG issues, but also have revised their voting guidelines to incorporate ESG issues and pushed for ESG changes in their proxy voting and support of ESG shareholder proposals.<sup>47</sup> Proxy reports for the 2021 proxy season reveal a rise in ESG shareholder proposals coupled with a rise in shareholder support of those proposals, including support from the largest institutional shareholders.<sup>48</sup>

In 2019, the nation’s most influential business executives jumped into the ESG fray when the Business Roundtable, the leading association of the nation’s top CEOs, issued a statement “redefining” corporate purpose to include a commitment to all stakeholders with a focus on advancing a broad array of ESG issues including those impacting customers, consumers, employees, suppliers, the environment, and the communities in which corporations operate.<sup>49</sup> The CEOs who signed the statement emphasized the need for corporations to make a “fundamental commitment” to deliver value to all stakeholders by grappling with a multitude of ESG-related issues.<sup>50</sup>

The growth in investor and business community pressure has translated into a steady rise in corporate focus on ESG, bringing ESG into the mainstream corporate discourse and landscape.<sup>51</sup> Anecdotal and empirical research reveals that a growing number of corporations have taken significant steps to incorporate ESG matters into their business practices.<sup>52</sup> Capturing

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ResponsibilityReport.pdf [https://perma.cc/VH8R-BDPH] (summarizing State Street’s ESG progress and commitment); Silk et al., *supra* note 10, at 10–11 (listing examples of institutional investors who have indicated an interest in ESG); *see also* Ho & Park, *supra* note 12, at 261–62 (suggesting institutional investors exercise influence to pressure companies to pay closer attention to ESG matters).

46. Eccles and Klimenko, *supra* note 13, at 108 (analyzing interviews with seventy senior executives at forty-three global institutional investing firms, including the biggest three asset managers and giant asset owners such as CalPERS and CalSTRS).

47. Liu, *supra* note 11.

48. *See Sidley Report*, *supra* note 35 at 6–7 (highlighting robust reporting from healthcare/pharmaceuticals, insurance, and energy companies); *SC 2021 Proxy Report*, *supra* note 12, at 10 (observing that proposals on employee-related DEI matters almost doubled, and that those proposals received strong shareholder support). Indeed, while there remains a small group of shareholders submitting ESG proposals, the investor support for such proposals is rising. *See id.* at 3, 7 (noting that the top ten proposers “account for more than two-thirds of shareholder proposals submitted to U.S. S&P Composite 1500 companies,” but that average shareholder support for social/political proposals is increasing).

49. *Business Roundtable Statement*, *supra* note 36.

50. *Id.*; *see All Stakeholders Not Just Shareholders*, *supra* note 13 (detailing support from CEOs).

51. Ho & Park, *supra* note 12, at 259–60.

52. *See Sidley Report*, *supra* note 35 at 1 (remarking that “[b]usinesses . . . have signaled a shift in focus”); *SC 2021 Proxy Report*, *supra* note 12 at 21 & n.61 (noting that Bank of America, Citigroup, Goldman Sachs, Wells Fargo, and J.P. Morgan Chase committed to achieving net-zero greenhouse gas emissions by 2050).

this trend, a November 2021 *New York Times* article noted that business schools have had to alter their curriculums to respond to the “flood” of interest in ESG by their students and because of the increased number of jobs requiring ESG knowledge.<sup>53</sup> Recent studies also reveal that most investment leaders have been taking “meaningful steps” to integrate sustainability issues into their investment criteria.<sup>54</sup> As this Article later points out, investor demand for ESG has translated into increased corporate disclosure of ESG information.<sup>55</sup> There also has been a significant rise in ESG and sustainable investment products as investment firms have sought to capitalize on investor demand for ESG.<sup>56</sup> While ESG will always have its critics, as one commentator noted, the recent focus on ESG strongly suggests that the business community is “all in” on ESG.<sup>57</sup>

2. *Linking ESG to Shareholder Value.*—The investment community has insisted that a corporate focus on ESG is aligned with the focus on shareholders and long-term shareholder value.<sup>58</sup> To be sure, this sentiment is not universal. A 2020 United States Government Accountability Office (GAO) study revealed that a few investors do not consider ESG information

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53. Jenny Gross, *Business Schools Respond to a Flood of Interest in E.S.G.*, N.Y. TIMES (Nov. 14, 2021), <https://www.nytimes.com/2021/11/13/business/dealbook/business-schools-esg.html> [<https://perma.cc/HQ39-GEXZ>].

54. Eccles & Klimenko, *supra* note 13, at 108; *see* Liu, *supra* note 11 (reporting asset managers demonstrated improved commitment to ESG, reflected by higher passing scores, based on stewardship survey). The 2021 survey noted that asset managers’ previous voting records did not reflect how much they claimed to care about ESG issues, but 2021 voting records revealed much stronger commitment to ESG matters. *Id.*

55. *See* Ho and Park, *supra* note 12, at 252 (noting that “[i]n 2018, institutional investors representing over US\$5 trillion in assets under management joined a petition to the Securities and Exchange Commission (SEC) urging it to adopt new rules regarding ESG disclosure by public companies”).

56. *See* KWON, *supra* note 20, at 12 (noting that \$22.9 trillion of the world’s investment in 2016 was responsible investment, accounting for almost 26% “of all professionally [sic] managed assets worldwide”); Lucy Pérez, Vivian Hunt, Hamid Samandari, Robin Nuttall & Krysta Biniek, *Does ESG Really Matter—and Why?*, MCKINSEY & CO.: MCKINSEY Q. (Aug. 2022), <https://www.mckinsey.com/business-functions/sustainability/our-insights/does-esg-really-matter-and-why> [<https://perma.cc/5X52-XWRS>] (reporting that although the rate of new ESG investments fell after the first quarter of 2022, the profile of ESG investments has continued to rise).

57. *See All Stakeholders Not Just Shareholders*, *supra* note 13 (saying “the corporate world is all in”).

58. *See id.* (quoting a CEO as saying that the best-run companies generate profits for shareholders, but that to generate long-term profits they “put the customer first and invest in their employees and communities”); *Business Roundtable Statement*, *supra* note 36 (quoting CEO of Vanguard as saying “boards can focus on creating long-term value, better serving everyone—investors, employees, communities, suppliers and customers” by “taking a broader, more complete view of corporate purpose”).

when making investment or voting decisions.<sup>59</sup> Some investors maintained that they consider ESG issues but only as part of their mission to promote social goals or produce benefits for society.<sup>60</sup> Then too, some scholars have expressed considerable skepticism about the claim that a corporate focus on ESG is aligned with financial returns.<sup>61</sup> Others have gone further, suggesting that focusing on ESG may be antithetical or harmful to enhancing shareholder value.<sup>62</sup>

Nonetheless, the current wave of ESG focus has been linked explicitly with economic and financial performance.<sup>63</sup> Supporters have insisted that ESG is about *shareholder value* rather than *shareholder or stakeholder*

59. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 9 (July 2020) [hereinafter GAO ESG Study], <https://www.gao.gov/assets/710/707967.pdf> [<https://perma.cc/63GR-G5YX>] (finding that out of seven public pension funds, two generally do not consider ESG information to assess company performance).

60. See *id.* (noting that some investors use ESG information to advance social goals as compared to those who primarily utilize that information to assess long-term value).

61. See Paul Brest, Ronald J. Gilson & Mark A. Wolfson, *How Investors Can (and Can't) Create Social Value*, 44 J. CORP. L. 205, 208–09 (2018) (expressing skepticism about the idea of creating social value without sacrificing financial returns); Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1618–20 (2021) (introducing the concept of corporate social responsibility bonds, which would generate a return in the form of a social benefit rather than a financial return); Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1070 (2022) (highlighting lack of support for ESG proposals by noting that boards not only opposed those proposals, but also that they recommended shareholders vote against the proposals); BRONAGH WARD, VITTORIA BUFALARI, MARK TULAY, SARA E. MURPHY, RICHA JOSHI & NICK COHN MARTIN, KKS ADVISORS & TEST OF CORP. PURPOSE, COVID-19 AND INEQUALITY: A TEST OF CORPORATE PURPOSE 15 (2020), [https://c6a26163-5098-4e74-89da-9f6c9cc2e20c.filesusr.com/ugd/f64551\\_a55c15bb348f444982bfd28a030feb3c.pdf](https://c6a26163-5098-4e74-89da-9f6c9cc2e20c.filesusr.com/ugd/f64551_a55c15bb348f444982bfd28a030feb3c.pdf) [<https://perma.cc/4GSN-FPWG>] (saying that “[t]he interests of stockholders and other stakeholders will not always align”); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 527–28 (2020) (observing that meta-analyses suggest pro-social behavior may only marginally benefit corporations).

62. See, e.g., Jessie M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?* 4 (Harvard Univ. & ECGI, Working Paper No. 579/2021, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3812642](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812642) [<https://perma.cc/9TF9-CUYT>] (saying high volume of academic work reports that “diversifying boards can harm financial performance”); Wayne Winegarden, *ESG Disclosure Requirements Will Harm Economic Vibrancy*, FORBES (Sept. 20, 2021, 9:25 AM), <https://www.forbes.com/sites/waynewinegarden/2021/09/20/esg-disclosure-requirements-will-harm-economic-vibrancy/?sh=2d96f89d393f> [<https://perma.cc/AKQ4-RT3J>] (citing studies that find ESG practices negatively impact financial performance); Robert Armstrong, *The ESG Investing Industry Is Dangerous*, FIN. TIMES (Aug. 24, 2021), <https://www.ft.com/content/ec02fd5d-e8bd-45bd-b015-a5799ae820cf> [<https://perma.cc/W3WJ-6QTZ>] (suggesting ESG is morally bankrupt and listing arguments against ESG); JEAN-PIERRE AUBRY, ANQI CHEN, PATRICK M. HUBBARD & ALICIA H. MUNNELL, *ESG INVESTING AND PUBLIC PENSIONS: AN UPDATE 5–6* (2020), <https://crr.bc.edu/wp-content/uploads/2020/10/SLP74.pdf> [<https://perma.cc/CJG3-GWYY>] (indicating that social investing has the potential to reduce returns).

63. See Ho, *supra* note 23, at 321–22 (noting ESG was previously conceived as only a public policy or social concern, but that now more than half of the world's public equity and debt is managed by financial institutions who view ESG as linked to financial risk and returns).

*values*. Recent studies consistently reveal that most of today’s investors believe that ESG information has an impact on corporate financial performance.<sup>64</sup> Surveys reveal that most investors report using ESG information to monitor a company’s expected financial performance.<sup>65</sup> A 2019 study found that most members of the investment community use ESG factors to understand their impact on financial value.<sup>66</sup> This finding aligns with the 2020 GAO study’s finding that most investors agreed that ESG factors could have a “substantial effect on a company’s long-term financial performance.”<sup>67</sup>

More specifically, studies reveal that most institutional investors rely upon ESG information to better understand risks that could impact a company’s financial performance over time.<sup>68</sup> “The use of ESG factors has emerged as a way for investors to capture information on potential risks and opportunities that otherwise may not be taken into account in financial analysis.”<sup>69</sup> In other words, investors use ESG disclosures to monitor corporations’ risk management profile.<sup>70</sup> Indeed, in proposing new rules clarifying plan fiduciaries’ ability to consider ESG factors when making investment decisions, the Department of Labor (DOL) noted, “the proposal makes clear that climate change and other ESG factors are often material and that in many instances fiduciaries . . . should consider climate change and other ESG factors in the assessment of investment risks and returns.”<sup>71</sup> The

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64. See GAO ESG Study, *supra* note 59, at 5, 9 (highlighting research and saying that institutional investors surveyed generally agreed about the importance of ESG’s impact on financial performance).

65. See *id.* at 10 (reporting that investors “said ESG issues can be important to a company’s operations and performance over time”).

66. See Eccles & Klimenko, *supra* note 13, at 110 (noting that many interviewees shared the opinion that they analyze material ESG factors to assess their impact on financial value).

67. GAO ESG Study, *supra* note 59, at 9.

68. See *id.* at 10 (reporting that investors use ESG disclosures to monitor corporations and gain a better understanding of how they manage risks); Ho, *supra* note 23, at 322 (noting that financial regulators have expressed “concern about the potential systemic impact of ESG risks on the stability and long-term sustainability of global capital markets”); Barnali Choudhury, *Social Disclosure*, 13 BERKELEY BUS. L.J. 183, 196 (2016) (noting social disclosure facilitates the identification and management of risk); Ho, *supra* note 37, at 651 (explaining that, in order to assess a firm’s financial performance, institutional investors now use ESG information on areas such as corporate governance, labor and employment standards, human resource management, and environmental practices).

69. GAO ESG Study, *supra* note 59, at 5.

70. See GAO ESG Study, *supra* note 59, at 10 (explaining how investors monitor companies’ management of ESG risks to protect their long-term investments).

71. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272, 57276 (proposed Oct. 14, 2021) (to be codified at 29 C.F.R. pt. 2550). The proposed rule represented a reversal of the previous Administration’s position that sought to exclude consideration of social issues. The DOL has had a long-standing position that ERISA plan fiduciaries “may not sacrifice investment returns or assume greater investment risks as a means of

DOL rule proposal aligns with the growing consensus that ESG issues have an impact on investment risks, returns, and long-term financial performance.<sup>72</sup>

There is a strong and growing body of research supporting the business community's increasing acknowledgment of the link between financial return and ESG issues.<sup>73</sup> According to that research, ESG factors are linked to economic performance in various ways. A recent paper found that the market reacts to ESG news when such news is identified as financially material for a given industry.<sup>74</sup> Among other ESG matters, research has found a link between corporate expected financial performance and returns and the

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promoting collateral social policy goals.” *See id.* at 57273–74 (referring also to guidance which indicated ERISA was violated by fiduciaries if they pursued social goals at the expense of reduced returns or greater risks). This position prompted regulatory action aimed at prohibiting fiduciaries from considering ESG factors. *See* Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658, 81690 (proposed Dec. 16, 2020) (to be codified at 29 C.F.R. pts. 2509, 2550) (stating that purpose of proposed rule was to address confusion that fiduciaries must always vote proxies on shareholder proposals to fulfill ERISA obligations, which “may have caused some fiduciaries to pursue proxy proposals that have no connection to increasing the value of investments used to pay benefits or defray the reasonable plan administrative expenses”); *id.* at 81658 (noting a fiduciary’s duty of prudence which “prevents a fiduciary from choosing an investment alternative that is financially less beneficial than reasonably available alternatives”). The initial rule explicitly referenced ESG factors. In response, many stakeholders raised concerns that the regulation failed to appreciate the fact that ESG factors could and should be viewed as pecuniary and thus material. These concerns led DOL to delete proposed regulatory language that singled out ESG. However, the DOL included statements in the new regulation casting serious doubt on the ability to rely on ESG issues in their investment process. *See* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. at 57275–76 (noting DOL’s attempt to provide clarity created further confusion regarding ESG factors). The October 2021 rule reverses this DOL position.

72. *See* Fisch, *supra* note 13, at 933 (noting that investors believe that sustainability disclosures allow them to better evaluate business risks); *Why ESG Is Here to Stay*, *supra* note 11 (noting that growing evidence that sustainable corporate practices link closely to performance is focusing investor attention on ESG matters).

73. *See, e.g.*, Ho, *supra* note 23, at 322 (reporting how institutional investors who consider ESG issues are managing an increased share of the market); Ho, *supra* note 37, at 665–68 (reviewing studies highlighting the financial materiality of ESG factors); SUNDIATU DIXON-FYLE, KEVIN DOLAN, VIVIAN HUNT & SARA PRINCE, *DIVERSITY WINS: HOW INCLUSION MATTERS* 13 (2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters> [<https://perma.cc/X9KD-4VQJ>] (explaining that McKinsey’s latest report shows greater corporate leadership diversity is correlated with increased profits); WARD ET AL., *supra* note 61, at 25, 43, 85–86 (citing a variety of empirical data, surveys, and studies that indicate a correlation between ESG measures and financial performance); George Serafeim & Aaron Yoon, *Which Corporate ESG News Does the Market React to?* 4 (Harvard Bus. Sch., Working Paper No. 21-115, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3832698](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832698) [<https://perma.cc/DCL5-5DU9>] (finding significant market reactions to particular kinds of ESG news); Lieberman, *supra* note 8 (citing studies).

74. Serafeim & Yoon, *supra* note 73, at 3.



following: climate change,<sup>75</sup> customers,<sup>76</sup> employees and the workforce,<sup>77</sup> workplace safety,<sup>78</sup> and diversity issues.<sup>79</sup> Studies also demonstrate that ESG factors were linked to corporate resiliency during the most recent global pandemic, demonstrating a strong and positive correlation between a company's market performance during the COVID-19 crisis and a company's ESG rating.<sup>80</sup> Importantly, researchers insist that the notion that adhering to ESG principles entails sacrificing financial return is "outdated" and inconsistent with recent research.<sup>81</sup>

### B. *The ESG Disclosure Movement*

The increased focus on ESG has inevitably coalesced around a desire for ESG disclosure.<sup>82</sup> Our federal securities laws emphasize the value of disclosure.<sup>83</sup> Disclosure serves a variety of critical goals, including reducing informational asymmetries, improving market efficiency, and supporting compliance with laws.<sup>84</sup> One overarching disclosure goal is accountability

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75. GAO ESG Study, *supra* note 59, at 5.

76. See *Why ESG Is Here to Stay*, *supra* note 11 (discussing evidence indicating that corporations are more likely to attract new customers and maintain the loyalty of existing customers if they have a strong ESG image).

77. See Lieberman, *supra* note 8 (citing a report indicating that ESG performance has an impact on attracting and retaining talent).

78. GAO ESG Study, *supra* note 59, at 5 (noting a potential connection between workplace safety and corporate performance).

79. See generally DIXON-FYLE ET AL., *supra* note 73 (finding relationship between diversity and financial performance and profitability).

80. WARD ET AL., *supra* note 61, at 25 (citing multiple studies).

81. See Eccles & Klimenko, *supra* note 13, at 108 (observing that some corporate leaders believe pursuing an agenda that includes ESG considerations goes against shareholder desires, and explaining why that view is outdated).

82. See Anagnosti et al., *supra* note 12 (noting investor focus on ESG has resulted in a pronounced trend towards greater ESG disclosure).

83. See *Santa Fe Indus. v. Green*, 430 U.S. 462, 477–78 (1977) (noting that the fundamental purpose of the federal securities laws rests on a "philosophy of full disclosure"); Lipton, *supra* note 61, at 508 (indicating that disclosure is critical to the SEC's mission to "protect investors, facilitate capital raising, and encourage the development of healthy capital markets"); Honigsberg et al., *supra* note 25, at 295 ("Mandatory disclosure is the cornerstone of federal securities law."); Ferrell, *supra* note 25, at 82 (noting the importance of mandatory disclosure to federal securities regulation).

84. See Choudhury, *supra* note 68, at 187 (proposing mandatory disclosure's primary role is to reduce information asymmetries); Ferrell, *supra* note 25, at 81 (highlighting the theory that disclosure can lead to more accurate stock prices of both the disclosing company and other companies); Fox, *supra* note 25, at 1369–72 (demonstrating that studies support the proposition that disclosure leads to improved stock accuracy); Andrew W. Winden, *Jumpstarting Sustainability Disclosures*, 76 BUS. LAW. 1215, 1221 (2021) (suggesting disclosure reduces costs to investors by enabling access to information); Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 370 (2011) (proposing disclosure reduces costs by enabling investors to compare companies); Gilson & Kraakman, *supra* note 25, at 565 (theorizing the relationship between informational availability and stock prices); John C. Coffee, Jr., *Market*

because disclosure is viewed as a primary mechanism for holding corporations accountable for their actions.<sup>85</sup> Disclosure provides increased transparency, which serves accountability goals, by enabling investors and other stakeholders to monitor corporate activities.<sup>86</sup> By increasing transparency and accountability, disclosure also serves to indirectly shape the behavior of corporate actors.<sup>87</sup>

Given the importance our system places on disclosure, it should come as no surprise that the increased attention on ESG has led to demands for robust ESG disclosure.<sup>88</sup> Consumers, nonprofits, and other stakeholder groups have played an important role in the push for ESG disclosure. In addition, some of the largest and most influential investors have played an

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*Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 722 (1984) (finding that a mandatory disclosure system “improve[s] the allocative efficiency of the capital market—and this improvement in turn implies a more productive economy”); Sale, *supra* note 16, at 1053 (noting that false or misleading statements made in registration statements results in liability under Section 11 of the Securities Act of 1933 and that this reflects an aim to reduce information asymmetries and fraud).

85. See Choudhury, *supra* note 68, at 187–88 (discussing that the “increasingly important role for mandatory disclosure is in relation to corporate accountability and governance”); Williams, *supra* note 15, at 1211–12 (stating that in the 1900s, disclosure as a regulatory measure was advanced to address corporate accountability concerns); BRANDEIS, *supra* note 15, at 92 (asserting that “[s]unlight is said to be the best of disinfectants”); BERLE & MEANS, *supra* note 15, at 317 (noting that information disclosure is necessary for the market to assess a company’s value); Langevoort, *supra* note 15, at 453 (discussing ways in which securities disclosure promotes accountability); Merritt B. Fox, *Required Disclosure and Corporate Governance*, L. & CONTEMP. PROBS., Summer 1999, at 113, 114 (concluding that “required disclosure can improve corporate governance”); LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 33 (2d ed. 1988) (suggesting the publicity of disclosure acts as a check on those who are disclosing).

86. See Lipton, *supra* note 61, at 509–10 (stating that disclosure “deters managers from engaging in self-dealing and other aggrandizing misconduct, and allows investors to detect, and discipline, such misconduct when it occurs” (footnotes omitted)); Choudhury, *supra* note 68, at 187 (suggesting that without mandatory disclosure managers would not otherwise always disclose information on matters in which they could benefit from information asymmetries); Winden, *supra* note 84, at 1222 (referencing arguments in support of mandatory disclosure, such as its potential to produce more accurate market pricing and more robust competition); Williams, *supra* note 15, at 1211–12 (stating early disclosure advocates championed it as a way to “bring to bear public pressure to change the actions and attitudes of corporate managers”); Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections Upon Federalism*, 56 VAND. L. REV. 859, 872–73 (2003) (noting disclosure has helped shareholders take an active role in corporate governance, and helped other monitors, such as accountants, perform their work).

87. See Lipton, *supra* note 61, at 506, 509 (observing that disclosure shapes corporate behavior because of its impact on reputation, which is important to a corporation’s success); Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 78 (2020) (“Transparency and reputational interests can themselves compel change in corporate behavior, even if formal enforcement of disclosure rules is weak.” (footnotes omitted)); Estlund, *supra* note 84, at 377–78 (highlighting the pressure that disclosure places on corporations to implement best practices).

88. See Choudhury, *supra* note 68, at 189 (noting that the rise in interest in social disclosure stems from the desire for improved transparency and accountability).

instrumental role in this push for ESG disclosure.<sup>89</sup> Investor and stakeholder pressure for enhanced ESG disclosure stems from a recognition of the pivotal role disclosure plays in enhancing accountability. In her seminal article advocating for corporate social disclosure, Professor Cynthia Williams not only highlights the manner in which federal securities law disclosure was aimed at promoting accountability to the public as well as investors, but also advances the hope that periodic disclosure of ESG information will create the kind of transparency that leads to improved accountability.<sup>90</sup> In addition to improving accountability, disclosure is also clearly aimed at impacting corporate behavior around ESG activities.<sup>91</sup> In this regard, ESG disclosure has become a central accountability issue for investors and those advocating for increased corporate commitment to ESG.

### C. *The Explosion in Voluntary Disclosure*

Pressure for ESG disclosure has had a dramatic impact on voluntary ESG disclosure.<sup>92</sup> According to the Governance & Accountability Institute, 90% of S&P 500 companies voluntarily published ESG reports in 2019, up from 86% in 2018, and less than 20% in 2011.<sup>93</sup> In addition, 65% of Russell 1000 companies published ESG reports, up from 60% in 2018.<sup>94</sup> A 2018 study found that some 92% of S&P 500 companies had some type of

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89. See Federico Fornasari, *Knowledge and Power in Measuring the Sustainable Corporation: Stock Exchanges as Regulators of ESG Factors Disclosure*, 19 WASH. U. GLOB. STUD. L. REV. 167, 190 (2020) (noting that ESG reporting in the last decade has risen, as “more and more corporations report, because of investors’ demand”).

90. See Williams, *supra* note 15 at 1204, 1221 (explaining how the legislative history of federal securities disclosure laws suggest an intent to create accountability). See also, Lipton, *supra* note 61 at 509–10 (describing several ways in which corporate disclosure encourages transparency and fosters accountability); Hillary A. Sale, *The New “Public” Corporation*, L. & CONTEMP. PROBS., Winter 2011, at 137, 137–38 (positing “that the government and the media have increasing influence over public corporations and their governance, and the private sphere is diminishing”); Donald C. Langevoort & Robert B. Thompson, “Publicness” in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 342 (2013) (proposing that “[f]ull publicness treatment should be reserved for companies with a larger societal footprint”).

91. See Williams, *supra* note 15, at 1211 (noting a congressional intent for disclosure to impact corporate behavior).

92. See Fisch, *supra* note 13, at 944 (“Most sustainability information is disclosed not in issuer financial or securities filings, but in standalone sustainability reports.”); Ho & Park, *supra* note 12, at 326 (charting information reflecting that much of ESG reporting is voluntary).

93. GOVERNANCE & ACCOUNTABILITY INST., INC., *supra* note 19, at 4; *90% of S&P 500 Index Companies Public Sustainability Reports in 2019*, *supra* note 19; see also Fisch, *supra* note 13, at 944 (noting that in 2016, sustainability reports were published by 82% of S&P 500 companies).

94. GOVERNANCE & ACCOUNTABILITY INST., INC., *supra* note 19, at 4.

ESG information on their websites while some 78% issued an ESG report.<sup>95</sup> Such reports were virtually nonexistent prior to 2000.<sup>96</sup>

Voluntary ESG reports are not created equal. The reports go by many different names, though the trend is to refer to such reports as “sustainability” reports. Importantly, these reports should be differentiated from older “citizenship” or “CSR” reports which focused primarily on philanthropy and charitable activities within the community.<sup>97</sup> While ESG reports appear in a variety of different places, they almost always appear on the corporation’s website and in a venue accessible to both investors and the broader public.<sup>98</sup> Then too, the reports can come in different lengths, though research suggests that ESG reports are getting longer.<sup>99</sup>

Voluntary ESG reports also can cover a wide range of different topics. Indeed, within each relevant bucket—E, S, and G—exists an array of topics on which corporations choose to report.<sup>100</sup> Hence, the diversity of coverage is to be expected given the broad range of ESG matters and the fact that the materiality of those matters may be different for different companies and different industries.<sup>101</sup> The often-evolving variety of disclosures also stems from increased investor demand for different kinds of disclosure as well as the sometimes conflicting nature of those demands.<sup>102</sup>

It is important to recognize that investor pressure has had an impact on the disclosure of ESG information in required filings. The SEC requires public companies to disclose material information in their annual 10-K filings and other periodic filings.<sup>103</sup> This includes disclosures under Item 303 of Regulation S-K under the Securities Act of 1933 (Securities Act) related

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95. KWON, *supra* note 20, at 27.

96. See Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 693 (2006) (noting that before 2000, a *Fortune* 50 company had prepared a corporate responsibility report only once).

97. See *id.* (explaining the utility of these reports).

98. See Sidley Report, *supra* note 35, at 3 (noting reports often appear on websites or public SEC filings).

99. See Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies’ CSR and ESG Disclosures*, 23 U. PA. J. BUS. L. 740, 751 (2021) (noting lack of standardization of disclosure between companies and that some companies publish lengthy stand-alone reports).

100. See *supra* note 35 and accompanying text.

101. See Eccles & Klimenko, *supra* note 13, at 110 (“A company that spends vast sums of money trying to address every single conceivable environmental, social, and governance (ESG) issue will likely see its financial performance suffer; however, companies that focus on material issues tend to outperform those that don’t.”).

102. See GAO ESG Study, *supra* note 59, at 13 (observing the lack of standardization of disclosure format across companies and also that institutional investors individually reach out to companies for additional disclosures).

103. See Peirce, *supra* note 3 (describing a number of existing disclosure requirements that require the disclosure of material information along with the possibility that such requirements would mean that corporations would need to disclose climate-related information).

to the disclosure of material events and uncertainties,<sup>104</sup> disclosures under Item 103 of the Securities Act for material pending legal proceedings,<sup>105</sup> and disclosures under Item 105 of the Securities Act for material factors that make an investment risky or speculative.<sup>106</sup> It also includes disclosure of material information necessary to make any required statements not misleading.<sup>107</sup> Materiality is defined as information about which there is a substantial likelihood that a reasonable investor would consider important in making an investment decision.<sup>108</sup> Material information can include known trends, events, and uncertainties that are reasonably likely to have an impact on a company's financial condition or operating performance. The SEC has maintained that the requirement to disclose material information can include ESG information.<sup>109</sup> The SEC also has issued interpretive guidance encouraging corporations to think more critically about the materiality of their ESG information.<sup>110</sup> This kind of guidance, coupled with investor pressure, has led to increased ESG disclosure in mandatory filings. A 2018 study found that almost 40% of S&P 500 companies included some ESG information in their annual reports, Form 10-K, or proxy statements.<sup>111</sup> A 2020 survey of ESG disclosure in SEC filings of the top fifty companies revealed that every company increased its ESG disclosures in at least one category in their proxy statement, and 42% of such companies increased their ESG disclosures in their annual report.<sup>112</sup> Thus, companies are disclosing

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104. 17 C.F.R. § 229.303(a) (2021).

105. *Id.* § 229.103(c)(3).

106. *Id.* § 229.105(a).

107. *Id.* § 230.408; *id.* § 240.12b-20.

108. *See* *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)) (concluding the general standard of materiality in the proxy solicitation context is as follows: “[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote” (alteration in original)).

109. *See* GAO ESG Study, *supra* note 59, at 1–2 (observing the SEC’s materiality disclosure requirements could obligate disclosure of ESG information); *Sample Letter to Companies Regarding Climate Change Disclosures*, U.S. SEC. & EXCH. COMM’N: DIV. OF CORP. FIN. (Sept. 22, 2021), <https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures> [<https://perma.cc/S25C-CVMT>] (issuing a sample letter concerning climate change disclosure that may be required). *See also* Peirce, *supra* note 3 (noting that the SEC’s current rules could require disclosure of climate-related information).

110. *See* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6297 (Feb. 8, 2010) (to be codified at 17 C.F.R. pts. 211, 231, 241) (providing guidance to public companies and reminding them “of their obligations under existing federal securities laws and regulations to consider climate change and its consequences as they prepare disclosure documents to be filed with us and investors”).

111. KWON, *supra* note 20, at 32.

112. Anagnosti et al., *supra* note 12. By far the most significant increase in ESG disclosure was with respect to human capital management. *See id.* (describing the increase in ESG disclosures related to human capital management as the “largest” as compared to other topics).

some ESG information in required filings under the SEC's existing disclosure requirements.<sup>113</sup>

Despite this disclosure growth, voluntary ESG disclosure in stand-alone documents is far more extensive and in-depth than ESG disclosure in required SEC filings.<sup>114</sup> Indeed, even when corporations report ESG information in their proxy statements and other required filings, there is a significant divergence between the kind of ESG information companies disclose in their required filings and the kind of ESG information they disclose in their voluntary reports.<sup>115</sup> This divergence is reflected in at least two ways. First, when corporations make disclosures about the same ESG topic in both their voluntary ESG report and in mandated filings, the ESG disclosure in the mandated filing is always much more limited than disclosure in voluntary documents.<sup>116</sup> By contrast, voluntary ESG disclosure is significantly more extensive, more specific, and more detailed than disclosure in mandated filings.<sup>117</sup> For example, a company's disclosure on human capital management may be one paragraph of very general information in their proxy report while the human capital management disclosure in the company's voluntary ESG report will cover several pages of very detailed information. Second, companies report ESG information on a wider variety of topics in their voluntary reports. Thus, research reveals that companies disclosed ESG topics in their voluntary reports that they did not discuss in their mandatory reports.<sup>118</sup> In addition to this divergence with respect to how the same company discloses ESG information, there are many companies that do not provide any ESG information in their required filings but do provide such information voluntarily in other venues. Highlighting this fact, while not every company in the 2020 GAO survey provided ESG disclosure in their required filings, every company indicated that they communicate ESG information outside of publicly mandated filings.<sup>119</sup>

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113. See Peirce, *supra* note 3 (“[C]ompanies routinely disclose climate-related information in SEC filings under the current rules . . .”).

114. Fisch, *supra* note 13, at 949; Sidley Report, *supra* note 35 (noting most companies publish more fulsome disclosure in their voluntary ESG reports); see GAO ESG Study, *supra* note 59, at 28 (comparing company-specific and generic disclosures).

115. See GAO ESG Study, *supra* note 59, at 25–26 (reporting analysis of ESG disclosure and concluding that voluntary disclosure generally contained a wider variety of ESG information).

116. See *id.* at 25 (delineating between information published in mandatory versus voluntary disclosures).

117. See *id.* at 17–18 (noting that companies view voluntary reports as “complementary” in that they publish information not contained in the mandatory reports, such as information geared towards investors focused on ESG).

118. See *id.* at 18 (observing that “four companies said they view their [voluntary disclosure] as a place to publish relevant ESG information that may not necessarily be material under the SEC definition and is therefore not included in regulatory filings”).

119. See *id.* (explaining that all interviewed companies communicate ESG information in ways other than mandatory and voluntary reporting).

Similarly, recent proxy reports reveal that 7% of companies report ESG information in their annual report while 90% voluntarily provide such information on their websites.<sup>120</sup> This divergence not only underscores the explosive growth in voluntary ESG disclosures, but also reveals that such growth has not been mirrored in mandated filings.

#### D. Voluntary Disclosure Debacle

1. *Accuracy Woes.*—Research reveals considerable concern spanning almost a decade about the accuracy and reliability of voluntary ESG disclosure. In her comprehensive review of voluntary ESG disclosure between 2016 and 2018, Professor Virginia Harper Ho explains that the growing demand for ESG disclosure has been met with growing dissatisfaction with voluntary ESG disclosures.<sup>121</sup> Ho also notes that survey data from 2019 and 2020 indicated similar concerns related to accuracy and reliability of ESG data.<sup>122</sup> One 2019 survey found that the vast majority of investors expressed concern about the accuracy of data in voluntary ESG disclosures.<sup>123</sup> A 2014 survey noted that investors report significant dissatisfaction with the accuracy and reliability of voluntary ESG disclosure.<sup>124</sup> Studies and surveys from 2020 consistently underscore most investors' lack of comfort with the quality and accuracy of ESG data.<sup>125</sup> Then too, a 2021 *Harvard Business Review* article insisted that much of the data in ESG reports is misleading.<sup>126</sup> Writing in 2020, one set of researchers characterized the current state of ESG reporting as “a bit like the Wild

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120. Sidley Report, *supra* note 35, at 3.

121. Ho, *supra* note 87, at 82; *see also* Winden, *supra* note 84, at 1237 (noting that as interest in ESG factors has increased, investors have increasingly expressed their dissatisfaction with voluntary ESG reports, including their reliability and quality).

122. Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure and ESG Reporting Reform from the Regulation S-K Concept Release*, THE CONF. BD.: SUSTAINABILITY MATTERS 5 n.17 (Aug. 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3682702](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3682702) [<https://perma.cc/S5H5-2EGP>] (highlighting growing investor interest in ESG disclosure reform based on survey data).

123. *See* Sarah Bernow, Jonathan Godsall, Bryce Klempner & Charlotte Merten, *More Than Values: The Value-Based Sustainability Reporting That Investors Want*, MCKINSEY & CO. 7 (July 2019), <https://www.mckinsey.com/business-functions/sustainability/our-insights/more-than-values-the-value-based-sustainability-reporting-that-investors-want> [<https://perma.cc/Q4TC-2DR3>] (reporting that 97% of investors surveyed thought sustainability reports should be audited in some way because of reliability concerns).

124. *See* Fisch, *supra* note 13, at 926 n.11 (citing a survey reporting 61% U.S. investor dissatisfaction with sustainability disclosures).

125. *Cf.* *Why ESG Is Here to Stay*, *supra* note 11 (observing that discomfort is warranted because ESG data is not audited); WARD ET AL., *supra* note 61, at 8 (highlighting accuracy concerns given lack of independent, third-party auditing).

126. *See* Kenneth P. Pucker, *Overselling Sustainability Reporting*, HARV. BUS. REV., May–June 2021, <https://hbr.org/2021/05/overselling-sustainability-reporting> [<https://perma.cc/G94R-STY7>] (“Measurement is often nonstandard, incomplete, imprecise, and misleading.”).

West.”<sup>127</sup> Moreover, the 2022 climate rule proposal indicated that concerns around accuracy served as an important impetus for the rule.<sup>128</sup>

While there exist significant complaints around accuracy and reliability of ESG reports, it is not entirely clear what the complaints encompass. There are at least two potential accuracy concerns. The first relates to “greenwashing,” or the practice of emphasizing the positive and omitting the negative.<sup>129</sup> The *Harvard Business Review* article seemed to focus on greenwashing, noting that voluntary ESG information sometimes highlights the positive and obscures the negative.<sup>130</sup> Many view greenwashing as misleading and therefore inaccurate. Corporations can engage in greenwashing in at least two ways. First, greenwashing may occur with respect to a particular ESG topic. For example, a corporation may highlight its record on workforce diversity while omitting or downplaying its record on worker safety.<sup>131</sup> The second form of greenwashing occurs when a corporation chooses to highlight certain ESG topics rather than others. For example, a corporation may choose to report on or otherwise significantly highlight its charitable giving while failing to report or significantly downplay its climate-change record. If a corporation makes this choice, some may characterize the ESG report as an example of greenwashing and therefore providing an inaccurate picture of the corporation’s overall ESG profile. Corporations have been criticized for this kind of greenwashing, which has been characterized as misleading and therefore inaccurate. To be sure, while it is likely impossible for any corporation to engage in positive behaviors with respect to every ESG issue, that does not negate the possibility

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127. Eccles & Klimenko, *supra* note 13, at 114.

128. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21429 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (noting improved reliability of information as a benefit of the proposed rule).

129. See Fisch, *supra* note 13, at 948 (defining “greenwashing” and pointing to Volkswagen as an example since an emissions scandal surfaced just one week after the company had been declared “the world’s most sustainable car company by the Dow Jones Sustainability Index”); Choudhury, *supra* note 68, at 209–10 (noting concerns around the possibility of corporations manipulating information to show their ESG activities in a favorable light); David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 394 (2005) (noting that voluntary environmental reports have been criticized because “such reporting can reflect only such self-aggrandizing aspects of environmental performance the firm is willing to reveal, while negative information is omitted or obscured”).

130. See Pucker, *supra* note 126 (warning of greenwashing and arguing that structural change is required to truly achieve sustainability goals); see also Francesco Badia, Enrico Bracci & Mouhcine Tallaki, *Quality and Diffusions in Sustainability Reporting in Italian Public Utility Companies*, MDPI: SUSTAINABILITY 13 (June 2, 2020), <https://www.mdpi.com/2071-1050/12/11/4525> [<https://perma.cc/L5NT-PGCL>] (noting that a company could provide information about some issues while ignoring issues with poor results).

131. Cf. Estlund, *supra* note 84, at 382 (exploring General Electric’s bias toward publicly disclosing positive employment-related information and not disclosing possibly negative information).



that by only highlighting positive actions a corporation may be painting a misleading portrait of its ESG record. Reflecting this accuracy concern, a 2021 report concluded that current voluntary ESG disclosures indicate that companies are “cherry picking” information in a manner that does not present an accurate picture.<sup>132</sup> The SEC’s climate rule proposal pinpointed these kinds of concerns around greenwashing as a rationale for the rule proposal.<sup>133</sup>

The second accuracy concern centers around the possibility that reported ESG information is false or otherwise omits material information necessary to ensure that it is not misleading. There is no real data on the extent of potentially misleading statements or omissions in voluntary ESG disclosures. In 2013, 25% of the world’s largest companies issued restatements related to the data they issued in their voluntary ESG reports.<sup>134</sup> Given the lack of oversight of ESG reporting, coupled with increases in the volume and detail of those reports, this figure likely underrepresents the number of mistakes or material omissions contained in such reports. Like greenwashing, the SEC’s climate rule proposal pinpointed concerns around misleading statements and omissions as another rationale for the rule proposal.<sup>135</sup>

*2. Comparability Concerns.*—One of the most common and long-standing critiques of voluntary ESG disclosure is the lack of uniformity associated with disclosed information, which makes it difficult to make accurate comparisons between and among companies.<sup>136</sup> The push for greater and more detailed voluntary ESG disclosure has led to the creation of a diverse array of reporting frameworks and metrics from a range of different standard-setting organizations.<sup>137</sup> Research suggests that the number of

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132. BD. INT’L ORG. SEC. COMM’NS, REPORT ON SUSTAINABILITY-RELATED ISSUER DISCLOSURES 8 (2021), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD678.pdf> [<https://perma.cc/VH7D-7AK2>].

133. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21429 (noting companies sometimes obtain higher ESG ratings through greenwashing and suggesting the proposed rule could provide investors more reliable sources of information).

134. Liv Watson, *Data Accuracy in Sustainability Reports*, WORKIVA (Nov. 20, 2020), <https://www.workiva.com/blog/data-accuracy-sustainability-reports> [<https://perma.cc/26V9-RQAN>].

135. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21429 (describing evidence of “obfuscation and other misleading efforts” in reports).

136. See Hazen, *supra* note 99, at 750–51 (“The absence of standardization in ESG metrics has been said to result in confusing inconsistencies in ESG data.”).

137. See Sidley Report, *supra* note 35, at 4 (listing the most frequently cited reporting frameworks); see also Winden, *supra* note 84, at 1225 (explaining the development of a variety of ESG reporting frameworks). The most frequently used ESG reporting frameworks, in order of usage, are SASB, TCFD, and then GRI. *Id.* Companies also use the U.N. Sustainable Development Goals and the U.N. Guiding Principles on Business and Human Rights. *Id.*

different reporting frameworks and methodologies continues to grow.<sup>138</sup> These different frameworks not only focus on different ESG topics but also rely upon different metrics and disclosure formats.<sup>139</sup> Thus, there is significant variation among how ESG information can be disclosed.<sup>140</sup> The current disclosure environment is further complicated by inconsistent or poorly defined terms, particularly because some terms have come to mean different things to different users.<sup>141</sup> This reality has resulted in radically different ESG disclosures even around similar topics.<sup>142</sup> The SEC referred to the current ESG disclosure environment as “fragmented and inconsistent.”<sup>143</sup>

Companies’ reliance on different methods and measures to disclose ESG information undermines the ability to make cross-company comparisons.<sup>144</sup> Companies’ use of different terms to reference similar issues also makes it difficult to make accurate comparisons.<sup>145</sup> And the fact that companies sometimes change the manner in which they disclose ESG information from year to year makes it difficult to even engage in year-to-year comparisons of the same company.<sup>146</sup>

#### *E. Mandated Disclosure to the Rescue?*

Almost universally, concerns raised by voluntary ESG disclosure are used as the primary rationale for preferring mandatory disclosure. Such concerns have caused ESG advocates to seriously question the value of

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138. See Sidley Report, *supra* note 35, at 4 (noting that although certain frameworks like SASB, TCFD, and GRI are often used, “[a]bout 39% of companies also referenced other nongovernmental standards”); see also Hazen, *supra* note 99, at 749–50 (noting that there are more than one hundred organizations that provide ESG information to companies using different formats and methodologies); Case, *supra* note 129, at 396–97 (describing proliferation of environmental reporting systems in the 1990s).

139. See GAO ESG Study, *supra* note 59, at 12 (noting that a variety of metrics and methods are used).

140. See Fleming & Ledbetter, *supra* note 10, at 10648 (indicating that such variation makes it difficult to adopt and implement ESG requirements); Sidley Report, *supra* note 35, at 4 (listing various frameworks).

141. See *Statement on SEC Regulation of ESG Issues*, FIN. ECONOMISTS ROUNDTABLE 4–5 (Oct. 2021), <https://static1.squarespace.com/static/61a4492358cbd07dda5dd80f/t/61e8d6dd8c22c04330637bc9/1642649310539/2021.pdf> [https://perma.cc/MX6P-E5SE] (recommending the SEC publish a list of defined terms to enhance ESG disclosure).

142. See GAO ESG Study, *supra* note 59, at 12 (explaining that investors have difficulty comparing ESG topics across companies even when the disclosure is on the same topic).

143. *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosure*, U.S. SEC. & EXCH. COMM’N 1, <https://www.sec.gov/files/33-11042-fact-sheet.pdf> [https://perma.cc/BJ7S-3DFD].

144. See GAO ESG Study, *supra* note 59, at 12 (suggesting that disclosures on the same topics are inconsistent, limiting the ability to compare across companies).

145. See *id.* at 32–33 (noting that companies refer to employees with different terms, such as ethnic minority versus diverse, and it is unclear if those terms are being used consistently).

146. *Id.* at 12.

voluntary ESG disclosure.<sup>147</sup> Perhaps more importantly, instead of seeking to address the shortcomings of voluntary ESG disclosure, the typical response to these shortcomings is to use them as *the* rationale for the necessity of mandated ESG disclosure.<sup>148</sup>

Historically, the SEC has only mandated specific disclosure around a very limited number of ESG topics.<sup>149</sup> For example, Regulation S-K requires information around some key governance topics such as board composition and executive compensation.<sup>150</sup> Corporations are also required to provide information on whether or not they consider diversity in their board nomination process.<sup>151</sup> Regulation S-K also requires corporations to disclose the material effects of compliance with environmental regulations on their capital expenditures.<sup>152</sup> Investor pressure has prompted the SEC to increase required disclosure around discrete topics, albeit modestly. For example, historically the only SEC-required human capital disclosure was disclosure of the number of people employed by a corporation.<sup>153</sup> Recent pressure prompted the SEC to enhance reporting obligations under Regulation S-K to provide for additional disclosure related to human capital management.<sup>154</sup>

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147. See Lipton, *supra* note 61 at 561–62 (describing insufficiency of voluntary disclosures and companies’ incentives to withhold information); Allen L. White & Diana M. Zinkl, *Raising Standardization*, ENV’T F., Jan./Feb. 1988, at 28, 28 (arguing that information disclosure must improve its consistency and comparability in order to become a mechanism for corporate accountability); Winden, *supra* note 84, at 1239 (“In the absence of significant improvement in the quality of the voluntary sustainability reports prepared by corporations, academics have proposed structures for a mandatory disclosure regime . . . .”); Petition for Rulemaking from Cynthia A. Williams, Osler Chair in Business Law, Osgoode Hall L. Sch. & Jill E. Fisch, Saul A. Fox Distinguished Professor of Business Law, Univ. Pa. L. Sch., to Brent J. Fields, Sec’y, Sec. & Exch. Comm’n 2 (Oct. 1, 2018), <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf> [<https://perma.cc/P8SE-67U5>] (describing voluntary ESG disclosure as “episodic, incomplete, incomparable, and inconsistent”).

148. See, e.g., Fisch, *supra* note 13, at 929–30 (proposing a mandated “Sustainability Discussion and Analysis” as part of an issuer’s annual report to shareholders, and requiring directors to certify the accuracy of those disclosures); Ho, *supra* note 23, at 321 (arguing for the SEC to adopt a “comply-or-explain” approach for ESG reporting).

149. Of course, mandatory disclosure is much more common and significant outside of the United States. Fisch, *supra* note 13, at 942.

150. GAO ESG Study, *supra* note 59, at 7.

151. See 17 C.F.R. § 229.407(c)(2)(vi) (2015) (exemplifying established diversity reporting requirements for nominating committees).

152. See 17 C.F.R. § 229.101(c)(1)(xii) (2015) (demonstrating established reporting requirements regarding the effect of environmental protections on expenditures, earnings, and competition).

153. Modernization of Regulation S-K Items 101, 103, and 105, 84 Fed. Reg. 44358, 44363–64 (proposed Aug. 23, 2019) (to be codified at 17 C.F.R. pts. 229, 239, 240) (describing prior requirement for disclosure of a company’s number of employees under Item 101 of Regulation S-K). Prior to 2019, Item 101 of Regulation S-K only required disclosure of the number of employees as part of the business description.

154. See Modernization of Regulation S-K Items 101, 103 and 105, 84 Fed. Reg. at 44388, (requiring description of human capital resources).

The relatively limited amount of mandated ESG disclosure stems from the SEC's significant reluctance to mandate specific disclosure around ESG issues. The most dominant rationale for that reluctance stems from a belief that ESG issues are not material and thus fall outside of the purview of issues around which the SEC should mandate disclosure.<sup>155</sup> That reluctance also stemmed from concern that the push for ESG disclosure would inappropriately lead to disclosure of social or political issues incompatible with the SEC's mission.<sup>156</sup> Thus, prior SEC responses to calls for more robust ESG disclosure have ranged from reluctance to outright hostility.<sup>157</sup> The SEC's historical reluctance to mandate disclosure related to ESG issues has persisted across different political administrations.<sup>158</sup>

However, the most recent change in presidential administrations created a political and regulatory climate much more receptive to investor and stakeholder calls for increased mandated ESG disclosure. Even before the March 2022 climate change rule proposal, there were several indicators that increased mandatory ESG disclosure was on the horizon.<sup>159</sup> When President Biden took office, he signed an order aimed at acknowledging and responding to ESG issues and directed all agencies to review existing regulations in light of that order.<sup>160</sup> Aligned with this directive, the SEC not only took several actions underscoring its attention to focus more significantly on ESG matters but also issued several statements suggesting that enhanced ESG disclosure was imminent. The SEC issued additional guidance reflecting a willingness to enhance corporations' ability to focus on

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155. See, e.g., Peirce, *supra* note 3 (explaining materiality concerns).

156. See *supra* note 7 and accompanying text.

157. See Letter from Julia G. Mahoney and Paul D. Mahoney, *supra* note 7, at 2 (noting that the SEC has thus far been opposed to mandatory ESG disclosures).

158. See Anagnosti et al., *supra* note 12 (noting the SEC's historical opposition); Winden, *supra* note 84, at 1216 ("The SEC has remained skeptical, over the course of multiple presidential administrations, that information on sustainability and social policy issues, typically referred to as environmental, social, and governance (or 'ESG') issues, is material to investors, and has resisted issuing new prescriptive disclosure rules.").

159. See Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (July 28, 2021), <https://www.sec.gov/news/speech/gensler-pri-2021-07-28> [<https://perma.cc/S756-7VZ6>] (announcing SEC staff directive to create a mandatory climate risk disclosure rule); Allison Herren Lee, *Statement on the Review of Climate-Related Disclosure*, U.S. SEC. & EXCH. COMM'N (Feb. 24, 2021), <https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure> [<https://perma.cc/7BFU-CMVL>] (directing Division of Corporation Finance to increase focus on public company disclosure related to climate change).

160. See Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272, 57273 (proposed Oct. 14, 2021) (to be codified at 29 C.F.R. pt. 2550) (stating that § 1 of Executive Order 13990 establishes the Biden Administration's policies on public health and the environment and that § 2 calls for agencies to review regulations from the prior administration that may be consistent with those policies).

ESG issues.<sup>161</sup> In addition, several SEC actions strongly signaled that an SEC mandate around climate disclosure was almost inevitable.<sup>162</sup> The SEC's Investor Advisory Committee and Asset Management Advisory Committee recommended that the SEC focus on more useful ESG disclosure.<sup>163</sup> Moreover, in February 2021, the SEC appointed a senior policy advisor for climate and ESG.<sup>164</sup> In March 2021, the SEC's Acting Chair sought public input into the SEC's review of its 2010 guidance on climate change disclosures in light of the dramatic increase in demand for climate change information.<sup>165</sup> In July 2021, incoming SEC Chair Gary Gensler asked the SEC staff to develop a rule proposal, to consider by the end of 2021, for

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161. See David M. Silk, Trevor S. Norwitz & Sabastian V. Niles, *SEC Staff Limits Exclusion of "Social Policy" Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 8, 2021), <https://corp.gov.law.harvard.edu/2021/11/08/sec-staff-limits-exclusion-of-social-policy-shareholder-proposals/> [<https://perma.cc/CS6H-G2RG>] (discussing recent guidance on the SEC's application of the "ordinary business" exclusion for shareholder proposals, and the SEC's decision to focus on whether a shareholder proposal has "broad societal impact" rather than significance to a particular issue when considering exclusion request). The guidance also reversed prior guidance and reaffirmed that issues of broad social or ethical concern could not be excluded under the economic-relevance exception. *Id.*

162. See David M. Silk, Sabastian V. Niles & Carmen X.W. Lu, *Mandatory Climate Change Disclosure Rules—A Preview from the SEC Chair?*, WATCHELL, LIPTON, ROSEN & KATZ (July 29, 2021), <https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.27758.21.pdf> [<https://perma.cc/RHT4-S2F4>] (noting the expectation of SEC rulemaking by year's end in light of Chair Gensler's clear expectation that the SEC establish an appropriate climate risk disclosure regime); David M. Silk, Sabastian V. Niles, Carmen X.W. Lu & Ram Sachs, *Global Climate and Sustainability Reporting Continues to Grow with Proposed New International and Domestic Regulatory Initiatives*, WATCHELL, LIPTON, ROSEN & KATZ 3 (July 16, 2021) [hereinafter Silk et al., *Global Climate and Sustainability Reporting Continues to Grow*], <https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.27745.21.pdf> [<https://perma.cc/VW8S-BVTB>] (noting that companies should expect regulatory pressure "for more extensive climate-related disclosures in the near future").

163. U.S. Sec. & Exch. Comm'n Asset Mgmt. Advisory Comm., *Recommendations for ESG*, U.S. SEC. & EXCH. COMM'N 7 (July 7, 2021), <https://www.sec.gov/files/amac-recommendations-esg-subcommittee-070721.pdf> [<https://perma.cc/HRF5-LCXT>]; Investor-as-Owner Subcomm. of the SEC Inv. Advisory Comm., *Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure*, U.S. SEC. & EXCH. COMM'N 7 (May 14, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf> [<https://perma.cc/BU6Z-HM6S>].

164. Press Release, U.S. Sec. & Exch. Comm'n, Satyam Khanna Named Senior Policy Advisor for Climate and ESG (Feb. 1, 2021), <https://www.sec.gov/news/press-release/2021-20> [<https://perma.cc/36PC-N4MP>].

165. See Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*, U.S. SEC. & EXCH. COMM'N (Mar. 13, 2021), <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures> [<https://perma.cc/2CD7-XT4D>] (asking for an evaluation of disclosure rules "with an eye toward facilitating the disclosure of consistent, comparable, and reliable information on climate change").

mandatory climate risk disclosure.<sup>166</sup> All of these actions made it clear that the SEC was headed towards some form of mandated climate disclosure.<sup>167</sup>

These actions all paved the way for the March 2022 climate change proposal. The proposed rules would require corporations to include specific climate-related disclosures in their registration statements and periodic reports as well as specific climate-related financial statement metrics in a note to their audited financial statements.<sup>168</sup> In particular, the rules would require corporations to provide disclosure around: (1) the governance of climate-related risks and relevant risk management, (2) the short-, medium-, and long-term material impact of climate-related risks on the business and financial statements, (3) the impact of climate-related risks on business strategy, business model, and outlook, and (4) the impact of climate-related events on the financial statements, as well as financial estimates and assumptions within the financial statements.<sup>169</sup> The proposal also would require corporations to include disclosure of a corporation's direct (Scope 1) and indirect (Scope 2) greenhouse gas emissions as well as information related to greenhouse gas emissions in its value chain (Scope 3).<sup>170</sup>

The hope is that mandatory climate-related disclosure will ensure more consistent, comparable, and reliable climate information.<sup>171</sup> Indeed, in its rule proposal, the SEC expressed concern about the current state of climate disclosure, noting that currently corporations “provide different information, in varying degrees of completeness, and in different documents and formats—meaning that the same information may not be available to

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166. Gensler, *supra* note 159.

167. See Silk et al., *Global Climate and Sustainability Reporting Continues to Grow*, *supra* note 162, at 1 (“The momentum toward universal mandatory reporting and disclosure on climate risk and sustainability has gained additional strength with recent developments at the international, domestic and state levels.”).

168. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21345–46 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (defining requirements under the new disclosure rule); Press Release, Sec. & Exch. Comm'n, *supra* note 1 (noting registrants' requirement under the new rule to include “certain climate-related disclosures in their registration statements and periodic reports”); *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosure*, *supra* note 143, at 1 (highlighting information required to be disclosed under the new rule).

169. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21345; Press Release, Sec. & Exch. Comm'n, *supra* note 1; *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosure*, *supra* note 143, at 1–2.

170. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21344–45, 21349; Press Release, Sec. & Exch. Comm'n, *supra* note 1; *Fact Sheet: Enhancement and Standardization of Climate Related Disclosure*, *supra* note 143, at 1–2.

171. See Press Release, Sec. & Exch. Comm'n, *supra* note 1 (identifying desired benefits of proposed rule); *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosure*, *supra* note 143, at 1 (same).

investors across different companies.”<sup>172</sup> The proposed rules seek to standardize climate disclosure.<sup>173</sup> As SEC Chair Gary Gensler noted, the proposed mandate seeks to provide corporations with “clear rules of the road.”<sup>174</sup> In addition, the hope is that sweeping ESG disclosure into the SEC’s mandatory regime will substantially increase the likelihood that the liability risks and internal control mechanisms associated with mandatory disclosure will better ensure the accuracy and reliability of ESG disclosures.<sup>175</sup>

This Article does not seek to debate whether these hopes are valid.<sup>176</sup> Instead, this Article seeks to assess how the potential for mandated ESG disclosure may impact corporate and stakeholder behavior around voluntary ESG disclosure. To this end, Part II places the evolution towards mandated ESG disclosure and its potential implications in the context of the broader discourse around the benefits and drawbacks of voluntary and mandated disclosure.

## II. Disclosure’s Tug of War: Mandatory Versus Voluntary Disclosure

Disclosure discourse traditionally has centered around a debate related to the benefits of voluntary versus mandated disclosure.<sup>177</sup> Such debate pits mandatory disclosure against voluntary disclosure.<sup>178</sup> This Part explores that debate and then highlights the debate through the prism of ESG disclosure.

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172. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21335.

173. See *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosure*, *supra* note 143, at 1 (“Investors also have expressed a need for more consistent, comparable, and reliable information about how a registrant has addressed climate-related risks when conducting its operations and developing its business strategy and financial plan. The proposed rules are intended to enhance and standardize climate-related disclosures to address these investor needs.”).

174. Press Release, Sec. & Exch. Comm’n, *supra* note 1 (observing the benefit of regulatory clarity to both investors and companies).

175. See *id.* (highlighting the goal of producing consistent and clear information for investors); *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosure*, *supra* note 143, at 1 (same).

176. See Peirce, *supra* note 3 (questioning the assumptions associated with the expected impact of mandatory climate disclosures).

177. See, e.g., Coffee, *supra* note 25, at 751–52 (evaluating proposed justifications for mandatory disclosure and asserting the best justifications may be those related to efficiency); Fox, *supra* note 25, at 1340–41 (mentioning the freedom associated with the ability to choose how much to disclose); Easterbrook & Fischel, *supra* note 25, at 683–85 (analyzing firms’ market incentives to disclose information under voluntary reporting schemes).

178. See, e.g., Coffee, *supra* note 25, at 752 (suggesting that voluntary disclosure schemes produce drawbacks that mandatory schemes do not); Fox, *Retaining Mandatory Securities Disclosure*, *supra* note 25, at 1340–41 (recognizing the “debate over mandatory disclosure”); Easterbrook & Fischel, *supra* note 25, at 682 (distinguishing between “the benefit of disclosure and the benefit of *mandatory* disclosure” (emphasis in original)).

A. *Understanding the Debate*

1. *The Virtues of the Mandate.*—Advocates of mandated disclosure contend that there is a greater likelihood that voluntary disclosure will produce suboptimal information.<sup>179</sup> In their view, when disclosure is voluntary there is nothing to ensure that all corporations produce high-quality information.<sup>180</sup> This is true even if there are economic and social benefits to doing so.<sup>181</sup> As a result, voluntary disclosure is less likely to ensure optimal disclosure, including disclosure that does not conceal or materially mispresent information.<sup>182</sup> While voluntary disclosure advocates argue that market forces will provide the pressure necessary to encourage optimal information disclosure, mandated-disclosure advocates disagree.<sup>183</sup> Instead, those advocates contend that market forces are insufficient on their own at pressuring all corporations to produce high-quality information.<sup>184</sup> In this regard, voluntary disclosure reflects market failure because it reflects the failure of market pressure to incentivize appropriate disclosure behavior.<sup>185</sup> There exists considerable research associated with voluntary disclosure confirming the market-failure narrative by revealing the uneven nature of corporate information produced in a voluntary disclosure regime. This research thus supports the contention that voluntary disclosure is suboptimal and subject to market failure.<sup>186</sup>

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179. See Coffee, *supra* note 25, at 722 (suggesting that without a mandatory system, voluntarily disclosed information will “not be optimally verified”).

180. See Fox, *supra* note 25, at 1339 (postulating that an issuer-choice model of disclosure would lead to disclosure “at a level significantly below th[e] social optimum”); Ferrell, *supra* note 25, at 110 (suggesting external pressure is needed by noting that “[a]n increase in the number of auditors in a country decreases the opacity of firms’ earnings disclosures”); Coffee, *supra* note 25, at 738 (listing agency costs and conflicts of interest among the forces that could disincentivize adequate disclosure).

181. See Fox, *supra* note 25, at 1379–80, 1393 (identifying market benefits of increased disclosure); Ferrell, *supra* note 25, at 110–11 (providing a hypothetical of when a firm might be incentivized to disclose more in the short term); Coffee, *supra* note 25, at 738 (noting incentives for management to act in the interests of shareholders).

182. See Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 9 (1983) (highlighting an argument in support of mandatory disclosure that “in the absence of a compulsory corporate disclosure system some issuers will conceal or misrepresent information material to investment decisions”).

183. See Coffee, *supra* note 25, at 728 (indicating that mandatory disclosure provides benefits to investors and that a regulatory scheme may be warranted if the market is unable to provide the “socially optimal supply of [securities] research”).

184. See *id.* at 722, 738 (noting that market forces cannot eliminate all instances of opportunistic behavior).

185. See *id.* at 738–43 (explaining why market forces alone are not sufficient to ensure the production of optimal information).

186. See, e.g., Fox, *supra* note 25, at 1339 (arguing that an issuer-choice disclosure model would produce disclosure “significantly below” the socially optimum level); Ferrell, *supra* note 25,



Scholars also insist that mandated disclosure is superior to voluntary disclosure because it responds to this market failure. First, by mandating the specific type of information that must be disclosed, mandated disclosure creates a baseline of optimal disclosure.<sup>187</sup> As Frank Easterbrook and Daniel Fischel note: “Imposition of a standard format and time of disclosure facilitates comparative use of what is disclosed and helps to create an efficient disclosure language.”<sup>188</sup> Second, mandated disclosure better ensures the quality, accuracy, and reliability of disclosed information.<sup>189</sup> This is because federal securities laws come with an array of tools that help ensure that corporations produce high-quality information.<sup>190</sup> Required disclosures must be filed with the SEC, increasing the likelihood that the SEC will pay attention to such disclosures, and thereby increasing the likelihood that corporations will pay attention to the accuracy and quality of those disclosures.<sup>191</sup> Required disclosures often come with interpretive guidance, which also enhances the potential for quality disclosure.<sup>192</sup> And of course, the SEC has a significant array of enforcement options to hold corporations liable for their failure to produce accurate disclosure.<sup>193</sup> The liability risks associated with mandated disclosure serve as a powerful incentive for ensuring that corporations produce accurate disclosure.

To be sure, the SEC has consistently made clear that there are liability risks associated with voluntary disclosure.<sup>194</sup> In guidance around company websites, the SEC noted that “companies should be mindful that they ‘are responsible for the accuracy of their statements that reasonably can be

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at 110 (suggesting that corporations are unable to adequately contract around lack of legal rules); Coffee, *supra* note 25, at 738 (identifying managerial incentives that indicate the need for a mandatory disclosure system).

187. See Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 WASH. U. L. REV. 487, 528 (2015) (noting that standardized disclosures create a baseline and that socially optimal levels of disclosure require mandated rather than voluntary disclosure, i.e., one based on private ordering).

188. Easterbrook & Fischel, *supra* note 25, at 700.

189. See Seligman, *supra* note 182, at 9 (outlining arguments advanced by proponents of mandatory disclosure that such disclosure will be higher quality).

190. See Sale & Thompson, *supra* note 187, at 528 (explaining that “[r]egulations that cut across issuers help to create a baseline from which all offerors and investors can operate on an equal basis”); Seligman, *supra* note 182, at 18–33 (providing analysis on the historical development of securities laws to address various problems like fraud and omissions).

191. See Sale & Thompson, *supra* note 187, at 528 (noting that “[o]fferors have inadequate incentives to disclose for various reasons” and that “[d]isclosure helps fill the gaps between offerors and investors”).

192. See *supra* notes 110, 161, and 165.

193. See Lee, *supra* note 165 (soliciting feedback on enforcement mechanisms, and mentioning “audit[s]” and other “form[s] of assurance”).

194. See, e.g., Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45862, 45869–70 (Aug. 7, 2008) (to be codified at 17 C.F.R. pts. 241, 271) (referencing potential liability under federal securities law antifraud provisions).

expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the Internet.”<sup>195</sup> In addition, the SEC has made clear that the voluntary nature of a corporation’s disclosure does not give the corporation license to engage in misleading or fraudulent disclosures.<sup>196</sup> Then too, the SEC has emphasized the fact that it assesses misleading statements or nondisclosures in a company’s required filings by examining information outside of the filings, including information voluntarily disclosed on websites and in other arenas.<sup>197</sup> All of these statements make clear that voluntary disclosure involves liability risks.

However, corporate behavior around voluntary disclosure strongly suggests that corporations do not view the liability risks associated with voluntary disclosure in the same manner that they view the liability risks associated with mandated disclosure.<sup>198</sup> Hence, studies indicate not only that corporations are much more likely to produce inaccurate or lower quality information when that information is voluntarily disclosed, but also that such suboptimal information stems at least in part from corporate perception about the lower liability risks associated with voluntary versus mandated disclosure.<sup>199</sup> As a result, mandated disclosure appears to be superior to voluntary disclosure because the liability risks associated with mandated disclosure have a greater likelihood of encouraging corporations to produce accurate and reliable disclosures.

In addition, when disclosure is produced in a mandatory context, corporations are more likely to establish the governance structures that are needed to ensure the quality and accuracy of disclosed information. On the one hand, there are SEC requirements around internal controls designed to ensure that corporations formally establish an internal information-

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195. *Id.* at 45869 (quoting Use of Electronic Media, 65 Fed. Reg. 25843, 25848 (May 4, 2000) (to be codified at 17 C.F.R. pts. 231, 241, 271)).

196. *See* Sale, *supra* note 16, at 1055 (noting that “section 10(b) provides issuer liability for misstatements and omissions regardless of whether they occur in an offering document, thus significantly broadening the potential scope of liability”); *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12 Civ. 8557(CM), 2013 WL 6233561, at \*18 (S.D.N.Y. Dec. 2, 2013) (“The fact that a corporation has no affirmative legal obligation to disclose information under applicable SEC regulations ‘does not mark the end of our inquiry;’ the corporation may still have a duty to disclose that information in order to avoid misleading investors.” (quoting *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 365 (2d Cir. 2010))).

197. GAO ESG Study, *supra* note 59, at 34–37 (discussing the SEC’s review process and the sources it looks to in order to assess disclosures, such as press articles, speeches, company websites, and earnings calls).

198. *See id.* at 27 (stating that companies fear competitive disadvantages and legal liability arising from disclosing detailed information).

199. *See supra* note 198.

production-and-approval system for certain kinds of required disclosures.<sup>200</sup> On the other hand, the liability risks associated with mandated disclosure often result in corporations establishing a robust review and approval process for information required to be disclosed in a mandated filing.<sup>201</sup> This process includes interactions with officers and executives who have particular expertise associated with disclosed information, board oversight of the disclosure process, and oversight and advice from legal counsel.<sup>202</sup> By contrast, there is significant skepticism about whether voluntary disclosures are subject to the more rigorous review and approval process associated with mandated reporting.<sup>203</sup> Indeed, historically a corporation's marketing department oversaw much of the voluntary disclosure on corporate websites without input or even knowledge of the content from anyone outside of the marketing department.<sup>204</sup> Hence neither the board, key executives, nor legal counsel oversaw or were made aware of such disclosures.<sup>205</sup> Even the strongest proponents of voluntary disclosure acknowledge that voluntary disclosure does not come with the kind of assurances, liability risks, or scrutiny that attaches to mandatory disclosure.<sup>206</sup>

Reflecting these concerns, in the climate rule proposal, the SEC noted that voluntary disclosure “is not subject to the full range of liability and other investor protections that help elicit complete and accurate disclosure by public companies.”<sup>207</sup> From this perspective, mandatory disclosure better ensures accurate and reliable information because it increases the likelihood

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200. See 15 U.S.C. § 7241 (requiring companies to develop internal controls); 15 U.S.C. § 78dd-1(a) (prohibiting securities issuers from engaging in corrupt trade practices); 15 U.S.C. § 7262(a) (providing for the SEC to promulgate rules governing internal controls); see also Langevoort & Thompson, *supra* note 90, at 380 (noting how the Sarbanes-Oxley Act “brought a new specificity and new visibility” to internal control regulations).

201. See Eccles & Klimenko, *supra* note 13, at 116 (noting that lack of universal reporting mechanisms presents a challenge to companies who wish to disclose such information to investors); Winden, *supra* note 84, at 1257 (noting that filings submitted to the SEC go through a rigorous control process).

202. See Winden, *supra* note 84, at 1257 (explaining that information submitted in SEC filings is “likely to [be] . . . reviewed by divisions in the organization responsible for disclosure controls and procedures, such as the general counsel, chief accounting officer, and chief financial officer”).

203. See *id.* at 1257 (explaining that sustainability reports are “inadequate[ly] reliab[le]” in part because they do not go through the same robust review process as SEC filings).

204. See Eccles & Klimenko, *supra* note 13, at 116 (proposing that firms should invest in ESG systems and “should press their audit firms to provide assurance on reported ESG performance, just as they do for financial performance”); Winden, *supra* note 84, at 1257 (citing 2016 letter noting that production of ESG reports were “subject to disjointed processing”).

205. See Winden, *supra* note 84, at 1257 (highlighting that companies’ finance and legal teams typically did not review sustainability reports).

206. See Peirce, *supra* note 3 (noting that voluntary disclosure is “subject neither to mandatory assurance nor to the level of liability or scrutiny that attaches to SEC filings” (footnotes omitted)).

207. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21335 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

that corporations will establish the internal controls and processes necessary to ensure the accuracy of any reported data.<sup>208</sup>

2. *The Value of Volunteering.*—Proponents of voluntary disclosure dispute the market-failure claims associated with mandated disclosure and insist that voluntary disclosure can and does result in high-quality information. Proponents of voluntary disclosure argue that voluntary disclosure serves an important signaling function, which enables corporations to differentiate themselves and signal the high quality of their products and services.<sup>209</sup> In their view, the signaling function of disclosure ensures that the market will entice corporations to voluntarily produce the optimal level of quality disclosure.<sup>210</sup> In addition, some scholars note that informational intermediaries, such as accountants and auditors, help ensure the accuracy of voluntarily disclosed information.<sup>211</sup> In this regard, voluntary disclosure renders mandated disclosure superfluous because voluntary disclosure is sufficient to ensure that corporations produce optimal levels of disclosure.<sup>212</sup>

More importantly, voluntary disclosure advocates argue that voluntary disclosure is superior to mandated disclosure. In their view, voluntary disclosure better ensures that corporations disclose only at the optimal levels. By contrast, the one-size-fits-all nature of mandated disclosure may not only force corporations to disclose more than is needed but also could be harmful to investors by leading to disclosure overload that overwhelms investors and discourages investors from fully participating in the market.<sup>213</sup>

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208. See Eccles & Klimenko, *supra* note 13, at 116 (encouraging companies to develop internal controls for ESG data and observing that historical lack of internal controls in this area has resulted in “untimely and poor-quality ESG data”); Winden, *supra* note 84, at 1257 (“Disclosures filed by U.S. public companies with the SEC are required to be subject to disclosure controls and procedures described in their annual reports on Form 10-K.”).

209. See Grossman & Hart, *supra* note 25, at 323–24 (suggesting that when transaction costs are negligible and it is illegal to lie, companies have “nothing to gain by withholding information”); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387, 418 (2001) (arguing that “[f]irms have a strong incentive to distinguish themselves by providing information about their projects to obtain capital,” and that for investors, “no news is bad news”).

210. See Easterbrook & Fischel, *supra* note 25, at 675–76, 683–85 (explaining how existing market pressures produce optimal levels of disclosure because the act of disclosing itself sends a signal about the firm’s value).

211. See *id.* at 688–89 (pointing out that “[i]nformational intermediaries increase the amount of accurate information about firms that can be conveyed to investors”).

212. See *id.* at 683–87 (positing that just because mandatory disclosure is one way of standardizing disclosures does not mean mandatory disclosure is necessary).

213. See, e.g., *id.* at 685 (suggesting the optimal level of disclosure is one that reduces investors’ costs of searching for information).

3. *Repercussions of the Debate.*—The debate around the merits of voluntary versus mandatory disclosure historically has led to conceptualizing disclosure as a zero-sum binary proposition. Such conceptualization has three ramifications. First, advocates of a particular form of disclosure tend to view an embrace of that disclosure as a wholesale rejection of the other. Second, advocates tend to view one type of disclosure as the antidote for the ills associated with the other form of disclosure. Third, as a consequence of the second, an embrace of a particular form of disclosure means that little attention will be paid to ameliorating the ills associated with the alternative form of disclosure. In this context, for example, an embrace of mandatory disclosure not only triggers a rejection of voluntary disclosure, but also brings with it the presumption that mandatory disclosure is *the* cure for any ills associated with voluntary disclosure. Because mandatory disclosure is the cure-all for the shortcomings of voluntary disclosure, the embrace of mandatory disclosure brings with it the strong possibility that no additional effort is made to respond to the shortcomings of voluntary disclosure.

B. *The Debate in the ESG Context*

On the one hand, voluntary ESG disclosure has evolved in a manner that supports the case for voluntary disclosure and thus potentially undermines arguments emphasizing the necessity of mandated disclosure. First, with respect to comparability, voluntary disclosure trends reflect increased uniformity as a result of some convergence on particular disclosure frameworks. Institutional investors and shareholders have pushed corporations to prioritize particular reporting frameworks for ESG disclosure.<sup>214</sup> Consistent with this push, a recent study revealed that three ESG reporting frameworks have emerged as the most frequently used ESG reporting frameworks: those promulgated by the Sustainability Accounting Standards Board (SASB), the Task Force on Climate-Related Financial Disclosures (TCFD) and the Global Reporting Initiative (GRI).<sup>215</sup> Moreover, the SASB and TCFD frameworks are often viewed as the most dominant frameworks in the United States.<sup>216</sup> In 2020, a group of the most notable standard setters on ESG reporting released a joint statement of their intention

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214. See Anagnosti et al., *supra* note 12 (explaining push to prioritize SASB and TCFD).

215. Sidley Report, *supra* note 35, at 4; see Fisch, *supra* note 13, at 945 (noting the sizable number of corporations that rely on the GRI standards); Anagnosti et al., *supra* note 12 (emphasizing reliance on SASB and TCFD).

216. See Anagnosti et al., *supra* note 12 (noting that 22% of surveyed companies stated in their SEC filings that they followed SASB, TCFD, or both for their sustainability reports available on their websites).

to collectively create a comprehensive and uniform reporting framework.<sup>217</sup> In November 2021, the International Sustainability Standards Board (ISSB) was launched with the goal of developing uniform reporting standards and encouraging the embrace of such standards.<sup>218</sup> These efforts underscore the fact that the voluntary disclosure regime has managed to facilitate more uniform disclosure and thus respond to concerns around comparability. Second, recent studies suggest that the accuracy and reliability of voluntary ESG disclosure has also improved. For example, one study found that 44% of the public trusted the accuracy of sustainability reports, up from 39% in 2016.<sup>219</sup> Based on such increase, some have suggested that accuracy concerns about voluntary ESG disclosure are decreasing.<sup>220</sup> Like comparability, these statistics suggest that the concerns related to voluntary disclosure may be capable of being ameliorated, and hence that the push towards mandatory disclosure may be unwarranted.

However, a closer and comprehensive look at voluntary ESG disclosure still suggests cause for concern and thus reason to question the ability of voluntary disclosure to offer benefits similar to mandatory disclosure. First, the push towards uniformity associated with ESG disclosure frameworks is still evolving and thus has not yet translated into an ESG disclosure landscape that enables comparability across the broad range of corporations.<sup>221</sup> Instead, the most recent surveys continue to reveal that companies use different reporting frameworks and disclosure metrics.<sup>222</sup> A recent survey indicates that many companies only use portions of the most frequently embraced

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217. CDP, CLIMATE DISCLOSURE STANDARDS BD., GLOB. REPORTING INITIATIVE, INT'L INTEGRATED REPORTING COUNCIL & SUSTAINABILITY ACCT. STANDARDS BD., STATEMENT OF INTENT TO WORK TOGETHER TOWARD COMPREHENSIVE CORPORATE REPORTING, INTEGRATED REPORTING 2–3 (2020), <https://29kjwb3arnds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf> [https://perma.cc/72WG-UGLN].

218. Mellissa Campbell Duru, Sinéad Oryszczuk, Paul Mertenskötter & Ivy-Victoria Otradovec, *ESG & Sustainability Reporting Developments: Climate Disclosure Prototypes*, COVINGTON & BURLING LLP (Dec. 6, 2021), <https://www.insideenergyandenvironment.com/2021/12/es-sustainability-reporting-development-climate-disclosure-prototypes/> [https://perma.cc/73WU-8F68].

219. Emily Holbrook, *Public Trust in Sustainability Reporting Is Rising Sharply*, ENV'T + ENERGY LEADER (Oct. 14, 2020), <https://www.environmentalleader.com/2020/10/public-trust-in-sustainability-reporting-is-rising-sharply/> [https://perma.cc/B8BN-EFV5].

220. *See id.* (quoting a CEO as indicating that trust in sustainability disclosures is increasing).

221. *Cf.* Peirce, *supra* note 3 (noting that even the most popular voluntary frameworks “are neither universally used nor precisely followed”).

222. *See* Sidley Report, *supra* note 35, at 3 (referencing the existence of different standards); Winden, *supra* note 84, at 1225 (“The variety of different ESG reporting frameworks means that there is no agreed set of ESG factors, with agreed standards for measuring them, that all companies can use as standards for disclosure, as there are for financial statements.”); GAO ESG Study, *supra* note 59, at 12 (noting variety of ESG metrics, which presents a challenge to investors who are trying to compare information across companies).

frameworks while many others do not use the framework at all.<sup>223</sup> Indeed, in its climate rule proposal, the SEC concluded that the proliferation of reporting frameworks has contributed to “reporting fragmentation, which can hinder investors’ ability to understand and compare registrants’ climate-related disclosures.”<sup>224</sup> So long as adoption of disclosure frameworks are voluntary, there is no guarantee that the majority of corporations will embrace a particular standard—even one that is deemed to be uniform or standard. In the corporate-governance arena, even though there are several governance practices around which a consensus has emerged within the business community—and thus that are now viewed as “best” practices—there remain many corporations that have refused to adopt such practices.<sup>225</sup> This experience underscores the difficulty with creating a uniform regime based on voluntary measures.

Second, although accuracy and reliability have improved, relatively recent studies indicate that such concerns continue to plague the voluntary ESG disclosure landscape.<sup>226</sup> A GAO study showed that 86% of institutional investors remain skeptical of voluntary ESG disclosures, and this skepticism is fueling the call for mandated disclosures.<sup>227</sup> The SEC climate rule proposal opined that “there may not be sufficient incentives or external disciplines to ensure that companies are providing complete and robust disclosure under those frameworks.”<sup>228</sup>

The persistent concerns surrounding voluntary ESG disclosure may be viewed as a confirmation of market failure, underscoring the inability of voluntary disclosure to ensure that corporations produce high-quality ESG information. Mandated disclosure appears to be the perfect antidote for the

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223. See Peirce, *supra* note 3 (pointing to survey indicating that “U.S. companies pick and choose elements of the TCFD framework to follow and the majority do not adhere to key parts of the framework”).

224. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21342 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

225. See Matteo Tonello & Paul Hodgson, *Corporate Board Practices in the Russell 3000, S&P 500, and S&P Mid-Cap 400*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 6, 2021), <https://corpgov.law.harvard.edu/2021/11/06/corporate-board-practices-in-the-russell-3000-sp-500-and-sp-mid-cap-400/> [<https://perma.cc/U24T-GSA8>] (explaining divide in governance practices, including majority voting and board declassification).

226. See Fisch, *supra* note 13, at 950 (stating that “sustainability reporting is not reliable”); Ho & Park, *supra* note 12, at 255 (observing that dissatisfaction with disclosure has increased alongside the demand for ESG information).

227. See Sara Dewey, *What to Know About the SEC’s Proposed Climate Risk Disclosure Rule*, ENV’T & ENERGY L. PROGRAM (Apr. 27, 2022), <https://eelp.law.harvard.edu/2022/04/what-to-know-about-the-sec-proposed-climate-risk-disclosure-rule/> [<https://perma.cc/3QBS-WHY5>] (citing studies).

228. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21342.

issues that plague voluntary ESG disclosure. Some insist that the liability risks along with the review and approval process associated with mandated disclosure offer the best chance of ensuring that corporations pay appropriate attention to the quality of ESG disclosures.<sup>229</sup> Commentators also insist that comparability concerns associated with voluntary ESG disclosure will only be ameliorated through mandatory ESG disclosure.<sup>230</sup> This is because mandated disclosure demands that corporations report on the same information in the same format.<sup>231</sup> Mandated disclosure thus ensures a common baseline of information that facilitates comparison across companies and industries.<sup>232</sup>

Alas, because disclosure has been conceptualized as a binary choice, the recognition that mandatory disclosure may better respond to some of the shortcomings associated with voluntary disclosure brings with it the potential to dismiss voluntary ESG disclosure altogether. The tendency to dismiss voluntary ESG disclosure is even more prevalent now that there appears to be serious momentum for mandated ESG disclosure.<sup>233</sup> This dismissal not only means that there may be less inclination to rely on voluntary ESG disclosure but also that relatively little attention will be paid to developing strategies aimed at improving the accuracy of voluntary ESG reports.

As the next Part reveals, this Article seeks to shift the narrative around how we conceptualize disclosure and thus reimagine how we view the continued viability of voluntary disclosure even as we embrace the adoption of mandatory disclosure.

### III. Dynamic Disclosure and the Link Between Mandatory and Voluntary Disclosure

At first glance, the historical disclosure conception pitting mandatory disclosure against voluntary disclosure appears valid. Indeed, there are

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229. See Winden, *supra* note 84, at 1257–58 (discussing the limited regulation of sustainability reports and how requiring these disclosures would “enhance the attention and level of care” companies give); GAO ESG Study, *supra* note 59, at 27 (reporting investors’ complaints that many companies’ disclosures “contained generic language or did not provide specific details about how the company manages ESG-related risks or opportunities”); Hazen, *supra* note 99, at 792–95 (explaining how ESG considerations may fit into existing SEC guidance).

230. See Winden, *supra* note 84, at 1253 (stating that requiring companies to disclose sustainability information in SEC filings should solve comparability issues).

231. See Press Release, Sec. & Exch. Comm’n, *supra* note 1 (suggesting the proposed rules will “provide investors with consistent, comparable, and decision-useful information”); *Fact Sheet: Enhancement and Standardization of Climate Related Disclosure*, *supra* note 143, at 1 (discussing the ability of mandatory disclosure to ensure clear rules and standardization).

232. See Sale & Thompson, *supra* note 187, at 528 (discussing how standardized disclosures fill information gaps and allow for comparison).

233. See Fleming & Ledbetter, *supra* note 10, at 10647 (noting that a middle-ground solution between mandatory and voluntary disclosure is unlikely because “investor demand for ESG information has become such a polarized political issue”).



several viable reasons why embracing mandatory disclosure may result in the demise of any reliance on voluntary disclosure. First, voluntary disclosure may be viewed as superfluous, obsolete, or inconsequential because mandated disclosure offers the same or similar, if not superior, benefits to voluntary disclosure.<sup>234</sup> Second, even if voluntary disclosure offers distinct benefits, it may be argued that the two disclosure regimes cannot coexist, and hence mandated disclosure must necessarily displace voluntary disclosure. Indeed, once mandatory disclosure emerges, stakeholders may no longer be incentivized to pressure corporations to produce voluntary disclosure, decreasing the likelihood that voluntary disclosure will receive appropriate attention. Moreover, corporations, focused on producing mandatory disclosure, may no longer have the time, resources, or inclination to simultaneously focus on producing robust voluntary disclosure. Third, even if voluntary disclosure can coexist with mandatory disclosure, some may see no legitimate reason for such coexistence. This includes those who view mandated disclosure as superior to voluntary disclosure, as well as those concerned about disclosure overload and hence concerned about the potential that seeking to maintain a robust voluntary disclosure regime may prove overwhelming to stakeholders and thus negatively impact their capacity to absorb any disclosure.<sup>235</sup>

This Part reimagines disclosure and makes the affirmative case for why any potential for mandated disclosure must not cause us to ignore the importance of voluntary disclosure. After pinpointing the practical reasons against any dismissal of voluntary disclosure, this Part demonstrates the flaws in the normative arguments for dismissing the importance of voluntary disclosure. In so doing, this Part highlights the dynamic nature of the disclosure regime and thereby illuminates the manner in which voluntary disclosure is inherently linked to mandatory disclosure. Based on these observations about dynamic disclosure, this Part reveals the necessity of remaining vigilant with respect to voluntary disclosure.

#### A. *The Practical Realities*

Before diving into a discussion of dynamic disclosure, it is important to point out that one very critical reason for ensuring that any potential for mandated disclosure does not cause us to dismiss voluntary disclosure is one grounded in political reality. First, there is the obvious potential that

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234. *See id.* at 10647 (hypothesizing that if the SEC were to “become[] willing to adopt an SD&A disclosure requirement, by then the Commission may be willing to go further and mandate ESG disclosures that are more fulsome, reliable, and comparable”).

235. *See* Honigsberg et al., *supra* note 25, at 300, 302–03 (discussing potential for investors to become overwhelmed with too much information); Coffee, *supra* note 25, at 730 (discussing the potential that disclosure can produce too much information); Easterbrook & Fischel, *supra* note 25, at 696 (discussing concerns with the thinking that more information is always better).

mandatory disclosure may not materialize. Commenters have raised serious objections to the proposed climate change disclosure.<sup>236</sup> These objections may cause the SEC to reconsider any climate change disclosure mandate. Such reconsideration has happened before with other SEC rule proposals, whereby the SEC tabled a rule proposal after significant pushback from the business community.<sup>237</sup> Hence, this possibility is not merely a speculative one. Second, even if the SEC issues a final rule, that rule may not survive legal challenges. Indeed, commentators have suggested that the SEC's proposed climate change rules violate several laws, including the First Amendment.<sup>238</sup> Not only has the business community been willing to challenge SEC rule proposals but also courts have been willing to overturn SEC rules in the wake of those challenges.<sup>239</sup> This reveals that the potential for any SEC rule to be overturned by the courts is very real. At a minimum, these political realities make it premature to dismiss the importance of voluntary ESG disclosure. Indeed, those realities mean that it is entirely possible that voluntary ESG disclosure may be our only disclosure option, at least for the foreseeable future.

Second, the potential that any mandated disclosure can be repealed also is reason not to completely dismiss voluntary disclosure. Even if a final rule is adopted and survives legal challenges, it is entirely possible for the SEC to later reverse course and repeal any disclosure mandate. The SEC historically has been reluctant to mandate disclosure of ESG issues.<sup>240</sup> The prior administration was particularly hostile to initiatives seeking to link ESG with financial considerations. A prime example of this hostility can be seen in actions related to ESG surrounding fiduciary plans. In November and December 2020, the DOL adopted rules requiring retirement plan fiduciaries to focus solely on “pecuniary” factors in their investment decisions.<sup>241</sup> These DOL rules were specifically premised on the view that ESG issues were not linked to investment risks and returns.<sup>242</sup> Indeed, while the DOL rules did not

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236. See *supra* notes 3 and 7.

237. See FAIRFAX, *supra* note 43, at 132–34 (discussing tabling of proxy access rule).

238. See *supra* note 7.

239. See FAIRFAX, *supra* note 43, at 139 (mentioning Business Roundtable's challenge to the SEC's proxy access rule); Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 828–29 (2013) (discussing how the Business Roundtable challenge resulted in the D.C. Circuit overturning the proxy access rule).

240. Anagnosti et al., *supra* note 12; Winden, *supra* note 84, at 1216.

241. Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658, 81658 (Dec. 16, 2020); see also Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272, 57275 (proposed Oct. 14, 2021) (to be codified at 29 C.F.R. pt. 2550) (recognizing confusion as to whether ESG factors may be treated as “pecuniary” factors under the current regulation).

242. See Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. at 57275 (acknowledging that “the preamble to the *Fiduciary Duties Regarding*

reference ESG, they included statements that reflected skepticism about the pecuniary nature of ESG factors, raising significant concerns about the ability of plan fiduciaries to consider ESG issues in their investment process.<sup>243</sup> As noted in Part I, in October 2021, the Biden administration quickly sought to reverse course, proposing new rules clarifying plan fiduciaries' ability to consider climate change and other ESG factors when making investment decisions.<sup>244</sup> While the relatively quick rule reversal may be viewed as a good signal for those who value consideration of ESG matters, it also underscores the equivocal nature of the political process and thus the precarious nature of relying solely on SEC mandates to meet disclosure needs. The virtual flip-flop on ESG issues means that there is no guarantee that any SEC mandate will remain in place over the long term. This kind of political environment therefore necessitates remaining vigilant with respect to voluntary ESG disclosure because that disclosure may be the only disclosure upon which we can consistently rely.

To be clear, this Article's claims about the need to focus on voluntary disclosure do not rest on the potential that mandatory disclosure never emerges. Instead, this Article insists that voluntary disclosure has value even if mandatory disclosure materializes. Grounded in a reconceptualization of our disclosure regime, this insistence rests not only on the premise that voluntary disclosure has value that cannot be replicated with mandatory disclosure but also on the premise that voluntary and mandatory disclosure are intertwined. The next subparts illuminate these claims.

### B. *Coexisting Disclosure*

The current disclosure environment reflects dynamic disclosure because that environment reveals the coexistence of mandatory and voluntary disclosure. Indeed, one may object to the notion of dynamic disclosure based on the contention that voluntary and mandatory disclosure cannot coexist. Consistent with this contention, it is entirely possible that once mandatory disclosure emerges stakeholders may no longer be incentivized to pressure corporations to produce voluntary disclosure, increasing the likelihood that such disclosure will receive appropriate attention. It is also entirely possible that corporations, focused on producing mandatory disclosure, may no longer have the time, resources, or inclination to simultaneously focus on producing

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*Proxy Voting and Shareholder Rights* final rulemaking expressed the view that it is likely that many environmental and social shareholder proposals have little bearing on share value or other relation to plan financial interests”).

243. *See id.* (discussing how aspects of the regulation caused confusion over whether an ERISA fiduciary could “consider ESG . . . in making investment and proxy voting decisions that the fiduciary reasonably believes will benefit the plan and its participants and beneficiaries”).

244. *Id.* at 57276.

robust voluntary disclosure. These possibilities suggest that mandatory and voluntary disclosure cannot comfortably coexist.

However, current ESG disclosure practices belie this suggestion. Voluntary ESG disclosure has developed alongside the admittedly more limited increased ESG disclosure in required SEC filings.<sup>245</sup> One set of researchers notes that, even as disclosure in mandated filings has increased, it is “important to acknowledge the continuing trend of companies providing most ESG reporting on corporate websites, rather than in SEC filings.”<sup>246</sup> This suggests that corporations can be incentivized to focus on both mandatory and voluntary reporting at the same time.

Moreover, existing disclosure practices reveal that voluntary and mandatory disclosure can continue to exist alongside one another even after specific mandates emerge. Indeed, some may theorize that the current coexistence of mandatory and voluntary ESG disclosure results from the fact that there is no specific mandated disclosure. Based on this theory, the emergence of mandatory disclosure may crowd out or reduce any reliance on voluntary disclosure. However, disclosure in other areas contradicts this assumption. For example, federal securities laws mandate disclosure around executive compensation and certain board composition matters.<sup>247</sup> Nonetheless, companies also voluntarily report additional information on these issues in their ESG reports and on their websites.<sup>248</sup> This practice highlights the fact that mandatory disclosures do not eradicate the continued publication of voluntary information. This coexistence suggests that incentives may continue to exist to not only ensure that stakeholders continue to push for voluntary disclosure but also to ensure that corporations continue to respond to that push. To be sure, this Article hopes to serve as one of those incentives.

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245. See Anagnosti et al., *supra* note 12 (noting that in 2020, 84% of surveyed companies used their SEC filings to direct readers to their websites to view sustainability disclosures).

246. *Id.*

247. GAO ESG Study, *supra* note 59, at 7; Item 402 of Regulation S-K, 17 C.F.R. § 229.402(a)(2) (requiring disclosure around executive compensation); Item 407 of Regulation S-K, 17 C.F.R. § 229.407(c)(2)(vi) (requiring disclosure related to corporate governance).

248. See, e.g., THE HOME DEPOT, 2021 ESG REPORT: DOING OUR PART 124–25 (2021), [https://corporate.homedepot.com/sites/default/files/THD\\_2021ESGReport.pdf](https://corporate.homedepot.com/sites/default/files/THD_2021ESGReport.pdf) [<https://perma.cc/NBP6-AE6R>] (including information on leadership structure, corporate governance policies, board committees, and board oversight of risk); FORD, ENVIRONMENTAL, SOCIAL AND GOVERNANCE REVIEW 28–38 (2021) (presenting information on risk management, board independence, accountability, director diversity, and executive compensation), [https://s201.q4cdn.com/693218008/files/doc\\_downloads/key-disclosures/2021/Ford-ESG-Presentation\\_November-'21.pdf](https://s201.q4cdn.com/693218008/files/doc_downloads/key-disclosures/2021/Ford-ESG-Presentation_November-'21.pdf) [<https://perma.cc/PJ7Z-A332>]; VERIZON, ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) REPORT 21–25 (2020), [https://www.verizon.com/about/sites/default/files/esg-report/2020/Verizon\\_2020\\_ESG\\_Report.pdf](https://www.verizon.com/about/sites/default/files/esg-report/2020/Verizon_2020_ESG_Report.pdf) [<https://perma.cc/46KA-SMSQ>] (highlighting board diversity, climate-related risk approach, data privacy, human rights, diversity and inclusion, and employee health and safety).

Of course, the fact that voluntary and mandatory disclosure can and do coexist is not a normative claim and thus does not answer the query about whether they *should* coexist. The next sections support this Article's core argument that such coexistence is essential to an effective disclosure regime, and thus it is normatively appropriate and desirable for voluntary and mandatory disclosure to coexist.

### C. *Valuing Voluntary Disclosure*

This subpart asserts that the coexistence of mandatory and voluntary disclosure is normatively appropriate because voluntary disclosure has benefits that cannot be replicated through mandatory disclosure. In other words, the coexistence of both forms of disclosure is desirable because mandatory disclosure does not render voluntary disclosure superfluous or inconsequential.

1. *Flexibility.*—Voluntary disclosure provides important flexibility around disclosure in at least two respects. The first flexibility centers around materiality and the content of disclosure. The SEC has clearly recognized that ESG issues can be material because such issues may have an impact on corporate financial performance.<sup>249</sup> A sizeable majority of investors and business community leaders also have recognized that ESG factors can be material.<sup>250</sup> Importantly, ESG matters can have both negative and positive impacts on financial matters, making assessment of ESG factors material to risk management as well as corporate performance.<sup>251</sup> However, assessing materiality is complex. Financial materiality varies by industry and by

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249. See Fisch, *supra* note 13, at 936 (discussing the SEC's introduction and expansion of mandatory reporting requirements related to executive compensation, a shift from its earlier restrictive approach).

250. See Esty & Karpilow, *supra* note 13, at 628 (“The past decade . . . has witnessed a groundswell of interest in sustainability among mainstream investors.”); Fisch, *supra* note 13, at 924 (referencing BlackRock CEO Larry Fink's 2018 letter to CEOs highlighting need to focus on sustainability and social issues); Ho & Park, *supra* note 12, at 261 (noting that ESG information is now considered material by mainstream investors for purposes of voting decisions); Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 625 (2009) (positing that the fact that boards support shareholder proposals on ESG topics undermines the theory that those ideas are unimportant); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 435 (2020) (suggesting ESG factors can impact firm value by assisting in the identification of specific risks and quality of management).

251. See Eccles & Klimenko, *supra* note 13, at 110 (quoting a CEO as saying “[w]e seek to analyze material issues such as climate risk, board quality, or cybersecurity in terms of how they impact financial value in a positive or negative way”).

company.<sup>252</sup> Perhaps more importantly, the business community is beginning to recognize that materiality of ESG factors can change over time,<sup>253</sup> and thus assessments of materiality must be more fluid and adaptive.<sup>254</sup> To the extent not all ESG matters are material to every company or industry, a primary benefit of voluntary disclosure is that it enables corporations to tailor their disclosure to ESG matters material to their particular industry or their particular corporation.<sup>255</sup> Voluntary disclosure gives corporations the flexibility to determine which ESG matters are most material to their business and operations, and thus to pinpoint which of the broad range of ESG matters on which they choose to disclose or otherwise significantly highlight.<sup>256</sup> Consistent with the notion that the materiality of ESG issues may evolve over

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252. See Ho & Park, *supra* note 12, at 260–61 (stating that “the materiality of particular ESG factors to investors varies according to industry sector and requires a firm-specific analysis”); Mozaffar Khan, George Serafeim & Aaron Yoon, *Corporate Sustainability: First Evidence on Materiality*, 91 ACCT. REV. 1697, 1722 (2016) (presenting analysis on the various ESG factors identified as material by industry); *Why ESG Is Here to Stay*, *supra* note 11 (noting that companies want to address ESG factors material to their industries and that relevant ESG factors vary according to industry); Lipton, *supra* note 61, at 531 (noting institutional investor support for required disclosure as long as materiality is sector-specific); Eccles & Klimenko, *supra* note 13, at 110 (“Materiality varies by industry.”).

253. See WARD ET AL., *supra* note 61 at 30 (referring to a concept of dynamic materiality).

254. See *id.* at 30 (noting that materiality can change over time and with major events); WORLD ECON. F., *EMBRACING THE NEW AGE OF MATERIALITY: HARNESSING THE PACE OF CHANGE IN ESG* 13 (2020), <https://www.weforum.org/whitepapers/embracing-the-new-age-of-materiality-harnessing-the-pace-of-change-in-esg> [<https://perma.cc/BLR6-NZPP>] (“What becomes financially material is changing faster than ever.”); Robert G. Eccles, *Dynamic Materiality in the Time of COVID-19*, FORBES (Apr. 19, 2020, 8:10 AM), <https://www.forbes.com/sites/bobeccles/2020/04/19/dynamic-materiality-in-the-time-of-covid-19/?sh=11329154f072> [<https://perma.cc/7BMA-QANG>] (explaining the idea of dynamic materiality as the idea that ESG materiality changes over time); Robert G. Eccles, *Dynamic Materiality and Core Materiality: A Primer for Companies and Investors*, FORBES (Jan. 17, 2020, 2:35 PM), <https://www.forbes.com/sites/bobeccles/2020/01/17/dynamic-materiality-and-core-materiality-a-primer-for-companies-and-investors/?sh=18e703732e6a> [<https://perma.cc/NSX9-ZQBK>] (explaining that companies decide what information they consider important).

255. See Romano, *supra* note 25, at 2374 (noting that because investors need information to make investment decisions, companies are incentivized to voluntarily disclose that needed information); Mahoney, *supra* note 25, at 1092 (positing that “managers will voluntarily provide whatever information investors desire, so long as the cost of production is less than the associated reduction in agency costs”); Easterbrook & Fischel, *supra* note 25, at 683 (illustrating the idea that a firm will disclose as much as is advantageous); see also Winden, *supra* note 84, at 1222 (noting that regulators may “frustrate the development and dissemination of information” if they set disclosure requirements themselves).

256. See *Why ESG Is Here to Stay*, *supra* note 11 (noting that companies use voluntary ESG reporting to address ESG factors material to their industries and that relevant ESG factors vary according to industry); WARD ET AL., *supra* note 61, at 30 (noting that the range of ESG issues is broad and that corporations use voluntary ESG reporting to reflect the materiality of ESG factors to their business).

time,<sup>257</sup> voluntary ESG also enables corporations to evolve their coverage of ESG topics over time.<sup>258</sup>

This kind of content flexibility undermines the claim that mandatory disclosure renders voluntary disclosure redundant. Indeed, mandatory disclosure is often criticized because it is inflexible and thus requires a one-size-fits-all disclosure approach that does not allow corporations suitable disclosure flexibility. This inflexibility stands in contrast to the flexibility associated with voluntary disclosure.

Some may contend that mandatory disclosure can be designed to provide flexibility, particularly when that disclosure is principles-based.<sup>259</sup> As one SEC Commissioner puts it, principles-based disclosure means that “companies have to think about what is financially material in their unique circumstances and disclose those matters to investors.”<sup>260</sup> Principles-based mandatory disclosure enables corporations to use their own discretion in determining whether certain information should be disclosed based on a disclosure “concept” such as materiality.<sup>261</sup> A principles-based approach to mandatory disclosure is distinct from a prescriptive-based approach to mandatory disclosure, which calls for corporations to comply with specific disclosure rules.<sup>262</sup> In 2013, the SEC issued a report discussing its overall disclosure approach in relation to updating Regulation S-K, and in that report the SEC emphasized its intent to adopt a principles-based approach to its disclosure requirements.<sup>263</sup> Consistent with this approach, when the SEC adopted a recent set of amendments to Regulation S-K, including rules related to human capital management, such amendments explicitly embraced a principles-based disclosure framework.<sup>264</sup> Such a framework allows corporations to provide disclosure based on their understanding of the issues

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257. *See supra* note 254.

258. *See* Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1839 (2021) (invoking the SEC’s defense of a principles-based approach to disclosure on the basis that materiality is unique to each company (quoting Modernization of Regulation S–K Items 101, 103, and 105, 84 Fed. Reg. 44358, 44370 (proposed Aug. 23, 2019) (to be codified at 17 C.F.R. 229, 239, 240))).

259. *See* Peirce, *supra* note 3 (noting that principles-based disclosure requirements “elicit tailored information from companies”).

260. *Id.*

261. *See* John D. Frey, *Striving for Simplicity: Updates to Regulation S-K Items 101 and 105*, 81 LA. L. REV. 999, 1004 (2021) (stating that under a principles-based disclosure system, “a registrant must determine both whether certain information is material and how to disclose the information deemed to be material”).

262. *See id.* at 1005 (contrasting principles-based approaches with prescriptive-based approaches to disclosure regulations).

263. *See id.* at 1011 (noting the SEC’s intent to utilize a principles-based approach).

264. *See* Thomas White, *SEC Amends Regulation S-K Disclosure Requirements*, BUS. L. TODAY (Aug. 2020), <https://businesslawtoday.org/month-in-brief/august-brief-securities-law-2020/> [<https://perma.cc/NR83-4UX4>] (noting that Items 101(a) and 101(c) would be more principles-based).

they believe to be material.<sup>265</sup> In fact, given the breadth of information associated with ESG, many have recommended that any mandated ESG reporting primarily focus on principles-based disclosure.<sup>266</sup> The existence and SEC embrace of principles-based mandatory disclosure appears to make voluntary disclosure redundant because it offers a kind of disclosure flexibility similar to voluntary disclosure. In this regard, the existence of such disclosure appears to undermine this Article's thesis regarding the continued value of voluntary disclosure at least as it relates to flexibility.

However, this misses the mark for at least three reasons. First, even if principles-based disclosure offers benefits similar to voluntary disclosure in terms of flexibility, voluntary disclosure offers other key benefits, thereby negating the argument that embracing both forms of disclosure is redundant. As later parts of this subpart reveal, voluntary disclosure is likely to be more extensive than mandatory disclosure. Voluntary disclosure also is likely to serve as an important foundation for mandatory disclosure. Thus, the fact that principles-based mandatory disclosure may offer some of the flexibility benefits of voluntary disclosure is not enough to render voluntary disclosure inconsequential. Second, it is very unlikely that all mandatory disclosure will be principles-based, which also ensures that mandatory disclosure will not be duplicative of voluntary disclosure. On the one hand, it may be true that a principles-based mandatory disclosure approach provides flexibility similar to voluntary disclosure. However, this means that it is also true that principles-based mandatory disclosure suffers from the same comparability flaws as voluntary disclosure.<sup>267</sup> By contrast, prescriptive-based mandatory disclosure, with its focus on specific-rule compliance, calls for uniform and consistent disclosure.<sup>268</sup> This means that if we are truly seeking a mandatory disclosure approach responsive to comparability concerns, that approach must include some form of prescriptive-based mandatory disclosure. Of course, while such an approach ameliorates concerns around comparability, it also tends to be less flexible. This means that a mandatory disclosure regime aimed at responding to comparability concerns will not be redundant with voluntary disclosure because that regime will likely include some form of prescriptive-based disclosure distinct from voluntary disclosure. Consistent with this assertion, the proposed climate change rules' primary

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265. See Frey, *supra* note 261, at 1005 (explaining that one benefit of a principles-based system is its emphasis on materiality standards).

266. See Hazen, *supra* note 99, at 765–66 (noting that an SEC investor advisory subcommittee recommended a principles-based approach for ESG disclosure).

267. See Frey, *supra* note 261, at 1005 (noting that a prescriptive-based approach provides comparability).

268. *Id.*



objective is to ensure more uniform and comparable disclosure, and those rules include prescriptive-based disclosure.<sup>269</sup>

Third, the existence of principles-based mandatory disclosure confirms this Article's premise about the connectedness of voluntary and mandatory disclosure. This is because conceptually, principles-based disclosure is a form of voluntary disclosure, or at the very least can be viewed as the mandatory disclosure regime seeking to accommodate the characteristics of voluntary disclosure.<sup>270</sup> The fact that the SEC has embraced both prescriptive-based and principles-based disclosure only underscores the fact that both forms of disclosure have been recognized as important to the effectiveness of the overall disclosure regime.<sup>271</sup> Indeed, along the same lines as this Article, some have characterized the debate about principles-based versus prescriptive-based disclosure as a false choice because our disclosure system needs and relies upon both.<sup>272</sup>

The second kind of flexibility associated with voluntary disclosure centers on the timing of disclosure. Voluntary disclosure gives corporations needed time to enhance and improve their disclosure efforts along with the underlying activities being disclosed.<sup>273</sup> Many corporations may neither have the internal strategies and policies nor the expertise with respect to appropriate disclosure metrics and frameworks to produce disclosure appropriately and accurately on many ESG topics. This is especially true given that demand and attention on ESG matters has been uneven. A voluntary disclosure framework gives corporations the time to implement

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269. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21335, 21340, 21429 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (emphasizing comparability as a principal objective of the proposed rules).

270. Some have referred to SEC disclosure responsive to general materiality requirements as “voluntary,” presumably to distinguish from disclosure that stems from a more specific mandate. See, e.g., Andrew Ramonas, *SEC Boosts Climate Disclosure Scrutiny Before Reporting Mandate*, BLOOMBERG L. (Jan. 19, 2022, 11:00 AM), <https://news.bloomberglaw.com/securities-law/sec-boosts-climate-disclosure-scrutiny-before-reporting-mandate?context=article-related> [https://perma.cc/ZF66-2EFG] (describing the SEC review of climate change disclosure in public filings as a review of “voluntary” disclosures).

271. See Frey, *supra* note 261, at 1004–05 (discussing benefits of both prescriptive- and principles-based approaches to disclosure); John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 752 (2009) (noting reality of coexistence of rules-based and principles-based disclosure).

272. See Coffee & Sale, *supra* note 271, at 752 (noting that “[m]ost systems are really combinations” of rules-based and principles-based standards).

273. See *Statement on SEC Regulation of ESG Issues*, *supra* note 141, at 11 (noting that investors will naturally drive disclosure by punishing companies who fail to provide it); Rose, *supra* note 258, at 1832 (noting that collecting information for disclosure saps resources that could be allocated towards a company's productive activities).

and build support for the practices and policies necessary for producing high-quality disclosure and the underlying oversight of ESG activities.<sup>274</sup>

This timing flexibility also means that voluntary disclosure is not interchangeable with mandatory disclosure. Instead, mandatory disclosure demands that disclosures occur at the time of required filings. To be sure, some may correctly note that mandated disclosure rules typically include a phase-in period.<sup>275</sup> Phase-in periods give companies needed time to ramp up their disclosure efforts and thus comply with mandated disclosure rules. Phase-in periods appear to contradict the notion that mandatory disclosure does not offer timing flexibility. However, what is a phase-in period but a period of extended voluntary disclosure prior to mandated disclosure? Indeed, phase-in periods simply delay the time when corporations must engage in mandated disclosure, and thus extend the time when corporations can continue to rely on voluntary disclosure. In this respect, the existence of phase-in periods serves as confirmation of this Article's core premise. Such periods underscore the value of voluntary disclosure even in the face of mandatory disclosure. Such periods also underscore the manner in which the mandatory disclosure regime relies upon the voluntary disclosure regime, thereby underscoring the dynamic link between the two regimes.

*2. The Laboratory of Disclosure Experimentation.*—Voluntary disclosure enables corporations to experiment around disclosure practices, and thus serves as a critical source of learning about the most appropriate disclosure practices. There are many different ESG disclosure metrics and standards that a corporation may utilize.<sup>276</sup> This is an inevitable result of the effort to produce disclosure around new issues. Voluntary disclosure enables the corporate community to determine best practices around disclosure. This is highlighted by the evolution of ESG disclosure, particularly related to climate. Indeed, for decades corporations have relied upon a range of different climate-related disclosure regimes.<sup>277</sup> Only recently has the business and investment community developed a consensus around best practices strong enough to form the basis of a proposal for a unified climate-

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274. See Rose, *supra* note 258, at 1834 & n.65 (describing how voluntary disclosure allows corporations to tailor their disclosure to that which is most relevant and material and to reduce unnecessary or outdated disclosure).

275. See, e.g., The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21411 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (including a phase-in period for the proposed climate disclosure rule); Press Release, Sec. & Exch. Comm'n, *supra* note 1 (noting the phase-in period associated with proposed climate change rule); *Fact Sheet: Enhancement and Standardization of Climate Related Disclosure*, *supra* note 143, at 3 (providing a table demonstrating the phase-in period).

276. See *supra* note 137.

277. See *supra* note 137 and accompanying text.

disclosure regime.<sup>278</sup> This experience underscores the manner in which voluntary disclosure enables experimentation with different disclosure practices and thus enables disclosure evolution to occur. Such disclosure evolution is one of the core benefits of voluntary disclosure. Importantly, this evolution took almost three decades, underscoring the fact that the development of disclosure best practices takes time, while simultaneously underscoring the value of the voluntary disclosure regime, which provides the needed time for trial and error around disclosure practices.

This kind of experimental evolution is a benefit unique to voluntary disclosure. Mandatory disclosure requires some agreement on disclosure best practices. Voluntary disclosure is the regime that enables that agreement to materialize and gain needed support.

3. *Accessibility.*—Voluntary disclosure is likely to be a more accessible and digestible form of disclosure. Voluntary disclosure appears on corporate websites and other social media platforms and is thus more readily accessible than mandated disclosure.<sup>279</sup> Voluntary disclosure is also aimed at a broader audience, including shareholders, nonshareholder stakeholders, regulators, and members of the public.<sup>280</sup> The fact that voluntary ESG disclosure is often aimed at a broader audience increases the likelihood that corporations will take steps to deliver the disclosure in a user-friendly format that is more easily digestible by a broader range of individuals and entities. Even when companies make mandatory disclosures related to ESG available on their website, those mandatory disclosures are likely to be less accessible and digestible than voluntary ESG disclosure because of the free-standing nature of voluntary disclosures. Under the existing mandated-disclosure framework, mandated ESG disclosure is one component of a broader disclosure document that focuses on a range of corporate activities and information. By contrast, voluntary ESG disclosure is often provided in the form of a free-standing ESG report or disclosure and thus is more likely to focus the reader's attention on ESG activities separate and distinct from other corporate activities.

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278. See CDP ET AL., *supra* note 217, at 2–3 (describing the intent of GRI, IIRC, SASB, CDP, and CDSB to come together with the goal of providing unified guidance on ESG reporting); Duru, et al., *supra* note 218 (noting the launch of “the ISSB and its work towards the development of uniform global environmental, social, and governance (“ESG”) reporting standards”).

279. See Anagnosti et al., *supra* note 12 (“Investors seeking ESG information do not necessarily expect any or all of that information to be presented in SEC filings, and sustainability disclosure on corporate websites can provide effective vehicles for this disclosure to investors.”).

280. See Ho & Park, *supra* note 41, at 264 (noting that “most publicly available ESG information is produced outside companies’ public filings and is intended for a broad range of stakeholders”); Lipton, *supra* note 61, at 531–32 (suggesting that sustainability information is used by noninvestor groups).

The free-standing nature of voluntary ESG disclosure increases the accessibility and digestibility of voluntary ESG information. On the one hand, the climate rule proposal acknowledges that mandated ESG information may be less accessible and digestible by pinpointing the search and information-processing costs associated with such information being incorporated as one part of broader mandated reports.<sup>281</sup> On the other hand, the proposed rules seek to respond to this concern by placing climate-related disclosures either in a separately captioned section or incorporated by reference in other sections.<sup>282</sup> However, while this response is a clear improvement over the current state of ESG information in mandated disclosures, this response continues to require investors to search through dense disclosures and thus may be comparably less accessible than a free-standing voluntary disclosure.

*4. Adaptability and Timeliness.*—Voluntary disclosure is also more adaptable to changing norms and practices. The creation and approval process associated with mandatory disclosure is time consuming.<sup>283</sup> This includes the time associated with gaining input from the many different individuals responsible for creating a rule proposal, as well as the time associated with seeking and incorporating public comments.<sup>284</sup> Updating or changing a rule involves a similar time-consuming process. This makes it challenging to update and change the disclosure parameters of an existing disclosure mandate. By contrast, voluntary disclosure can be updated much more frequently and rapidly.<sup>285</sup> This means that voluntary disclosure can evolve much more quickly than mandatory disclosure.

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281. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21429 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (explaining predicted consequences of mandated disclosure for search costs and information-processing efficiency).

282. See *id.* (noting the proposed rules' requirement of placing climate-related disclosures in a separate section "captioned 'Climate-Related Disclosure' . . . or alternatively, to incorporate by reference from another section, such as Risk Factors, Description of Business, or MD&A").

283. See Peirce, *supra* note 3 (noting time associated with promulgating climate rules).

284. See *id.* (expressing gratitude to those who submitted comments in response to request for comment); see also *Rulemaking, How It Works*, U.S. SEC. & EXCH. COMM'N: INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/glossary/rulemaking-how-it-works#:~:text=The%20public> [<https://perma.cc/7YFY-Q6XZ>] (noting that the SEC considers public input during the rule-making process); Jonathan S. Sack & Penina Moisa, *Examining the SEC's Rulemaking Process*, LAW J. NEWSLS. (Mar. 2022), <https://www.lawjournalnewsletters.com/2022/03/01/examining-the-secs-rulemaking-process/?slreturn=20220629144034> [<https://perma.cc/2HJQ-V956>] (noting that the SEC provides a comment period and that it must respond to significant comments received).

285. See Anagnosti et al., *supra* note 12 (observing changes in ESG disclosure from 2019 and 2020); Allison Herren Lee & Robert J. Jackson, Jr., *Joint Statement of Commissioners Robert J. Jackson, Jr. and Allison Herren Lee on Proposed Changes to Regulation S-K*, SEC. & EXCH.

The ability for voluntary disclosure to evolve more rapidly inevitably means that voluntary disclosure is much more likely to reflect current disclosure policies and practices. We need only look at the divergence in disclosure around human capital management to underscore this point. Despite investor pressure and a recognition that human capital management has changed radically in the last few decades, mandated disclosure around human capital management has remained virtually unchanged.<sup>286</sup> By contrast, voluntary disclosure around human capital management has increased dramatically.<sup>287</sup> The robust nature of voluntary human capital management disclosure better reflects modern policies and practices than the relatively limited requirements associated with mandated human capital management disclosure.

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As this subpart illuminates, voluntary disclosure clearly offers benefits that mandatory disclosure does not and cannot. For this reason alone, it is important not to dismiss the normative value of voluntary ESG disclosure.

#### D. *Disclosure Connectedness*

This subpart demonstrates that it is normatively appropriate and desirable for voluntary and mandatory disclosure to coexist because of the connected nature of those disclosures. This subpart not only reveals how voluntary and mandatory disclosure comprise a disclosure continuum pursuant to which mandatory disclosure draws from voluntary disclosure, but also reveals that voluntary disclosure serves as a contemporaneous and instrumental supplement and extension of mandatory disclosure.

*1. Continuous Disclosure and the Feedback Loop.*—Mandatory and voluntary disclosures exist on a continuum pursuant to which mandatory disclosure relies and draws upon voluntary disclosure. Importantly, as noted above, mandatory disclosure does not offer the ability to experiment with disclosure and thereby generate best disclosure practices. Instead, mandatory disclosure draws on the lessons learned from voluntary disclosure. This is

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COMM’N (Aug. 27, 2019), <https://www.sec.gov/news/public-statement/statement-jackson-lee-082719> [<https://perma.cc/Y7JN-NRRM>] (noting that flexibility is a benefit offered by a principles-based disclosure system, which grants companies discretion to choose what to disclose).

286. See Frey, *supra* note 261, at 1031 (noting that the only required disclosure for human capital management is the number of employees and arguing this is not sufficient given widespread interest in more fulsome disclosure related to the topic); see also Soyoung Ho, *SEC Adopts Disclosure Rule on Human Capital Management*, THOMAS REUTERS: TAX & ACCT. (Aug. 28, 2020), <https://tax.thomsonreuters.com/news/sec-adopts-disclosure-rule-on-human-capital-management/> [<https://perma.cc/5RUY-PJX9>] (noting some investor disappointment in revised human capital management rules).

287. See Anagnosti et al., *supra* note 12 (noting that the most significant increase in ESG disclosure in 2020 revolved around human capital management disclosure).

clear from historical rule mandates as well as the current climate change rule proposal which draws heavily on lessons learned from voluntary ESG disclosure practices.<sup>288</sup> In this regard, voluntary disclosure represents the genesis of mandatory disclosure, serving as an instrumental springboard for the eventuality of mandatory disclosure. Rather than a separate regime, voluntary disclosure is thus a necessary part of the continuum towards mandatory disclosure. This process is dynamic and continual.

The fact that voluntary disclosure serves as the foundation for mandatory disclosure may cause one to think the value of voluntary disclosure ends once mandatory disclosure emerges. This thinking is misguided in at least three respects. First, the fact that disclosure policies and practices evolve even after mandatory disclosure emerges on a particular topic means that voluntary disclosure is still necessary to facilitate any updates or changes to existing disclosure mandates.<sup>289</sup> Second, we are at the beginning of the ESG disclosure journey. Thus, not only are there many ESG topics for which the SEC has not yet considered a mandate but also there are many ESG topics around which there is very little voluntary disclosure.<sup>290</sup> Hence, voluntary ESG disclosure is still vital for the disclosure experimentation and evolution needed for those topics. Third, mandatory disclosure is likely to always lag behind any voluntary ESG reporting regime. As discussed previously, this lag results from the fact that voluntary disclosure can more easily respond to changes in disclosure policies and practices.<sup>291</sup> This means that mandatory disclosure will always need to draw upon the experiences associated with voluntary disclosure. This lag inevitably means that mandated ESG disclosure will always be less extensive, encompassing some, but not all, of the ESG information that investors believe to be important and that investors may find in voluntary ESG disclosure.<sup>292</sup> In this respect, voluntary disclosure links with mandatory disclosure in a dynamic and continual feedback loop.

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288. See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21343 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (noting the SEC's decision to base the climate proposal rule on the TCFD framework because it has been widely accepted); see also Peirce, *supra* note 3 (noting that the disclosure framework in the climate change proposal is based on the TCFD framework and the Greenhouse Gas Protocol); George S. Georgiev, *The SEC's New Proposal on Climate Disclosure: Critiquing the Critics*, UNIV. OF OXFORD: BUS. L. BLOG (Mar. 29, 2022), <https://www.law.ox.ac.uk/business-law-blog/blog/2022/03/secs-new-proposal-climate-disclosure-critiquing-critics> [<https://perma.cc/NEA6-SB8F>] (same).

289. See *supra* note 288 and accompanying text.

290. See GAO ESG Study, *supra* note 59, at 21–22, 24, 28–29 (highlighting certain topics that are disclosed less frequently).

291. See *supra* note 285 and accompanying text.

292. See *supra* note 286 and accompanying text.

2. *Complimentary Disclosure.*—Voluntary disclosure also contemporaneously supplements and complements mandatory disclosure. Even when corporations report ESG information in their proxy statements and other required filings, there is a significant divergence between what companies disclose in their required filings and what they disclose in their voluntary reports.<sup>293</sup> First, when corporations make disclosures about specific ESG matters in mandated filings, they are always much more limited than disclosure in voluntary documents.<sup>294</sup> By contrast, voluntary disclosure around the same ESG topic is significantly more extensive, more specific, and more detailed than disclosure in mandated filings.<sup>295</sup> Then too, companies report information on a wider variety of ESG topics in their voluntary ESG reports. Thus, research reveals that companies disclose ESG topics in their voluntary reports that they do not discuss in their mandatory reports. Highlighting this fact, while not every company in the 2020 GAO survey provided ESG disclosures in their required filings, every company indicated that they communicate ESG information outside of publicly mandated filings.<sup>296</sup> Similarly, as indicated earlier, only 7% of companies provide ESG disclosures in their annual report while 90% of companies provide ESG disclosure on their websites.<sup>297</sup>

Importantly, mandatory ESG reporting is likely to always be more limited than voluntary ESG reporting. There is only so much real estate corporations can feasibly dedicate to ESG information in their required filings. Indeed, proxy reports and annual reports already require reporting on a wide range of information, making those reports considerably longer and denser. There is a practical limit to the volume of information that can be included in a mandated filing. No such limit exists for voluntary disclosure, enabling voluntary ESG disclosure to be a gap-filler and extension of required ESG reporting.<sup>298</sup> This also ensures that voluntary ESG disclosure is a vital component of the ESG disclosure landscape.

#### E. *Publicness and Dynamic Disclosure*

This Article has argued that the modern disclosure environment reflects a system of dynamic disclosure that not only belies the contention that we

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293. See GAO ESG Study, *supra* note 59, at 25–26, 28 (illustrating that companies’ voluntary reports provide more extensive coverage of ESG topics than their mandatory reports).

294. See *id.* at 28 (comparing disclosure examples from voluntary reports versus mandatory reports).

295. See *id.* (illuminating differences with an example of disclosure in official SEC filings versus a sustainability report); see also Fisch, *supra* note 13, at 949 (noting that many times voluntary ESG disclosure is far more extensive and in-depth than mandatory ESG disclosure).

296. GAO ESG Study, *supra* note 59, at 18.

297. Sidley Report, *supra* note 35, at 3.

298. See GAO ESG Study, *supra* note 59, at 18 (noting that some companies stated they use voluntary reports to complement their mandatory regulatory filings).

must choose between voluntary and mandatory disclosure but also reveals the fact that voluntary and mandatory disclosure work together. Dynamic disclosure is evident in two respects. First, disclosure is dynamic because voluntary and mandatory disclosure are part of an evolving disclosure continuum. This continuum consists of continual disclosure cycles pursuant to which mandatory disclosure draws from voluntary disclosure. Second, the two forms of disclosure represent a contemporaneously connected disclosure regime. In this regime, voluntary disclosure serves as a disclosure gap-filler and both complements and extends mandatory disclosure. Dynamic disclosure therefore describes a disclosure regime in which voluntary and mandatory disclosure are integrated components of an evolving disclosure feedback loop.

While this Article is the first to label and explain dynamic disclosure, this pattern of dynamic and interconnected disclosure has been acknowledged in several important ways.

1. *Publicness and Disclosure.*—Publicness is a relatively new corporate governance theory that acknowledges the manner in which a wide range of groups influence corporations and corporate decision-making.<sup>299</sup> In so doing, the theory challenges the traditional view of corporate governance that only recognizes the influence of traditional “internal” corporate actors—i.e., officers, directors, and shareholders. The theory of publicness contends that, in addition to these internal groups, many “outside” groups influence the way in which corporations and corporate decision-making evolve, including the government, media, analysts, and everyday citizens—so-called Main Street.<sup>300</sup> From this perspective, the key to understanding publicness is in understanding that the group demanding corporate governance extends far beyond traditional internal actors.<sup>301</sup> More importantly, the key to

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299. See Sale, *supra* note 90, at 139–41 (analyzing the shift, caused by scandals, from the prior conception of corporations as operating in the private sphere and subject to markets to corporations operating in the public sphere and “defined by scrutiny and governed by government, Main Street, the media, and politicians”); see also Sale & Thompson, *supra* note 187, at 527 (noting that “issuers both impact and are impacted by the market and forces outside those of the individual entity”); Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629, 1630 (2014) [hereinafter Sale, *J.P. Morgan*] (stating that public critiques of regulators, the media, and individuals can force corporations to alter their governance structures); Langevoort & Thompson, *supra* note 90, at 340, 379–84 (explaining the meaning of publicness and proposing two levels of publicness); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1020 (2013) [hereinafter Sale, *Public Governance*] (asserting that a company’s decision on whether to leave a mandatory ESG disclosure item “blank” is determined not only by what takes place in the private realm but also the public because the resulting disclosure is public and can be scrutinized).

300. See Sale, *supra* note 16, at 1065 (“Publicness is a concept that encompasses the interplay between the inside players in the corporation (directors and officers) and outsiders—like media and analysts—who cover the company.”); Sale, *supra* note 90, at 137 (suggesting that public corporations operate amongst actors in both the public and private sphere).

301. Sale, *Public Governance*, *supra* note 299, at 1034.



understanding publicness is in understanding the significant influence of these other outside actors. These outside actors scrutinize decision-making and press for more external governance.<sup>302</sup> The theory of publicness represents an important departure from conventional theories of corporate governance that only focus on the influence of a narrow range of corporate actors. “Put differently, corporations are subject to a variety of pressures and interests; some are internal, but many are external. Those outside pressures and influences have been increasing over time, but have been neglected in scholarship.”<sup>303</sup>

Publicness derives from the increasingly visible nature of corporations.<sup>304</sup> The modern corporation is subject to constant scrutiny not only because of the 24/7 media cycle but also because of the potency of electronic media.<sup>305</sup> The growth in the media cycle and social media outlets has meant that outside actors have a continuous window into corporate affairs.<sup>306</sup> This window allows outside actors to scrutinize and shape corporate behavior.<sup>307</sup> Media attention is therefore both an agent and a core form of publicness.<sup>308</sup>

Disclosure is intimately linked to the theory of publicness.<sup>309</sup> In fact, disclosure is the engine that creates publicness by making information widely available to actors outside of the corporation. As Professor Hillary Sale puts it, “publicness is about what is disclosed, what is not, and how those choices impact the issuer, investors, markets, and the public.”<sup>310</sup> Disclosure increases the role of outside groups by increasing information flow to those groups.<sup>311</sup> Disclosure is the mechanism that makes it possible for actors outside of the corporation to have a window into corporate decision-making and create pressure for reform and more public governance.<sup>312</sup> Disclosure not only

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302. *Id.*

303. *Id.* at 1014 n.7.

304. Sale, *J.P. Morgan*, *supra* note 299, at 1631.

305. *Id.*

306. *See id.* (noting how news delivered through electronic media travels quickly).

307. *See id.* (“Non-regulators, in particular, can play a significant role in constraining the choices of corporate actors, both through pressure for increased regulation and pressure for governance changes.”).

308. *See* Sale, *supra* note 16, at 1066 (identifying media attention as a form of publicness); Sale, *J.P. Morgan*, *supra* note 299, at 1654 (same).

309. *See* Sale, *Public Governance*, *supra* note 299, at 1020–21 (suggesting that the decision whether to disclose information in regulatory filings creates effects that extend beyond the private sphere, and this that the underlying regulations act as “an indirect form of publicness”).

310. Sale, *supra* note 16, at 1066.

311. *See* Sale, *Public Governance*, *supra* note 299, at 1033 (indicating voting allows shareholders to vote in response to information in the disclosures, and that both the votes and disclosures “increase media participation and the role of groups like Occupy Wall Street”).

312. *See id.* at 1034–35 (noting the pressure outside groups place on corporations in response to corporate failures).

enables corporate information to be examined and vetted by outside parties such as the media, bloggers, and everyday citizens, but it also allows those parties to use such information to alter corporate governance policies and practices.<sup>313</sup> The modern disclosure environment, pursuant to which there is increased amounts of continuous public disclosure, drives publicness.<sup>314</sup> The cycle of continuous disclosure results from *all* types of disclosure: “mandatory, voluntary, and, in some cases, silence.”<sup>315</sup>

Publicness connects the public and social media cycle with public disclosure choices.<sup>316</sup> That cycle draws on the entire range of publicly available information. This includes information in public filings as well as information voluntarily made available on corporate websites, Instagram, Twitter, blogs, and other social media outlets. As technology increases, information has become more accessible, digestible, and analyzable.<sup>317</sup> And as this occurs, media, employees, and everyday people have demanded increasingly more information.<sup>318</sup> The connection between advances in technology and the increased proliferation of social media outlets allows the public to pay closer attention to the corporation and how it is governed.<sup>319</sup> In this environment, companies that produce public information govern subject to public scrutiny.<sup>320</sup> Disclosure thus both creates and drives publicness.<sup>321</sup>

The publicness theory recognizes that the boundaries between public and private are shifting.<sup>322</sup> Publicness diminishes the line between private and public because publicness means that actors have the ability to consume public information from a variety of sources—both publicly mandated and

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313. See Sale, *J.P. Morgan*, *supra* note 299, at 1630 (describing how public disclosures are assessed and critiqued by the public in a way which may force corporations to change their preferred governance structure).

314. See Thompson & Sale, *supra* note 86, at 872 (indicating that periodic disclosure acts as a mechanism for an increased federal role in corporate governance).

315. See *id.* (interpreting the term *disclosure* to encompass those three forms of disclosure—voluntary, mandatory, and silence).

316. Sale, *supra* note 16, at 1051.

317. Sale, *supra* note 90, at 144.

318. *Id.*; see also Sale, *Public Governance*, *supra* note 299, at 1029–30 (highlighting the say-on-pay provisions of Dodd-Frank as an example of the externalization of corporate decisions).

319. See Sale, *supra* note 90, at 144 (discussing how information has become more accessible due to ever-advancing technology alongside reporting requirements).

320. *Id.* at 147–48.

321. See Sale, *Public Governance*, *supra* note 299, at 1020 (noting that disclosure functions both in the private and public spheres).

322. See Sale, *Public Governance*, *supra* note 299, at 1033 (stating that private ordering has decreased and public governance has increased because of a self-regulation failure); Sale, *J.P. Morgan*, *supra* note 299, at 1635–36 (noting the “shrinking” conception of the corporation’s private space).

privately or voluntarily produced.<sup>323</sup> The interaction between disclosure and the current media environment moves corporations “from the private to the public—whether they like it or not.”<sup>324</sup>

The theory of publicness provides normative support for this Article’s thesis around dynamic disclosure. Publicness highlights the dynamic nature of the modern disclosure environment by underscoring the manner in which the Internet and the modern social media environment ensure that all publicly disclosed information—mandatory and voluntary—is continuously and readily accessible to the public. Viewed from this lens, the phrase dynamic disclosure reflects a recognition that the modern publicness of corporate information has eroded the walls between voluntary and mandated disclosure, making it impossible *not* to consider voluntary disclosure as an integral aspect of mandated disclosure and the overall disclosure regime in which corporations operate.

Dynamic disclosure reflects publicness in the manner the public consumes the mix of voluntary and mandatory ESG disclosure as well as the manner in which corporations disseminate ESG information.<sup>325</sup> There exists a continuous disclosure cycle coupled with a continuous media cycle pursuant to which ESG information is disclosed to an array of external actors through a variety of different media platforms on an ongoing and evolving basis. In this cycle, voluntary and mandatory ESG disclosures are collectively consumed by the public, and thus both forms of disclosure shape the public’s overall perceptions related to a corporation’s ESG profile and commitments.<sup>326</sup> Corporations also make use of both mandatory and voluntary ESG disclosures to communicate with the public about their ESG activities and commitments. In this manner, publicness has blurred the lines between voluntary and mandatory ESG disclosure, creating an interconnected disclosure regime.

2. *The SEC and Dynamic Disclosure.*—SEC enforcement guidance and behavior acknowledge dynamic disclosure by explicitly recognizing the important connection between voluntary and mandatory disclosure to assessing the overall integrity of corporate disclosures. Companies are required to report information that may be necessary to ensure that their

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323. See Sale, *Public Governance*, *supra* note 299, at 1033 (listing various ways in which corporate governance has become subject to both internal and outside actors, and noting how “private” decision-making can become public).

324. See Sale, *J.P. Morgan*, *supra* note 299, at 1630.

325. The current focus on ESG can be seen as a reflection of publicness. The public has demanded that corporations focus on ESG matters. That demand has translated into increased corporate attention on ESG matters. Their demands have been fueled by publicness and the public environment that provides external actors with information that can be used to both scrutinize corporate ESG activities and place pressure on corporations surrounding their ESG activities.

326. See *supra* section III(D)(1).

mandated disclosures are not materially misleading.<sup>327</sup> As Professor Hillary Sale notes, omissions are critical to fulfilling this requirement.<sup>328</sup> One vitally important way to pinpoint whether or not a mandatory filing contains material omissions is through evaluation of information in voluntary disclosures. To this end, the SEC has issued guidance in the past not only making clear that it reviews corporate disclosures beyond mandated filings but also stating that SEC staff “actively” compares information voluntarily provided to information disclosed in SEC filings.<sup>329</sup> This guidance acknowledges the link between mandatory and voluntary disclosure, and thus the dynamic disclosure environment in which the modern corporation operates.

The SEC’s behavior with respect to ESG is particularly illustrative concerning the SEC’s understanding of the connected nature of voluntary and mandatory disclosure. The 2020 GAO ESG disclosure study made clear that the SEC assesses misleading statements or nondisclosures in a company’s mandatory filings by examining information outside of the filings, including information voluntarily disclosed on websites and in other arenas.<sup>330</sup> Moreover, the SEC recently doubled down on its guidance about the connection between voluntary and mandatory disclosure in the context of ESG disclosure, making it clear that a corporation’s voluntary ESG disclosures impact the SEC’s assessments related to the accuracy of mandatory ESG disclosure.<sup>331</sup> Thus, in 2021, the SEC issued a sample comment letter related to its disclosure review that put corporations on notice of its understanding of the link between voluntary and mandatory ESG disclosure. In the very first sample comment, the SEC stated the following: “We note that you provided more expansive disclosure in your corporate social responsibility report (CSR report) than you provided in your SEC filings. Please advise us what consideration you gave to providing the same type of climate-related disclosure in your SEC filings as you provided in your CSR report.”<sup>332</sup> The fact that the SEC went out of its way to issue a sample comment on this issue—and positioned it at the top of its sample comments—underscores the fact that the SEC uses voluntary ESG

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327. 17 C.F.R. § 230.408 (2020); 17 C.F.R. § 240.12b-20 (2021); *see* Ho & Park, *supra* note 12, at 325 (highlighting, in annual reports, the basis for ESG disclosure is “materiality-based, and necessary to render disclosure not misleading”).

328. Sale, *supra* note 16, at 1052.

329. Anagnosti et al., *supra* note 12.

330. GAO ESG Study, *supra* note 59, at 35.

331. *See Sample Letter to Companies Regarding Climate Disclosures*, *supra* note 109 (issuing a sample letter and noting that climate change disclosure may be required under existing disclosure rules).

332. *Id.*

disclosures to identify potential disclosure gaps in mandatory disclosure.<sup>333</sup> On the heels of this sample comment letter, in 2021 the SEC issued comment letters to several corporations raising questions about the integrity of their mandatory disclosures based on SEC review of voluntary ESG disclosures.<sup>334</sup> The SEC's guidance and behavior highlight the SEC's recognition of the connected nature of voluntary and mandatory disclosure.

3. *The Business Community.*—Corporations also have recognized the connected nature of our disclosure regime. This is best exemplified by corporations' own disclosure practices related to ESG. Corporations often use their mandated ESG filings to highlight more detailed information contained in their voluntary ESG disclosures.<sup>335</sup> One survey revealed that 84% of companies that disclosed ESG information in their mandated filings referred readers to ESG disclosure on their company's website.<sup>336</sup> That same survey noted that this trend is growing, and thus an increasing number of companies are using their mandated filings to highlight additional ESG information voluntarily disclosed on their websites.<sup>337</sup> This explicit reference to voluntary ESG disclosure in mandated filings underscores corporations' implicit linkage of those two disclosure regimes.

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As these observations reveal, the SEC and the business community have already recognized dynamic disclosure. This recognition finds normative support in the theory of publicness.

#### F. *Lingering Concerns*

This Article's thesis around dynamic disclosure may raise several concerns and questions. This Article addresses two of the most prominent concerns below.

1. *Disclosure Overload.*—Some may raise concerns about the need to maintain robust voluntary disclosure alongside mandatory disclosure based

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333. See Benjamin Bain, *SEC Finds Gaps in Climate Change Disclosures in Annual Reports*, BLOOMBERG (Sept. 22, 2021, 6:01 PM), <https://www.bloomberg.com/news/articles/2021-09-22/sec-finds-gaps-in-climate-change-disclosures-in-annual-reports> [https://perma.cc/4WSR-HQ4Q] (reporting that the SEC identified gaps in disclosures related to the effects of climate change).

334. See Ramonas, *supra* note 270 (reporting the SEC requested that subsidiaries of the following companies "report any risks they faced from climate change in 2021 or better describe them": Morgan Stanley, Verizon Communications Inc., Ford Motor Co., Nissan Motor Co. Ltd., and Toyota Motor Corp.).

335. See Anagnosti et al., *supra* note 12 (noting that "a growing number of surveyed companies are using their SEC filings to highlight to investors that they are providing enhanced ESG reporting. . . on their corporate websites").

336. *Id.*

337. *Id.*

on the potential for disclosure overload. As Easterbrook and Fischel warn: “One must be careful, though, about committing the fallacy of thinking that if some information is good, more is better.”<sup>338</sup> Along these lines, several commentators and regulators have highlighted the problem of disclosure overload, noting that too much information could produce an information overload that undermines the utility of disclosure.<sup>339</sup> From this perspective, maintaining voluntary and mandatory disclosure may be inadvisable because it may increase the chances of information overload. However, at least one recent comprehensive study of ESG information challenges the narrative of information overload as it relates to ESG, instead arguing that there is an information underload.<sup>340</sup> Then too, empirical research suggests that individual investors actually benefit from receiving more, rather than less, disclosure.<sup>341</sup> These studies and research challenge the veracity of the overload narrative. Moreover, the narrative around disclosure overload begs an important question: What is the dividing line between optimal information flow and disclosure overload? Indeed, even those who raise concerns about disclosure overload acknowledge the importance of disclosure.<sup>342</sup> Unfortunately, those who raise such concerns do not provide any specific criteria around how best to distinguish between overload and optimal disclosure. As a consequence, it is not clear that the continued existence of both voluntary and mandatory disclosure inevitably leads to overload, especially when voluntary ESG disclosure provides important benefits and mandatory ESG disclosure is necessarily more limited. Thus, reliance solely on mandatory disclosure is not necessarily the antidote for disclosure

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338. Easterbrook & Fischel, *supra* note 25, at 696.

339. *See, e.g.*, Estlund, *supra* note 84, at 394–96 (analyzing whether disclosure costs outweigh the benefits); Choudhury, *supra* note 68, at 197–98 (questioning the utility of additional disclosure obligations given the limited ability of individuals to process information); Ho, *supra* note 87, at 79 (noting that the Supreme Court has “expressed concern that excess immaterial information might produce disclosure overload, working against the goals of mandatory disclosure and hurting investors by obscuring material information”); Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, *The Path Forward on Disclosure* (Oct. 15, 2013), <https://www.sec.gov/news/speech/spch101513mjw> [<https://perma.cc/437X-6H93>] (acknowledging the risk of disclosure overload and that the SEC must regularly evaluate to avoid that dilemma); Honigsberg et al., *supra* note 25, at 300, 302–03 (suggesting that today’s high volume of disclosure may overwhelm investors); Coffee, *supra* note 25, at 729–30 (noting it is “theoretically possible that too much information is already produced”).

340. *See* Ho, *supra* note 121, at 74 (finding that investors are more concerned with under-disclosure than over-disclosure).

341. *See* Honigsberg et al., *supra* note 25, at 304–05 (noting that less mandatory disclosure may reduce investor participation at IPO stage, but that “other information-generating activities, such as active trading of the company’s stock, might entice individuals to still invest in public companies”).

342. *See, e.g.*, Easterbrook & Fischel, *supra* note 25, at 680–81, 684–85, 696 (noting the benefits of disclosure while also expressing concerns around disclosure overload); Choudhury, *supra* note 68, at 198 (noting that benefits of disclosure only accrue when “they are not outweighed by . . . problems of informational overload”).

overload. Instead, the antidote is likely more streamlined disclosure in both regimes.

2. *Comparability and Accuracy Revisited.*—Some also may raise concerns about a continued focus on voluntary disclosure based on the previously mentioned comparability and accuracy issues associated with voluntary disclosure. Certainly, the lack of uniformity associated with voluntary ESG disclosure undermines its usefulness for purposes of cross-company comparison goals. However, as previously mentioned, voluntary disclosure adds value in ways other than those connected to cross-company comparisons. Thus, the fact that voluntary ESG disclosure may be less useful in this area is not a rationale for minimizing its continued salience. Inaccuracy associated with voluntary ESG disclosure poses a more serious concern. Usable disclosure demands accuracy.<sup>343</sup> Inaccuracy therefore undermines the usefulness of disclosure. The lack of accuracy with respect to voluntary ESG disclosure makes reliance on those disclosures imprudent and reduces the effectiveness of that disclosure as a tool for improving accountability and achieving its other goals.<sup>344</sup> Importantly, uncertainty about the accuracy and reliability of ESG information leads to discounting even high-quality, accurate voluntary ESG information.<sup>345</sup> This is because perceptions about inaccuracy undermine confidence in all voluntary ESG disclosures.<sup>346</sup> Investor perceptions related to greenwashing and other forms of inaccuracy decrease the likelihood that investors will rely on all voluntary

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343. See Sale, *supra* note 16, at 1048 (noting that accuracy ensures investors are well-informed in decision-making).

344. See *id.* at 1055 (noting that inaccurate voluntary disclosures undermine the purpose of the disclosure system).

345. See Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 290–91 (2001) (stating that the absence of standardized metrics for environmental information could lead investors to discount even high-quality disclosure if companies are able to take advantage of the lack of standardization to disclose misleading information); White & Zinkl, *supra* note 147, at 29 (indicating that a lack of standardized information makes it difficult for investors to appropriately assess companies); Tom Tietenberg & David Wheeler, *Empowering the Community: Information Strategies for Pollution Control*, WORLD BANK (1998), <https://documents1.worldbank.org/curated/en/431471468147870698/pdf/902860WPOBox380WERING0THE0COMMUNITY.pdf> [<https://perma.cc/HJ3E-BAPV>] (arguing that the credibility of a label—like “organic”—is undermined without an enforceable standard by which to measure it).

346. See Case, *supra* note 129, at 395 (“Public skepticism engendered by misleading or inaccurate reporting undercuts incentives for even superior environmental performers to voluntarily report due to concern that even accurate, reliably informative reporting will be viewed as nothing more than ‘green washing.’”); Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 289 (2014) (indicating the risk that company exploitation of sustainability efforts can undermine opinion even of companies who are genuinely making sustainability efforts).

ESG disclosures, even those that may be accurate.<sup>347</sup> As one author notes, “[p]ublic skepticism engendered by misleading or inaccurate reporting undercuts incentives for even superior . . . performers to voluntarily report due to concern that even accurate, reliably informative reporting will be viewed as nothing more than ‘green washing.’”<sup>348</sup> In this respect, the inaccuracies associated with voluntary ESG disclosure threaten to undermine our ability to harness any of the benefits from that disclosure.

While this Article acknowledges the serious concerns associated with voluntary ESG disclosure and accuracy, this Article also argues that the appropriate response to those concerns is not to jettison voluntary ESG disclosure but rather to shore up the defects in voluntary ESG disclosure. Consistent with this argument, this Article insists that ameliorating those concerns does not require us to solely rely on mandatory disclosure. Instead, we must look to other solutions to improve the accuracy of voluntary ESG disclosure such as reliance on third-party intermediaries or enhanced board oversight. An appropriate exploration of these solutions is beyond the scope of this Article. However, the existence of alternative methods for enhancing accuracy concerns related to voluntary ESG disclosure means that we need not dismiss the tremendous value associated with voluntary ESG disclosure because of those accuracy concerns. Perhaps more importantly, given the manner in which mandatory ESG disclosure draws from, and relies upon, voluntary ESG disclosure, ameliorating accuracy concerns related to voluntary ESG disclosure is critical to the integrity of the overall ESG disclosure landscape, and hence cannot be ignored even if mandatory ESG disclosure materializes.

#### IV. Conclusion

The current demand for corporations to pay closer attention to ESG has translated into a demand for enhanced ESG disclosure. On the one hand, there appears to be a strong likelihood that the SEC will finally respond to those demands with mandated ESG disclosure. On the other hand, investor and stakeholder demand has already translated into a significant amount of voluntary ESG disclosure. While that disclosure varies, there is no doubt that it is significantly more detailed and more robust than ESG disclosure currently found in required public filings.

Unfortunately, problems with voluntary ESG disclosure have raised questions about the viability of voluntary ESG disclosure. Despite decades

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347. See Fisch, *supra* note 13, at 948 (discussing the problem of greenwashing in the voluntary disclosure regime); Case, *supra* note 129, at 395 (explaining that concerns over greenwashing may undercut reports by “superior environmental performers”); Cherry, *supra* note 346, at 289 (identifying BP as a “free rider” on the social-responsibility reputations of other companies).

348. Case, *supra* note 129, at 395.



of voluntary ESG disclosure, investors and stakeholders continue to complain about the accuracy and comparability of that disclosure. Those complaints are often “Exhibit A” for those demanding greater mandated ESG disclosure.

While this Article does not refute the benefits of mandated ESG disclosure, this Article does insist that voluntary ESG disclosure has tremendous benefits. Moreover, this Article insists that the benefits of voluntary ESG disclosure will remain even if the SEC manages to mandate some form of ESG disclosure. Importantly, this Article makes clear that recognizing the value and benefits of mandatory ESG disclosure does not render voluntary ESG disclosure obsolete or inconsequential. In so doing, this Article seeks to shift the disclosure debate away from a binary choice between mandatory and voluntary disclosure.

Instead, this Article offers a reconceptualization of the disclosure environment in the form of dynamic disclosure. This Article argues that the modern disclosure environment reflects a system of dynamic disclosure that not only belies the contention that we must choose between voluntary and mandatory disclosure but also reveals that voluntary and mandatory disclosure work together. First, dynamic disclosure means that voluntary and mandatory disclosure are part of an evolving disclosure continuum whereby mandatory disclosure draws from voluntary disclosure. Second, the two forms of disclosure represent a contemporaneously connected disclosure regime pursuant to which voluntary disclosure serves as a disclosure gap-filler and both complement and extend mandatory disclosure. Dynamic disclosure, therefore, describes a disclosure regime in which voluntary and mandatory disclosure are integrated components of an evolving disclosure feedback loop.

This Article’s thesis around dynamic disclosure finds critical normative support in the more recent publicness theory of corporate governance. That theory reveals the manner in which the modern social media environment has blurred the lines between public and private disclosure, enabling all stakeholders to more easily consume both mandatory and voluntary disclosure while ensuring that both forms of disclosure impact the governance choices of modern public corporations. Thus, this theory acknowledges the realities of dynamic disclosure.

Dynamic disclosure has important ramifications for our understanding of disclosure, particularly ESG disclosure. Dynamic disclosure means that we can and must embrace the benefits of both voluntary and mandatory ESG disclosure. It also means that we must spend the necessary time to enhance voluntary ESG disclosure even as we push for mandatory ESG disclosure.