

Should the Securities and Exchange Commission Adopt a Mandatory ESG-Disclosure Framework?

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November 2021

This policy brief addresses recent proposals calling for the Securities and Exchange Commission (SEC) to adopt a mandatory environmental, social, and governance (ESG) disclosure framework.¹ It illustrates how the breadth and vagueness of these proposals obscures the important—and controversial—policy questions that would need to be addressed before the SEC could move forward on ESG disclosure in a principled way.

WHAT IS ESG?

The abbreviation “ESG” is used as shorthand for a dizzyingly broad array of environmental, social, and governance topics affecting businesses, including climate change, human capital management, supply chain management, human rights, cybersecurity, diversity and inclusion, corporate tax policy, corporate political spending, executive compensation practices, and more.²

Members of the ESG movement are similarly diverse, in both identity and motivation. They include financially motivated investors and traditional asset managers who believe companies’ approach to (at least certain) ESG topics will bear on companies’ long-term performance or the long-term performance of the investors’ or asset managers’ broader investment portfolios.³ They also include values-based investors who care about whether and how corporations address (at least certain) ESG topics because of religious or sociopolitical commitments. The ESG umbrella also shelters various noninvestor corporate stakeholders and third parties who care about whether and how corporations address (at least certain) ESG topics because they are personally affected (e.g., employees vis-à-vis labor practices) or because of religious or sociopolitical commitments (e.g., environmentalists vis-à-vis environmental impact). ESG proponents also include members

of an emerging corps of people and institutions who profit from the movement, including corporate sustainability officers, providers of ESG ratings and indices, accounting firms that offer ESG-related services, and managers of specialized ESG-investment vehicles.

Even the Business Roundtable seemingly embraced ESG in 2019 in its Statement on the Purpose of the Corporation,⁴ though some suspect its motivations have more to do with public relations or a desire to protect executives from shareholder discipline than a true commitment to ESG.⁵ The stated motivations of others involved in the movement are also questionable. Traditional asset managers claim that their commitment to ESG is motivated by a desire to improve long-term fund performance for the benefit of investors.⁶ But agency costs offer an alternative potential explanation: embracing the ESG movement may help asset managers curry political favor, enabling them to fend off greater regulation of the industry;⁷ it may advance the personal sociopolitical commitments of those who run them; or it may offer a way to attract investors to fund offerings without imposing any meaningful limitations on how a fund is managed.

THE ESG FUZZINESS PROBLEM

The breadth of topics embraced by ESG and the breadth of motivations spurring the ESG movement have created a big tent that has undoubtedly served a purpose by helping the various causes of those involved to gain momentum. But it has also created problems. For example, ESG performance ratings are inconsistent and difficult to decipher. Which of the myriad ESG issues are factored into a rating, how performance on those issues is measured, and the weight each issue is given are subjective, usually nontransparent determinations that vary across ratings providers.⁸

The breadth of ESG topics also makes studies that purport to show a positive link between ESG performance and financial performance difficult to interpret. There is no a priori reason to believe that a company's approach to climate change and a company's approach to diversity or any other ESG issue will each have the same sort of impact on a company's financial performance; yet these studies often bundle ESG issues together to measure ESG performance or rely on ESG performance ratings that themselves bundle the issues together. They therefore leave unanswered which, if any, discrete corporate policies related to ESG actually affect financial performance.⁹

Regulators have also pointed out problems with use of the term "ESG." SEC officials have expressed concerns regarding its use in mutual fund advertising because its vagueness can leave fund investors with misimpressions about what exactly they are buying into.¹⁰ The US Department of Labor has found fault with the term in part because, "by conflating unrelated environmental, social, and corporate governance factors into a single term, ESG invites a less than appropriately rigorous analytical approach in evaluating whether any given E, S, or G consideration presents a material business risk or opportunity to a company that corporate officers and directors should manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations in evaluating an investment in that company."¹¹

THE DIFFICULT QUESTIONS RAISED BY CALLS FOR SEC ADOPTION OF A MANDATORY ESG DISCLOSURE REGIME

Many are urging the SEC to create a comprehensive, mandatory, ESG disclosure regime, and title I of H.R. 1187, a bill recently passed by the House of Representatives, would require the SEC to do so.¹² Proponents contend that although a large percentage of public companies voluntarily disclose ESG-related information in stand-alone sustainability reports, these companies utilize divergent frameworks developed by private standard setters, and the disclosures may not be produced in the same careful manner as disclosures in SEC filings. They argue that an SEC-mandated ESG disclosure regime would enhance investors' ability to compare companies on ESG dimensions, combat the problem of selective ESG disclosure (also known as "greenwashing"), and improve the quality of ESG disclosures.

The trouble with these proposals, however, is that they speak in generalities about the importance of ESG to investors without specifying which, if any, specific ESG topics are financially material, and they invite the SEC to model a mandatory ESG-disclosure framework after frameworks developed by private standard setters without strict regard for notions of financial materiality. For example, title I of H.R. 1187 would require public companies to provide in their annual proxy statements a description of the company's views "about the link between ESG metrics and the long-term business strategy" of the company and any process the company "uses to determine the impact of ESG metrics on the long-term business strategy."¹³ The bill would also require the SEC to require public companies to disclose ESG metrics in any filing that requires audited financial statements.¹⁴ But the bill does not define "ESG metrics." Instead, it requires the SEC to do so through rulemaking, explicitly authorizing the SEC to, as it may deem appropriate, "incorporate any internationally recognized, independent, *multi-stakeholder* environmental, social, and governance disclosure standards" (emphasis added) when it promulgates a definition of ESG metrics.¹⁵

As discussed at greater length in my recently published article "A Response to Calls for SEC-Mandated ESG Disclosure,"¹⁶ this feature of the bill raises numerous difficult policy questions. I outline several in the following subsections.

Does the SEC Have the Requisite Institutional Competence and Democratic Accountability? When the SEC mandates disclosure of information because of the information's demonstrable importance to companies' financial performance, it clearly acts within the scope of both its expertise and authority. Asking the SEC to choose an ESG disclosure framework on the basis of considerations that extend into the realm of politics thrusts the SEC into a less familiar and more controversial role, one that threatens to undermine its reputation as a nonpartisan regulator of the capital markets.¹⁷

Questions of institutional competence and democratic accountability are particularly significant because advocates for ESG disclosure clearly see ESG disclosure as a mechanism for promoting

certain types of corporate behavior and discouraging others.¹⁸ Mandating that such disclosures appear in SEC filings would amplify this effect by involving the board and executives who certify SEC filings in the ESG disclosure process. Advocates view this as a benefit of SEC-mandated ESG disclosure.¹⁹ But the SEC lacks the expertise and authority to broadly regulate corporate behavior. As one scholar has observed, if the goal is to drive changes in firm behavior for social ends, an ESG-standard-setting process requires “a broader democratic legitimization than what financial reporting standard setting usually has; it needs to be more akin to what we require for other major regulatory interventions into firm behavior (e.g., taxes or emission limits).”²⁰

Is This How the SEC Should Allocate Its Scarce Resources?

Placing responsibility for developing an ESG disclosure framework on the SEC also raises questions about resource allocation. If the SEC mandates disclosure on a topic, it assumes a responsibility for ensuring compliance, either through its screening of SEC filings or through enforcement. Proponents view this as a benefit, given that it promises to promote the integrity, uniformity, and completeness of companies’ ESG disclosures, combating the problem of greenwashing that many believe is prevalent in sustainability reporting today.²¹ But unless the SEC’s budget is increased, this added responsibility will necessarily divert resources from other pressing SEC priorities. That diversion may be warranted, but it is a cost that must be explicitly weighed in the discussion.

How Burdensome Would This Be for Public Companies?

An SEC-mandated ESG disclosure regime would impose new information-gathering and reporting obligations on companies that today do not prepare sustainability reports pursuant to whatever framework the SEC could adopt. Even companies that do currently use that framework when preparing sustainability reports would bear additional costs, because the process for preparing SEC filings is much more rigorous and involved. As Jill Fisch, professor at the University of Pennsylvania Law School, has observed, the leading ESG disclosure frameworks created by private standard setters identify “dozens of disclosure items, and current sustainability reports commonly exceed one hundred pages in length.”²² She notes that the “cost of developing and complying with comparable mandatory disclosure requirements would place a heavy burden on issuers.”²³

Is Vastly Expanding Public Companies’ Exposure to Securities Class Actions a Good Idea?

Placing ESG disclosures in SEC filings also heightens the private liability risk faced by companies, directors, and officers. Whereas ESG disclosures in stand-alone sustainability reports can theoretically give rise to private securities fraud liability, mandating that such disclosures be included in SEC filings heightens that risk considerably for a few reasons. First, stand-alone sustainability reports are not subject to the certification requirements imposed by the Sarbanes-Oxley Act that

operate to heighten the liability exposure of CEOs and CFOs.²⁴ Disclosures in stand-alone sustainability reports also avoid exposure to liability under section 11 of the Securities Act of 1933 and under rule 14a-9, promulgated under the Securities Exchange Act of 1934, because section 11 applies only to misrepresentations and omissions in a company's registration statement filed with the SEC in connection with a public offering and rule 14a-9 applies only to misrepresentations and omissions in a company's proxy solicitation materials.²⁵ Such disclosures are also less exposed to litigation under rule 10b-5, promulgated under the Securities Exchange Act of 1934.²⁶ This is because sustainability reports have multiple audiences, so it remains possible for a company to argue that a topic covered in such a report was not material within the meaning of the securities laws and did not affect its stock price. Companies also have freedom to couch statements in sustainability reports in aspirational or vague terms, which can help to reduce liability risk.²⁷ Indeed, some law firms recommend that companies phrase ESG disclosures in these terms for precisely this reason.²⁸ SEC-mandated disclosure would likely reduce this flexibility. As a consequence, it would be more difficult for a company to argue against the materiality of ESG information, at least in a manner that might support a motion to dismiss. Indeed, title I of H.R. 1187 would render ESG disclosures de facto material.²⁹

Some may perceive this as a benefit,³⁰ but others would view it as a major cost. The debate over the social value of fraud on the market securities fraud class actions is long-standing and passionate. Fraud on the market class actions threaten to impose massive damages on defendants and thus may have settlement value out of proportion to their merits, inviting strike suit litigation that taxes companies—and ultimately shareholders—and threatens to affect corporate disclosure practices in socially undesirable ways. Concerns over strike suit litigation led to the adoption of the Private Securities Litigation Reform Act (PSLRA) in 1995, which makes it more difficult for a securities fraud class action to get past a motion to dismiss.³¹ Most important, the PSLRA requires plaintiffs to plead particularized facts giving rise to a strong inference of scienter and imposes a discovery stay until after a motion to dismiss has been decided.³² It also contains a safe harbor for forward-looking statements accompanied by meaningful cautionary language or made without actual knowledge of their falsity.³³ The predictable form lawsuits related to ESG disclosures will take are of a sort, however, that are often immune from the PSLRA's protections against abusive litigation.

Imagine a company that has an industrial accident, finds itself embroiled in a sexual harassment scandal, or experiences a cybersecurity breach. These are events that even the most prudently managed corporation cannot completely protect against, at least not at acceptable cost. They are also events that, when made public, can result in a meaningful stock price decline. Imagine also that the company has in the past made representations in its SEC filings that speak to the company's management of workplace safety, human relations, or cybersecurity risks, as the case may be. Imagine further that a rule 10b-5 class action is filed alleging that the relevant disclosures were misleading half-truths that helped the company maintain an artificially inflated stock price, because the company did not disclose facts available to the board which, at least in hindsight,

appear to have suggested that the unfortunate event was likely to occur or that the risk management strategies the company was undertaking were inadequate.

Cases like this—commonly referred to as event-driven securities litigation—have increased in prevalence in recent years,³⁴ and SEC-mandated ESG disclosure would only accelerate this trend. Event-driven securities class actions can be difficult to get dismissed on the pleadings, even when of dubious merit.³⁵ Although it may be highly doubtful that the alleged omissions were material to investors or that the defendant corporation acted with the requisite scienter, courts may (and often do) allow cases like this to proceed past a motion to dismiss.³⁶ Unless the statement alleged to be misleading was so vague as to be considered puffery, questions of materiality are often treated by courts as raising factual questions inappropriate for resolution on a motion to dismiss. And whereas the PLSRA's heightened scienter pleading requirement creates a real barrier to frivolous claims alleging that defendants knew, or were reckless in not knowing, the falsity of an affirmative misstatement, scienter may not be rigorously examined in half-truth cases. This is because scienter will turn on whether the defendants knew, or were reckless in not knowing, that a reasonable investor would have viewed the challenged statement as misleading in light of the omission of some allegedly material fact. Whether a statement is misleading, and whether an omitted fact is material, turns on the perspective of a reasonable investor, raising factual questions that courts may be reluctant to examine on a motion to dismiss.³⁷

The difficulties associated with terminating event-driven securities litigation at the motion to dismiss stage, coupled with the costs of discovery and extremely large potential damage awards typical in this sort of litigation, means that the risk of vexatious litigation is high.³⁸ This has led many to voice concerns about event-driven litigation.³⁹ These critics include not just groups such as the US Chamber Institute for Legal Reform that have a vested interest in reducing corporate liability exposure,⁴⁰ but also respected scholars,⁴¹ and even shareholder-oriented groups such as Institutional Shareholder Services.⁴² Any serious discussion regarding the adoption of a broad SEC-mandated ESG disclosure regime cannot ignore these concerns.

Is There a Private Ordering Solution?

Investors have alternative tools at their disposal to achieve greater consistency and credibility in corporate ESG disclosures, raising the question of why a mandatory regulatory solution should be favored over a market-based solution. Investors can submit precatory proposals under rule 14a-8 requesting greater board involvement in ESG disclosure practices or ESG risk oversight, for example.⁴³ If investors can reach a consensus on which ESG disclosure framework they prefer, they can also use rule 14a-8 or informal engagement to promote its use. They could use similar techniques to encourage integrated ESG reporting in SEC filings, if they were to view that as independently important.

It appears that these techniques are already bearing considerable fruit. During the 2019 proxy season, Glass Lewis found that “approximately 43% of Russell 1000 companies had established some sort of board oversight of ESG issues.”⁴⁴ Moreover, in Larry Fink’s 2020 letter to CEOs he asks the companies BlackRock invests in to (a) publish a disclosure in line with industry-specific Sustainability Accounting Standards Board (SASB) guidelines by year-end or disclose a similar set of data in a way that is relevant to the particular business and (b) disclose climate-related risks in line with the recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD).⁴⁵ In his 2021 letter, Fink reports encouraging progress over the past year, noting “a 363% increase in SASB disclosures and more than 1,700 organizations expressing support for the TCFD.”⁴⁶ Other leading asset managers, such as State Street and Vanguard, have similarly called on companies to align their ESG disclosures with the SASB standards and TCFD recommendations.⁴⁷ Moreover, calls for greater consistency and comparability in ESG disclosures have led major standard setters to begin efforts at harmonization.⁴⁸ Though the proposals seeking an SEC-mandated ESG disclosure framework have emphasized the failure of market forces over the past several decades to produce “consistent, comparable, highly-reliable ESG information,” they may have spoken too soon.⁴⁹

Is This Actually Good for Stakeholders?

The concerns about mandatory ESG disclosure raised thus far are likely to resonate most strongly with those who possess a free-market orientation. But progressive scholars have also warned against the tendency to try to expand the scope of the federal securities laws in service of non-financial interests. In a recent article, Ann Lipton, associate dean for faculty research at Tulane University School of Law, warns of the “detrimental effects of relying on investor-oriented disclosure to serve the needs of the general public.”⁵⁰ She argues that funneling demands for ESG disclosure through the SEC encourages advocates for information disclosure geared toward stakeholder audiences to conceal their true motives and that this prevarication comes at real cost, as the “need to emphasize financial risk and shareholder return inhibits a fuller discussion of the *societal* need for such information” and risks “contributing to a discourse that suggests that investors are the only members of society who matter.”⁵¹ She also points out that SEC-mandated ESG disclosure would fail to reach a growing number of large and socially impactful private companies that are not subject to SEC-imposed disclosure obligations.⁵² A better approach, in Lipton’s view, is to push for a generalized disclosure system designed in service of stakeholder as opposed to investor interests.⁵³

Furthermore, adoption of an SEC-mandated ESG disclosure regime would represent a symbolic embrace and entrenchment of “stakeholder capitalism”—the controversial notion that corporate managers should manage the corporation not for the primary benefit of shareholders but rather for a broader set of constituencies, including society at large. Though deviating from the so-called norm of shareholder primacy is often criticized on the basis that it serves to insulate corporate managers from accountability and thereby increases agency costs, stakeholder capitalism may also harm the very constituencies it purports to help. In a recent essay, Tariq Fancy—BlackRock’s first

global chief investment officer for sustainable investing between 2018 and 2019—called the idea that corporate managers will drive the type of societal change ESG proponents hope a “fairy tale,” and an extremely dangerous one at that because it makes the necessity of government intervention to address systemic problems facing society seem less urgent.⁵⁴ Others have similarly argued that direct regulation, rather than reliance on corporate fiduciary duties or SEC disclosure policies, is the proper way to deal with societal problems.⁵⁵ Leaving it to corporate managers is not only likely to prove ineffective and counterproductive, but it also undermines democratic values.⁵⁶ Elected officials, accountable to voters and subject to the checks and balances built into American constitutional design, should decide how the nation approaches important matters of societal concern.

CONCLUSION

Henry Kissinger is credited with coining the idea of “constructive ambiguity” as a negotiating tactic, one that employs the deliberate use of ambiguous language on sensitive topics to advance some political purpose. But ambiguity can be destructive as well, particularly if the end sought is sound public policy. Whether the SEC ought to mandate ESG disclosure and, if so, how it should do so can be approached and debated on a discrete, topic-by-topic basis, like any other item of arguably material information. If the call instead is for the SEC to adopt a broad ESG disclosure framework modeled after frameworks designed to meet the informational needs of stakeholder-inclusive audiences, then the significance of the request should be recognized and the difficult questions it raises openly addressed.

ABOUT THE AUTHOR

Amanda M. Rose is a professor of law at Vanderbilt University Law School and a professor of management at Vanderbilt University’s Owen Graduate School of Management. She is a recognized expert on securities regulation. Her scholarship has appeared in the *Columbia Law Review*, the *Chicago Law Review*, the *University of Pennsylvania Law Review*, the *Northwestern University Law Review*, and many other respected publications. In recognition of her excellence as a scholar, Vanderbilt University awarded her the FedEx Research Professorship for the 2021/22 academic year. Before becoming an academic, Rose practiced law at Gibson, Dunn & Crutcher LLP and served as a law clerk to the Hon. William A. Fletcher on the United States Court of Appeals for the Ninth Circuit.

NOTES

1. Letter from Cynthia A. Williams, Osler Chair in Business Law, Osgoode Hall Law School, and Jill E. Fisch, Saul A. Fox Distinguished Professor of Business Law, University of Pennsylvania Law School, to Brent J. Fields, Sec'y, Sec. & Exch. Comm'n (Oct. 1, 2018); Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee, *Recommendation from the Investor-as-Owner Subcommittee of the SEC Advisory Committee Relating to ESG Disclosure*, May 14, 2020; ESG Disclosure Simplification Act of 2021, H.R. 1187, 117th Cong. title I (2021).
2. Stavros Gadinis and Amelia Miazad list within "ESG's wide scope" issues related to climate change, workplace relationships (including gender equality and diversity), technology problems such as privacy and cybersecurity, and supply chain challenges such as humane work conditions and observe that "ESG's scope expands by the day with new concerns vying for corporate attention, like the use of sugar in packaged foods or children and screen time." Stavros Gadinis and Amelia Miazad, "Corporate Law and Social Risk," *Vanderbilt Law Review* 73, no. 5 (2020): 1401, 1414-15. Sometimes the equally broad terms "sustainability" and "nonfinancial disclosure" are used synonymously to refer to this collection of topics.
3. Larry Fink states that BlackRock's "investment conviction is that sustainability- and climate-integrated portfolios can provide better risk-adjusted returns to investors." Larry Fink, "Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance," BlackRock, accessed September 16, 2021, <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter>. John Coffee links interest in ESG disclosure by managers of diversified index funds to a desire to reduce systematic risk. John C. Coffee, "The Future of Disclosure: ESG, Common Ownership, and Systematic Risk" (Law Working Paper No. 541/2020, European Corporate Governance Institute, Brussels, March 2021). Jeffrey Gordon similarly observes that index funds' approach to certain ESG matters can serve the interests of their investors by reducing systematic risk. Jeffrey N. Gordon, "Systemic Stewardship" (Law Working Paper No. 566/2021, European Corporate Governance Institute, Brussels, February 2021).
4. Business Roundtable, *Statement on the Purpose of a Corporation*, August 19, 2019.
5. The Council of Institutional Investors warns that "'stakeholder governance' and 'sustainability'" may become "hiding places for poor management." Council of Institutional Investors, "Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose," press release, August 19, 2019, https://www.cii.org/aug19_brt_response. The editorial board of the *Wall Street Journal* observes that there is "more than a whiff of pre-emptive politics" in the Business Roundtable's statement and warns that "[a]n ill-defined stakeholder model can quickly become a license for CEOs to waste capital on projects that might make them local or political heroes but ill-serve those same stakeholders if the business falters." "The 'Stakeholder' CEOs," *Wall Street Journal*, August 19, 2019. Lucian Bebchuk and Roberto Tallarita argue that the statement is "largely . . . a rhetorical public relations move, rather than the harbinger of meaningful change." Lucian A. Bebchuk and Roberto Tallarita, "The Illusory Promise of Stakeholder Governance," *Cornell Law Review* 106, no. 1 (2020): 98. Elizabeth Demers and coauthors note that an "alternative view on corporate ESG investments derives from agency theory," and explain that this "more skeptical perspective suggests that executives may choose to improve their compan[ies'] ESG scores at the expense of shareholders in order to build their own personal reputations." Elizabeth Demers et al., "ESG Didn't Immunize Stocks against the COVID-19 Market Crash, but Investments in Intangible Assets Did," *Journal of Business Finance and Accounting* 48 (2021): 438.
6. Larry Fink, "Larry Fink's 2020 Letter to CEOs." Ron O'Hanley argues that "Sustainable investing is about value, not values . . ." Ronald O'Hanley, "Investor Focus on Sustainability Is about Managing Risk," State Street, February 2020, <https://www.statestreet.com/ideas/articles/investor-focus-on-sustainability-is-about-managing-risk.html>.
7. The embrace of ESG by asset managers has occurred during a time of increasing public concern regarding the outsized power these managers have over the economy. David McLaughlin and Annie Massa observe that the biggest three asset managers, BlackRock, Vanguard, and State Street, are "potentially the most powerful force over a huge swath of America Inc." and that "[a]larm bells have begun to go off with some regulators, as well as with an ideologically diverse array of academics and activists." David McLaughlin and Annie Massa, "The Hidden Dangers of the Great Index Fund Takeover," *Bloomberg Businessweek*, January 9, 2020. Matt Egan reports that "[c]ritics say BlackRock (BLK), Vanguard and State Street (STT) have become too powerful and that the Biden administration and Congress need to rein them in." Matt Egan, "BlackRock and the \$15 Trillion Fund Industry Should Be Broken Up, Antimonopoly Group Says," *CNN Business*, November 24, 2020. John Coates outlines various potential policy responses to the "legitimacy and accoun-

- tability challenge” posed by the concentration of power “in the hands of a dozen or fewer people” at the largest asset managers. John C. Coates, “The Future of Corporate Governance Part I: The Problem of Twelve” (Harvard Public Law Working Paper No. 19-07, Harvard Law School, Cambridge, MA, September 20, 2018), 19–23.
8. Rajna Gibson Brandon, Philipp Krueger, and Peter Schmidt explain that, “[g]iven the complexity of measuring a firm’s non-financial or ESG performance, the validity of these ratings has been debated critically” and provide an overview of the literature on ESG ratings divergence. Rajna Gibson Brandon, Philipp Krueger, and Peter S. Schmidt, “ESG Rating Disagreement and Stock Returns” (Finance Working paper No. 651/2020, European Corporate Governance Institute, Brussels, August 2021), 5–8. James Mackintosh reports how the same company’s ESG score can vary widely depending on the methodology employed by the ESG rating provider and observes that ESG ratings “are no more than a series of judgments by the scoring companies about what matters—and investors who blindly follow their scores are buying into those opinions, mostly without even knowing what they are.” James Mackintosh, “Is Tesla or Exxon More Sustainable? It Depends Whom You Ask,” *Wall Street Journal*, September 17, 2018.
 9. Magali Delmas, Dror Etzion, and Nicholas Nairn-Birch observe that “while there appears to be agreement that environmental and social performance is multidimensional and that the strength of the relationship between each dimension and financial performance may vary, there is little consensus in the literature on what each dimension represents and thus what corporate social responsibility ratings actually measure.” Magali A. Delmas, Dror Etzion, and Nicholas Nairn-Birch, “Triangulating Environmental Performance: What Do Corporate Social Responsibility Ratings Really Capture?,” *Academy of Management Perspectives* 27, no. 3 (2013): 256. Researcher Jon Entine critiques a popular rating used by academic researchers of corporate social performance (CSP) as “hopelessly flawed” and observes that “[a]lthough there is general agreement that CSP is a multidimensional construct, there are no agreed-on standards or theoretical rationale or way to aggregate and therefore compare multiple dimensions across or within industries.” Jon Entine, “The Myth of Social Investing: A Critique of Its Practice and Consequences for Corporate Social Performance Research,” *Organization and Environment* 16, no. 3 (2003): 354–56. Virginia Harper Ho reviews the empirical literature supporting the materiality of ESG information and notes that the literature “shows that the financial materiality of many specific ESG indicators varies by industry sector” and that “large-scale studies do not answer the question of *which* ESG indicators are material to a particular firm’s investors” (emphasis added). Virginia Harper Ho, “Nonfinancial Risk Disclosure and the Costs of Private Ordering,” *American Business Law Journal* 55, no. 3 (2018): 419. Some posit that corporations that embrace ESG activities can build social capital and trust, positioning firms to better weather periods of crises. Paul C. Godfrey, Craig B. Merrill, and Jared M. Hansen, “The Relationship between Corporate Social Responsibility and Shareholder Value: An Empirical Test of the Risk Management Hypothesis,” *Strategic Management Journal* 30, no. 4 (2009): 425–45. Others posit that the engagement with stakeholders that ESG activities promote may help surface risks leading to better risk management practices. Gadinis and Miazad, “Corporate Law and Social Risk.” These claims are empirically contested. Demers et al., “ESG Didn’t Immunize Stocks.” And like more general assertions that ESG contributes to better firm financial performance, they leave unanswered just *which* of the myriad activities that fall under the ESG heading lead to the hypothesized effects.
 10. Elad L. Roisman, Comm’r, Sec. & Exch. Comm’n, Keynote Speech at the Society for Corporate Governance National Conference (July 7, 2020); Juliet Chung and Dave Michaels, “ESG Funds Draw SEC Scrutiny,” *Wall Street Journal*, December 16, 2019; Pippa Stevens, “‘Fooling Ourselves’ to Focus on ‘Amorphous’ Social Investing Factors, Says SEC Commissioner Peirce,” CNBC, December 17, 2019. Recent empirical work by Dana Brakman Reiser and Anne Tucker substantiates these concerns, concluding that “the ESG label acts more as a product signal and branding mechanism than it does a promise of a specific investment strategy or avoided externalities.” Dana Brakman Reiser and Anne Tucker, “Buyer Beware: Variation and Opacity in ESG and ESG Index Funds,” *Cardozo Law Review* 41, no. 5 (2020): 1927. The Division of Examinations has highlighted deficiencies and internal control weaknesses identified during examinations of advisers and funds related to ESG investing. Securities and Exchange Commission Division of Examinations, *Risk Alert: The Division of Examinations Review of ESG Investing*, April 9, 2021, <https://www.sec.gov/files/esg-risk-alert.pdf>. Rule changes may follow. Request for Comments on Fund Names, 85 Fed. Reg. 13222–25 (March 6, 2020); Andrew Ramonas, “Asset Managers Need More ESG Vote Transparency, SEC’s Lee Says,” *Bloomberg Law*, March 17, 2021.
 11. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,857 (November 13, 2020).
 12. Williams and Fisch to Brent J. Fields; Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee, *Recommendation*; H.R. 1187.
 13. H.R. 1187 § 103(a).

14. H.R. 1187 § 103(b)(1).
15. H.R. 1187 §§ 103(b)(1)(B), 103(b)(4). The bill also calls for the creation of a permanent Sustainable Finance Advisory Committee, which would, inter alia, be tasked with recommending “policy changes to facilitate the flow of capital towards sustainable investments, in particular environmentally sustainable investments.” H.R. 1187 § 103. “Sustainable finance” is defined to mean “the provision of finance with respect to investments taking into account environmental, social, and governance considerations.” H.R. 1187 titles II–X consolidate a variety of other bills previously introduced related to ESG disclosure on specific topics, such as political spending, executive pay, climate risk, tax havens and offshoring, workforce investment, harassment, cybersecurity, diversity, and forced labor.
16. Amanda M. Rose, “A Response to Calls for SEC-Mandated ESG Disclosure,” *Washington University Law Review* 98, no. 6 (2021): 1821–56.
17. Paul Mahoney and Julia Mahoney argue that the SEC “has neither the expertise nor the political accountability to pursue climate, diversity, and other public policy goals” and warn that if the SEC adopts an ESG disclosure regime it risks “eroding public trust in its capacity and willingness to serve as an apolitical technocratic regulator of the capital markets.” Paul G. Mahoney and Julia D. Mahoney, “The New Separation of Ownership and Control: Institutional Investors and ESG,” *Columbia Business Law Review* 2021, no. 2 (2021): 842–43.
18. Ann Lipton asserts that “[t]he goal, in short, is to *make* sustainability information relevant to financial performance, even if it is not currently, by empowering noninvestor groups to pressure corporations into improving their behavior” and that, “[f]ar from pursuing investor wealth, much of the sustainability movement is designed to make corporate profits difficult to achieve unless management attends to the needs of noninvestor stakeholders.” Ann M. Lipton, “Not Everything Is about Investors: The Case for Mandatory Stakeholder Disclosure,” *Yale Journal on Regulation* 37, no. 2 (2020): 532. Mahoney and Mahoney argue that the goal of ESG proponents is to change firm behavior in socially motivated directions. Mahoney and Mahoney, “The New Separation of Ownership and Control,” 8–12. Harper Ho observes that “disclosure is widely recognized as a soft form of regulation, incentivizing changes in corporate behavior where direct regulation may be difficult to achieve or enforce.” Virginia Harper Ho, “Non-Financial Reporting & Corporate Governance: Explaining American Divergence & Its Implications for Disclosure Reform,” *Accounting, Economics, and Law: A Convivium* 10, no. 2 (2020): 1–29.
19. Ruth Jebe warns that “as long as sustainability disclosure remains separate from required disclosure, changes in corporate conduct will be few and slow.” Ruth Jebe, “The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream,” *American Business Law Journal* 56, no. 3 (2019): 669. Jill Fisch explains that SEC-mandated sustainability disclosures “will lead to the board of directors being accountable for sustainability disclosures in a way in that they are not in the current system” and that the “board’s role in overseeing and certifying the sustainability disclosures will require that they set up reporting systems,” which, in turn, “will both improve the reliability of the disclosures and provide the board with a greater role in overseeing and understanding the issuer’s sustainability practices,” enabling it “to incorporate sustainability considerations into its analysis of strategic issues and operational risk management.” Jill E. Fisch, “Making Sustainability Disclosure Sustainable,” *Georgetown Law Journal* 107, no. 4 (2019): 962.
20. Hans B. Christensen, Luzi Hail, and Christian Leuz, “Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review” (Finance Working Paper No. 623/2019, European Corporate Governance Institute, Brussels, May 2021), 94.
21. Fisch argues that sustainability disclosures should be included within securities filings in part because it “would subject issuers’ sustainability disclosures to SEC oversight and enforcement and clarify that fraudulent misrepresentations and omissions are actionable as securities fraud.” Fisch, “Making Sustainability Disclosure Sustainable,” 963.
22. Fisch, “Making Sustainability Disclosure Sustainable,” 959.
23. Fisch, 959.
24. 17 C.F.R. §§ 240.13a-14, 240.15d-14.
25. 15 U.S.C. § 77k; 17 C.F.R. § 240.14a-9.
26. 17 C.F.R. § 240.10b-5.

27. Thomas Lee Hazen has noted that “[g]eneralized statements about a company’s commitment to ethical conduct likely will be considered aspirational and hence not materially misleading.” Thomas Lee Hazen, “Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies’ CSR and ESG Disclosures,” *University of Pennsylvania Journal of Business Law* 23, no. 3 (2021): 782.
28. Society for Corporate Governance and Gibson, Dunn, and Crutcher LLP, *Legal Risks and ESG Disclosures: What Corporate Secretaries Should Know*, June 2018, 16–17; Jones Day, “Managing Legal Risks from ESG Disclosures under U.S. Law,” (white paper, Jones Day, Cleveland, OH, July 2019), 3. Rather than mandating disclosure, another potential way to achieve more robust ESG disclosure is to insulate such disclosures from liability. Hazen has suggested that the SEC adopt a liability safe harbor rule to encourage ESG disclosures. Hazen, “Social Issues in the Spotlight,” 36–40.
29. ESG Disclosure Simplification Act of 2021 § 103(b)(3), H.R. 1187, 117th Cong. (2021).
30. Fisch takes the position that, when it comes to policing SEC-mandated ESG disclosures, “private enforcement is likely to serve as a valuable supplement to public enforcement.” Fisch, “Making Sustainability Disclosure Sustainable,” 965.
31. Private Securities Litigation Reform Act, Pub. L. No 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).
32. 15 U.S.C. § 78u-4(b).
33. 15 U.S.C. § 78u-5.
34. Kevin LaCroix explains that fewer financial frauds have led to more event-driven securities class actions, where “the plaintiffs seek to rely on problems the defendant companies have experienced in their operations that caused their share price to drop,” and that the rise in these suits is “one of the significant factors explaining why the number of securities lawsuits filings is so high above historical norms.” Kevin LaCroix, “First, Wildfires. Then What? Securities Litigation, of Course,” *D&O Diary*, November 18, 2018. Coffee describes the “new trend” of “event-driven” class actions, where an adverse event such as “an explosion, a crash, a mass torts episode (such as a toxic drug with a side effect)” will trigger a securities class action alleging that “investors were injured by the defendant company’s failure to disclose its misconduct or negligence.” John C. Coffee Jr., “Securities Litigation in 2017: ‘It Was the Best of Times, It Was the Worst of Times,’” *CLS Blue Sky Blog*, March 19, 2018. Elisa Mendoza and Jeffrey Lubitz document the rise in event-driven securities class actions and discuss examples of recent cases. Elisa Mendoza and Jeffrey Lubitz, *Event-Driven Securities Litigation: The New Driver in Class Action Growth* ([New York?]: Institutional Shareholder Services, 2020). The US Chamber Institute for Legal Reform explains that event-driven securities class actions “typically contend that the defendant company’s statements before the adverse event occurred misrepresented the risk that an oil platform would explode, that its products would be the subject of tort litigation, or that its systems containing employee or customer information would be hacked” or, alternatively, “that the company was obligated to disclose the risk of the adverse event and failed to do so.” US Chamber Institute for Legal Reform, *A Rising Threat: The New Class Action Racket That Harms Investors and the Economy*, October 2018, 12. It argues elsewhere that the number of event-driven securities class actions continues to rise and offers regulatory and legislative solutions that the SEC and Congress could adopt to address the perceived problem. US Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to Reform the Broken Securities Class Action System*, February 2019.
35. Mendoza and Lubitz explain that the arguments made in event-driven litigation, “even if tenuous, do survive motions to dismiss.” *Event-Driven Securities Litigation*, 5. Jeffrey Dailey and Neal Marder explain that despite their weakness, “not all [event-driven] cases are dismissed, and even those that are dismissed come with significant cost and disruption to a company.” Jeffery A. Dailey and Neal Ross Marder, *The Rise in Event-Driven Securities Litigation: Why It Matters to Directors and Officers* (n.p.: Willis Towers Watson, 2018), 2. Emily Strauss reports regression results indicating that securities class actions arising from misconduct where the most direct victims are not shareholders have significantly lower dismissal rates than cases where the primary victims are shareholders. Emily Strauss, “Is Everything Securities Fraud?,” *UC Irvine Law Review* (forthcoming).
36. Coffee explains that “[w]hen the risk seemed remote at the time the corporate issuer made its disclosures, both the materiality of the issuer’s omission and its alleged scienter would seem open to serious challenge,” but that although “many cases should and will be dismissed, this category of cases may remain viable.” John C. Coffee Jr., “The Changing Character of Securities Litigation in 2019: Why It’s Time to Draw Some Distinctions,” *CLS Blue Sky Blog*, January 22, 2019. Strauss explains: “Many of the catastrophes that result in [event-driven] lawsuits may truly be black swan events, such that the risk that they might occur was so slight as to be immaterial, and thus disclosure of the risk was

not required under the securities laws. Alternatively, even if the risk ultimately was material, managers may not have perceived it to be so, and therefore did not disclose the risk not because they thought they had anything to hide, but because they honestly and un-recklessly misjudged the likelihood that the disaster would occur. Under 10b-5, this constitutes mistake, rather than fraud, because the managers lacked scienter. In both of these situations, the fact of the underlying disaster opens the door to hindsight bias, potentially increasing pressure on defendants to settle.” Strauss, “Is Everything Securities Fraud?,” 22.

37. Amanda M. Rose, “The ‘Reasonable Investor’ of Federal Securities Law: Insights from Tort Law’s ‘Reasonable Person’ and Suggested Reforms,” *Journal of Corporation Law* 43, no. 1 (2017): 101.
38. Strauss argues that “[t]he pressure to settle even claims with a low probability of success is compounded in event-driven cases for several reasons,” including that: (a) “such firms are typically fighting battles on multiple fronts” and “might not have the resources to devote to battling out a shareholder lawsuit of even unclear merit, particularly when doing so will likely keep the initial misconduct in the news cycle and the stock price depressed” and (b) “the application of 10b-5 jurisprudence in event-driven securities cases has been inconsistent, leading to great uncertainty for defendants.” Strauss, “Is Everything Securities Fraud?,” 18. Proponents of mandatory ESG-disclosure have downplayed the associated private liability risk by pointing out that plaintiffs bear the burden of proving that they suffered a loss as a result of a misleading half-truth. Fisch, “Making Sustainability Disclosure Sustainable,” 965. However, plaintiffs’ burden to prove loss causation does little to mitigate the risk of vexatious litigation. Loss causation is an issue that generally cannot be resolved before the completion of discovery. It can be averred generally in the complaint, and the Supreme Court has held that defendants cannot present evidence of a lack of loss causation in opposition to class certification. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011). The risk of strike suits is further compounded by the difficulty defendants face in opposing class certification in event-driven cases. Rose, “A Response to Calls for SEC-Mandated ESG Disclosure,” 1851–52.
39. LaCroix explains: “I have been sounding the alarm on event-driven cases for some time now. While on the one hand, these cases often lack merit (for example, they are often fatally deficient on scienter or causation allegations), on the other hand, their sheer volume means cost and vexation for companies and their insurers. The fact is that in the ebb and flow off [*sic*] day to day business, many companies face setbacks or hit unexpected operational hurdles. It is bad enough that these companies must deal with the adverse circumstances; increasingly they must also deal with a resulting securities lawsuit as well.” Kevin LaCroix, “Scrutinizing Event-Driven Securities Litigation,” *D&O Diary*, March 27, 2018. Others have observed similarly: “The inherent problem in all event-driven securities litigation is that just because something bad happened does not mean that the company or its directors and officers committed fraud. Because many of these events relate to business or operational risks that are known or already subject to a company’s risk disclosures, many of the event-driven suits are based on the tenuous theory that the occurrence or the event upon which the case is based was the materialization of an under-disclosed or downplayed risk.” Dailey and Marder, *The Rise in Event-Driven Securities Litigation*, 1.
40. The US Chamber Institute for Legal Reform argues that these cases “are powerful weapons for extorting settlements, regardless of the merits, due to the cost of defending the case in court and the reputational harm to the defendant company were the underlying event to appear in the headlines.” US Chamber Institute for Legal Reform, *A Rising Threat*, 2. However, reacting to the Chamber’s position, Julie Reiser and Steven Toll argue that “event-driven cases serve as a deterrent to companies who might otherwise conceal or misrepresent their operations because they recognize that investors will hold them accountable for doing so.” Julie G. Reiser and Steven J. Toll, “Event-Driven Litigation Defense,” *Harvard Law School Forum on Corporate Governance*, May 23, 2019.
41. Coffee observes that the “trend in ‘event-driven’ litigation appears to be to file early, soon after the stock drop, and without the more elaborate investigation that the larger established plaintiff’s firms today employ in securities litigation [focused on more traditional financial frauds].” Coffee, “Securities Litigation in 2017.” Fox and Mitts observe that “too many event-driven suits have survived past the motion to dismiss stage when the allegations in their complaints should have been found insufficient with respect to either loss causation or materiality.” Merritt B. Fox and Joshua Mitts, “Calamity: The Hazards of Event-Driven Securities Litigation” (unpublished manuscript, August 28, 2020), 2.
42. Mendoza and Lubitz of Institutional Shareholder Services note that “the new trend of event-driven securities class action litigation is on the rise and resulting in more and more recoveries for shareholders, despite more tenuous arguments being the basis of the lawsuits.” Mendoza and Lubitz, *Event-Driven Securities Litigation*, 2. They also observe that “[e]vent-driven suits are based on a more tenuous argument than core accounting” cases. Mendoza and Lubitz, 4.

43. 17 C.F.R. § 240.14a-8. SEC rule 14a-8 permits shareholders of publicly held companies to require management to include shareholder-sponsored proposals in management's proxy statement if certain procedural requirements are met and the substance of the proposal does not fall within one of several enumerated bases for exclusion. Hazen explains that in recent years, "shareholders have enjoyed considerable success under the [] rule in requiring management to include shareholder proposals relating to social issues." Thomas Lee Hazen, "Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose," *Boston College Law Review* 62, no. 3 (2021): 894. He provides examples of instances where the SEC staff has refused to allow management to exclude shareholder proposals "relating to sustainability, climate change, and ESG." Hazen, "Corporate and Securities Law Impact," 895nn239-241. Not all support this trend. See Stephen M. Bainbridge, "Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal," *Fordham Law Review* 85, no. 2 (2016): 705-742. Although the SEC recently tightened the ownership requirements for submitting shareholder proposals and heightened the level of shareholder support a proposal must receive to be eligible for resubmission, it did not broaden the substantive bases upon which management can exclude shareholder proposals. Securities and Exchange Commission, "SEC Adopts Amendments to Modernize Shareholder Proposal Rule," press release no. 2020-220, September 23, 2020, <https://www.sec.gov/news/press-release/2020-220>.
44. Hannah Saltman, interview by Courtney Keatinge, *Proxy Talk*, Glass Lewis, April 29, 2020, <https://www.glasslewis.com/proxy-talk-how-corporate-boards-can-oversee-esg-issues/>.
45. Fink, "Larry Fink's 2020 Letter to CEOs."
46. Larry Fink, "Larry Fink's 2021 Letter to CEOs," BlackRock, accessed September 16, 2021, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.
47. Ron O'Hanley, "The ESG Opportunity for Corporate Directors: Five Questions for ESG Board Oversight" (remarks, ESG: Beyond the Tipping Point, National Association of Corporate Directors New England Chapter, Boston, MA, January 12, 2021), 8.
48. "In September 2020, five leading framework and standard-setting organizations—CDP, CDSB, GRI, IIRC and SASB—announced a shared vision for a comprehensive corporate reporting system that includes both financial accounting and sustainability disclosure, connected via integrated reporting," and in "response to global market demands for convergence, in November 2020 the IIRC and SASB announced their intention to merge into a unified organization, the Value Reporting Foundation." "SASB Standards & Other ESG Frameworks: The Sustainability Reporting Ecosystem," Sustainability Accounting Standards Board, accessed September 16, 2021, <https://www.sasb.org/about/sasb-and-other-esg-frameworks/>; Integrated Reporting Framework, "IIRC and SASB Announce Intent to Merge in Major Step Towards Simplifying the Corporate Reporting System," press release, November 25, 2020, <https://integratedreporting.org/news/iirc-and-sasb-announce-intent-to-merge-in-major-step-towards-simplifying-the-corporate-reporting-system/>; Impact Management Project, World Economic Forum, and Deloitte, *Statement of Intent to Work Together towards Comprehensive Corporate Reporting*, September 2020; Sustainability Accounting Standards Board, "Promoting Clarity and Compatibility in the Sustainability Landscape," *SASB Blog*, July 12, 2020; World Economic Forum, "Measuring Stakeholder Capitalism: World's Largest Companies Support Developing Core Set of Universal ESG Disclosures," press release, January 22, 2020, <https://www.weforum.org/press/2020/01/measuring-stakeholder-capitalism-world-s-largest-companies-support-developing-core-set-of-universal-esg-disclosures>.
49. Williams and Fisch to Brent J. Fields; Harper Ho, "Nonfinancial Risk Disclosure and the Costs of Private Ordering," 431-56.
50. Lipton, "Not Everything Is about Investors," 504.
51. Lipton, 555, 560.
52. Lipton, 519-26.
53. Lipton 519-26. David Case advocates for the use of "informational regulations," defined as "government mandated public disclosure of information on the environmental performance of regulated entities," to supplement command-and-control environmental regulatory strategies but observes that "the SEC is not the appropriate agency, nor federal securities law the appropriate vehicle, to develop a comprehensive informational regulatory approach to environmental protection based on a paradigm of formal corporate environmental reporting." David W. Case, "Corporate Environ-

mental Reporting as Informational Regulation: A Law and Economics Perspective,” *University of Colorado Law Review* 76, no. 2 (2005): 383, 410.

54. Tariq Fancy, “The Secret Diary of a ‘Sustainable’ Investor,” *Tariq Fancy, Medium*, August 20, 2021.
55. Bebchuk and Tallarita, “The Illusory Promise of Stakeholder Governance,” 58–66; Matteo Gatti and Chrystin Ondersma, “Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera,” *Iowa Journal of Corporation Law* 46, no. 1 (2020): 1–73.
56. Saura Masconale and Simone Sepe argue that investor-induced corporate conformism on contested moral issues undermines pluralistic values. Saura Masconale and Simone M. Sepe, “Activist Capitalism and Democracy” (Law Working Paper No. 568/2021, European Corporate Governance Institute, Brussels, August 2021).