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MULTINATIONAL ASSET MANAGEMENT FIRMS & ESG DISCLOSURE MANAGEMENT

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In recent years, the United States, European Union, and United Kingdom have introduced "Environmental, Social, and Governance" disclosure regulations. Multinational Asset Management Firms must now navigate the evolving and varied disclosure and labeling requirements they are subjected to across multiple jurisdictions. This Article provides a brief history of ESG disclosure regulation and provides a summary of the enacted and proposed regulations and identifies the biggest points of contention between the regulations and provides suggestions for a more comprehensive standardized regulatory framework.

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INTRODUCTION

"Environmental, Social, and Governance" ("ESG") reporting embraces the use of a metrics-based approach to measure a company's sustainability practices and socially responsible behavior,[1] and has emerged as a politically contentious topic.[2] ESG disclosures, when done correctly, have the potential to improve a company's environmental practices,[3] human rights performance,[4] and stakeholder relations.[5] However, as discussed herein, ESG reporting mechanisms have only recently been introduced by governments and remain underdeveloped.

A private environmental governance ("PEG") patchwork of voluntary certification, rating, and ranking systems has evolved

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1. *See* Abhishek Vishnoi, *Five Trends MSCI Sees in the Growth in Sustainable Investing*, BLOOMBERG (Jan. 15, 2020, 11:25 PM), https://www.bloomberg.com/news/articles/2020-01-16/here-are-five-trends-msci-sees-leading-growth-in-esg-investing.

2. *See* Elizabeth Pollman, *The Making and Meaning of ESG* 22-23 (U. Pa. L. Sch. Inst. for L. & Econ., Working Paper No. 659, 2022).

3. *See* Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 YALE J. REGUL. 625, 626–27 (2019).

4. *See* David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 5 (2019).

5. *See* Jerry K C Koh & Victoria Leong, *The Rise of the Sustainability Reporting Megatrend: A Corporate Governance Perspective*, 18 BUS. L. INT'L 233, 235–36 (2017).

over time in the absence of such requirements being mandated by governments.[6] Many of these PEG systems lack standardized metrics and uniform methodologies and remain without any centralized direction or repository. However, the evolution of voluntary climate-related disclosures and recent efforts at standardization in that area have provided a strong foundation to build on.

Recently, the United States ("US"), European Union ("EU"), and United Kingdom ("UK") have each made progress towards promoting general corporate disclosure of ESG metrics through: (1) The Enhancement and Standardization of Climate-Related Disclosures for Investors (US, 2024) ["Climate Rules"],[7] (2) The Non-Financial Reporting Directive (EU, 2014) ["NFRD"],[8] The Corporate Sustainability Reporting Directive (EU, 2021) ["CSRD"],[9] and the European Parliament Greenwashing Directive (EU, 2024) ["Greenwashing Directive"][10] and finally, (3) The Climate-Related Financial Disclosures Requirement (UK, 2022) ["CFD"].[11]

The jurisdictions' respective regulatory bodies have also published more targeted disclosure rules focused on funds and sustainable investment in the form of: (1) The Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment

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6. Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 135–37 (2013).

7. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239 & 249) [hereinafter "Climate Rules"].

8. Directive 2014/95, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1 [hereinafter "NFRD"].

9. Directive 2022/2464, of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, 2022 O.J. (L 322) 15 [hereinafter "CSRD"].

10. Directive 2024/825, of the European Parliament and of the Council of 28 February 2024 Amending Directives 2005/29/EC and 2011/83/EU as Regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Through Better Information, 2024 O.J. [hereinafter "Greenwashing Directive"].

11. The Companies (Strategic Report) (Climate-Related Financial Disclosure) Regulations 2022, SI 2022/31 (UK); The Limited Liability Partnerships (Climate-Related Financial Disclosure) Regulations 2022, SI 2022/46 (UK) [hereinafter collectively "CFD"].

Practices (US, proposed 2022) ["Proposed Enhanced Disclosures Rule"][12] and the Investment Company Names (US, 2023) ["Names Rule"],[13] (2) The Sustainable Finance Disclosure Regulation (EU, 2019) ["SFDR"][14] and the Taxonomy for Sustainable Activities (EU, 2022) ["Taxonomy Regulation"],[15] and lastly, (3) The Sustainability Disclosure Requirements and Investment Labels (UK, 2023) ["SDR"].[16]

The world's top asset management firms serve individuals, companies, governments, and foundations across national borders. The top 15 asset management firms, which are all based in the US and Europe (The UK and Switzerland[17] are not in the EU), hold tens of billions of USD in Assets Under Management ("AUM") (See Figure 1).[18] Accordingly, their investment decisions and shareholder votes[19] have great influence on the world's corporations. Large asset managers who market to multiple jurisdictions ("Multinational Asset Management Firms", hereinafter "MAMFs") find themselves subject to the regulatory disclosure requirements of all sovereignties they avail themselves to. For this reason, many US, EU, and UK asset managers

12. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274 & 279) [hereinafter "Proposed Enhanced Disclosures Rule"].

13. Investment Company Names, 88 Fed. Reg. 70436 (Oct. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270 & 274) [hereinafter "Names Rule"].

14. Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector, 2019 O.J. (L 317) 1 [hereinafter "SFDR"].

15. Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088, 2020 O.J. (L 198) 13 [hereinafter Taxonomy Regulation].

16. FIN. CONDUCT AUTH., Policy Statement 23/16, Sustainability Disclosure Requirements (SDR) and investment labels (Nov. 28, 2023), https://www.fca.org.uk/publication/policy/ps23-16.pdf [hereinafter "SDR"].

17. The Swedish Environmental Code transposes a number of EU directives. The Swedish Accounts Act incorporates, among other things, the NFRD and the Taxonomy Regulation. The CSRD, SFDR have also been adopted by Sweden. *See* Patrik Marcelius et al., *Environmental, Social & Governance Law Sweden 2024*, INT'L COMPAR. LEGAL GUIDE (Jan. 17, 2024), https://iclg.com/practice-areas/environmental-social-and-governance-law/sweden.

18. *World's Top Asset Management Firms*, ADV RATINGS, https://www.advratings.com/top-asset-management-firms (last visited Mar. 9, 2024).

19. *See Proxy Voting Gives Fund Shareholders a Say*, INVESTOPEDIA, https://www.investopedia.com/articles/basics/04/082704.asp (last visited Apr. 27, 2023).

must navigate several evolving regulatory disclosure laws and systems at a time. This imposes a regulatory burden on asset management firms that can be remedied by standardization. Also, investors and customers alike suffer in trying to comprehend and compare ESG performance among companies.

FIGURE 1. TOP 15 ASSET MANAGEMENT FIRMS

Source. ADV Ratings, World's Top Asset Management Firms (last visited Mar. 9, 2024) https://www.advratings.com/top-asset-management-firms.

Rank	Company	Country	AUM $B (USD)	Balance Sheet
1	BlackRock	US	9,090	03/31/23
2	Vanguard Group	US	7,600	03/31/23
3	Fidelity Investments	US	4,240	03/31/23
4	UBS Group	Switzerland	3,960	12/31/22
5	State Street Global Advisors	US	3,600	03/31/23
6	Morgan Stanley	US	3,131	03/31/23
7	JP MorganChase	US	3,006	03/31/23
8	Goldman Sachs	US	2,672	03/31/23
9	Credit Agricole	France	2,660	03/21/23
10	Allianz Group	Germany	2,760	03/31/23
11	Capital Group	US	2,700	03/31/23
12	Amudni	France	2,103	03/21/23
13	Bank of New York Mellon	US	1,910	03/31/23
14	PIMCO	US	1,800	03/31/23
15	Edward Jones	US	1,700	03/31/23

In Section I, this Article provides background by discussing the rise of the asset management firm, the history of socially responsible investing and fiduciary duty, the growing demand for ESG disclosure, and the meaning of materiality. Section II

details the most prominent voluntary disclosure frameworks including the Global Reporting Initiative, the Greenhouse Gas Protocol Corporate Standard, the Task Force of Climate-Related Financial Disclosures, and the International Sustainability Standards Board. Section III then details the various government disclosure regulations that have emerged in the United States, European Union, and United Kingdom. Section IV explores the interplay between the different regulations. Section V provides some suggestions to improve upon ESG disclosure frameworks and lastly, this Article concludes by describing the current state of ESG regulation for Multinational Asset Management Firms. For MAMFs, staying on the pulse of the burgeoning ESG disclosure landscape is an intensive yet necessary process as governmental bodies work out the kinks of their somewhat overlapping and sometimes contradictory regulations. This Article compares the status of ESG disclosure regulations in the US, EU, and UK and underscores the notable differences between them. Understanding these differences and ensuring compliance is especially important for MAMFs. In addition to finding their investment strategies regulated, they must also stay atop company-level ESG disclosures since ESG compliance provides an educated prediction as to the long-term financial resiliency of the companies they invest in.

I. BACKGROUND

A. *Rise of the Asset Management Firm*

Asset management is "the practice of increasing total wealth over time by acquiring, maintaining, and trading investments that have the potential to grow in value."[20] There are two general categories of asset management: traditional asset management and alternative asset management. Traditional asset management firms buy and monitor securities in public markets.[21] Alternative asset management firms invest in a variety

20. *What Is Asset Management, and What Do Asset Managers Do?*, INVESTOPEDIA, https://www.investopedia.com/terms/a/assetmanagement.asp (last visited Feb. 27, 2023).

21. OFF. OF THE COMPTROLLER OF CURRENCY, TRADITIONAL AND ALTERNATIVE INVESTMENT MANAGEMENT SERVICES, https://www.legalbluebook.com/bluebook/v21/rules/18-the-internet-electronic-media-and-other-nonprint-resources/18-1-basic-citation-forms (last visited Mar. 9, 2024).

of asset classes and strategies including Private Equity, Hedge Funds, Real Estate, and Private Debt.[22]

Since the 1980s, shareholding power has become increasingly concentrated in the hands of large asset management firms.[23] The "Big Three" asset managers—BlackRock, Vanguard, and State Street—collectively hold, on average, over 20% of the shares of the S&P 500 companies.[24] In the United States, this trend can accurately be described as a process of *re*-concentration. At the end of the 19th century, the American economy was controlled by a handful of corporations and banks.[25]

The Gilded Age[26] came to an end in the early twentieth century as a result of robber barons issuing new shares to support takeover efforts, Progressive Era[27] antitrust laws, federal taxes aimed at robber barons, and the stock market boom of the 1920s.[28] By 1945, 94% of US equity was held by individuals.[29] Then, in the middle of the twentieth century, new capital pooling-structures, namely pension funds, emerged.[30] A similar phenomenon occurred in the United Kingdom and elsewhere in Europe starting in the 1980s.[31] Population growth and wealth

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22. Swarnabha Seth et al., *Alternative Asset Management: The Current State and Way Ahead*, Wipro (June 2020), https://www.wipro.com/capital-markets/alternative-asset-management-the-current-state-and-way-ahead/.

23. Benjamin Braun, *American Asset Manager Capitalism*, Inst. for Advanced Study & Max Planck Inst. for the Study of Soc. (June 24, 2020), http://acdc2007.free.fr/braun620.pdf; *see generally* Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 Bus. & Pol. 298 (2017).

24. *See* Braun, *supra* note 23, at 4.; *see also* Caleb N. Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, 79 Md. L. Rev. 954, 960 (2020).

25. Braun, *supra* note 23, at 5.

26. "The Gilded Age is a period of gross materialism and blatant political corruption in U.S. history during the 1870s that gave rise to important novels of social and political criticism." *Gilded Age*, Encyclopaedia Britannica, https://www.britannica.com/event/Gilded-Age (last visited Apr. 20, 2023).

27. "The Progressive movement was a political and social-reform movement that brought major changes to the United States during the late 19th and early 20th centuries. . . . [T]he movement's goals involved strengthening the national government and addressing people's economic, social, and political demands." *The Progressive Era Key Facts*, Encyclopaedia Britannica, https://www.britannica.com/summary/The-Progressive-Era-Key-Facts (last visited Apr. 20, 2023).

28. Braun, *supra* note 23, at 5.

29. *Id.*

30. *Id.* at 6.

31. Andrew G. Haldane, Exec. Dir., Bank of Eng., The Age of Asset Management?, Address at the London Business School Conference on Asset Management (Apr. 4, 2014) (transcript available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=1df4edb6e73ca97594b2cf4a3226b9bef5be8bce).

disparity trends suggest that the global asset management industry will continue to grow.[32] The consolidation of assets into fewer hands is relevant to the topic of ESG because large MAMFs have an increased incentive to internalize externalities.[33]

B. *History of Socially Responsible Investing and Fiduciary Duty*

The first institutions to integrate social considerations into investing decisions were faith-based organizations such as the Methodist movement within the Church of England and the Quaker Friends Fiduciary Corporation.[34] John Wesley, the founder of the Methodist movement within the Church of England delivered a sermon in 1760 outlining the basic tenets of social investing, advising that we "ought not to gain money at the expense of life . . . for to gain money we must not lose our souls."[35] To better align their investments with their religious core values, the Quaker Friends Fiduciary Corporation implemented a policy of avoiding "sin stocks" (those associated with weapons, alcohol, and tobacco) in 1898.[36]

However, for generations, the predominant capitalist belief was that corporations existed solely to generate shareholder wealth.[37] In 1970, *The New York Times* published Chicago economist Milton Friedman's notable essay in which he asserts that: "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say engages in open and free competition without deception

32. *Id.* at 2, 15.

33. Colin Myers & Jason J. Czarnezki, *Sustainable Business Law? The Key Role of Corporate Governance and Finance*, 51 ENV'T L. 991, 1035 (2021); *see also* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 3–4, 6–7, 10, 49 (2020).

34. Blaine Townsend, *History of Socially Responsible Investing and ESG Investing*. J. OF IMPACT & ESG INVESTING (2020), https://www.bailard.com/wp-content/uploads/2020/09/History-Socially-Responsible-Investing-and-ESG-Investing.pdf; See for a modern example of Church of England activity Condon, *supra* note 33, at 21.

35. John Wesley, Sermon 50: Use of Money *in* THE WORKS OF JOHN WESLEY, (ed. Thomas Jackson ed., 1872).

36. *See* Peter Roselle, *The Evolution of Integrating ESG Analysis into Wealth Management Decisions*, J. APPLIED CORP. FIN., Spring 2016, at 75, 75.

37. *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33.

or fraud."[38] Friedman's sentiment solidified into the concept of Shareholder Wealth Maximization ("SWM").[39] The theory of SWM posits that all fiduciaries must act to maximize the value of the shareholders' interest in the corporation even to the detriment of other stakeholders such as bondholders, creditors, employees, and communities where the business operates.[40] Fiduciaries are "persons or organizations that act on behalf of others and are required to put the clients' interests ahead of their own, with a duty to preserve good faith and trust."[41] The theory of SWM goes hand in hand with the concept of Shareholder Primacy, which contends that "to the extent other constituents have unprotected interests inconsistent with those of shareholders, the interests of shareholders prevail."[42] Asset management firms have a fiduciary duty to their investors just as companies have a fiduciary duty to their shareholders.

In the 1960s and the following decade, civil rights, women's rights, and anti-war activists ignited a social revolution in the United States. This social movement coincided with the rise of environmentalism. Rachel Carson's 1962 Book, *Silent Spring*,[43] inspired outcry against the indiscriminate use of pesticides.[44] Social and environmental activists challenged shareholder primacy and began demanding that corporations aim to benefit, or at the very least disclose their impact on, the greater community. Socially Responsible Investing ("SRI") emerged as a response to the activists' demands. In London, the Ethical Investment Research Services Ltd ("EIRIS")[45] was created in 1983 to provide faith-based institutions and non-governmental organizations independent research to support making socially

38. *Id.*
39. Alan R. Palmiter, Sustainable Corporations 56 (Aspen Publishing, 2022).
40. *Id.*
41. Adam Hayes, *Fiduciary Definition: Examples and Why They Are Important*, Investopedia, https://www.investopedia.com/terms/f/fiduciary.asp (last updated Mar. 19, 2024)*; see also* Palmiter, *supra* note 39, at 57.
42. Palmiter, *supra* note 39, at 57.
43. Rachel Carson, Silent Spring (Houghton Mifflin, 1962).
44. *See* Eliza Griswold, *The Wild Life of 'Silent Spring'*, N.Y. Times Mag., Sept. 23, 2012, at 126, 128.
45. EIRIS is today a part of the French data vendor Vigeo-EIRIS; the two companies merged in 2015.

informed investment decisions.[46] The availability of SRI funds grew exponentially in the early 2000s.[47]

C. *Growing Demand for ESG Disclosure*

The acronym ESG first became prominent when it appeared in 2004 in a United Nations ("UN") Global Compact Report.[48] One year later, the UN Environmental Program Finance Initiative's ("UNEP-FI") Freshfields Report discussed the materiality of ESG and its relationship to investors' fiduciary duties.[49] In 2006, the UN-backed Principles for Responsible Investment ("PRI") launched and has since gained the support of financial institutions from around the world that manage trillions in assets.[50] In recent years, investors have demanded that companies and asset management firms disclose ESG information.[51] Disclosure frameworks and regulations are meant to shed light on a company's relationship with ESG factors and subsequently encourage those companies to make decisions more aligned to achieve ESG goals. The Hawthorne Effect, coined by sociologist Henry A. Landsberger in 1958, asserts that subjects change their behavior if they know they are being observed.[52] Accordingly, disclosure regulation aims to promote company action by increasing transparency.

Shareholder activism encouraging voluntary disclosure has become more commonplace.[53] Such activism pressures corporations to voluntarily disclose ESG data. Shareholders have followed formal and informal avenues to influence corporate behavior. Formally, shareholders have issued shareholder

46. *About EIRIS*, EIRIS, "https://eirisfoundation.org/about-us/ [https://web.archive.org/web/20000303163945/] (last visited Mar. 24, 2023).

47. Palmiter, *supra* note 39, at 301.

48. UN Env't Program, *Who Cares Wins: Connecting Financial Markets to a Changing World* (2004), https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf.

49. Freshfields Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social, and Governance Issues into Institutional Investment,* UN Env't Program Fin. Initiative (2005), https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf.

50. Principles for Responsible Inv., Annual Report 2018 6 (2018).

51. A.B.A., ESG in the Boardroom: A Guidebook for Directors 86. (Katayun I. Jaffari & Stephen A. Pike eds., ABA Publishing 2022).

52. Henry A. Landsberger, Hawthorne Revisited (W.F. Humphrey Press Inc. 1958).

53. Palmiter, *supra* note 39, at 230.

proposals encouraging increased disclosure of ESG metrics.[54] One example is Majority Action, a non-profit shareholder advocacy organization's success with a shareholder proposal at JPMorgan Chase's annual shareholder meeting requesting that the bank align its financing to the Paris agreement goals and disclose its relevant environmental information.[55] Informally, shareholders have submitted letters requesting greater transparency.[56] In March 2023, more than 1,400 Vanguard shareholders submitted a letter to the firm complaining that not integrating ESG into its investment decisions is a breach of fiduciary duty.[57]

Overall, there has been a drastic increase in the availability of ESG funds and assets in the United States from 1995 to 2018 (*See* Appendix 1). Globally, there has also been an increase in ESG investing from 2014 to 2018 (*See* Appendix 2). Now, approximately one fourth of assets professionally managed globally are tied to some form of ESG data.[58]

Many asset management firms that have created "ESG funds" or "SRI funds" use positive screening, negative screening, best in class[59], themed funds[60], and integrated analysis[61] to curate a portfolio of targeted investment opportunities.[62] Positive screening refers to limiting investment in companies that meet certain ESG criteria such as having a low carbon footprint, promoting workplace diversity, or maintaining high standards

54. *Id.* at 305.

55. *Id.* at 231.

56. *See* Hazel Bradford, *Vanguard Pressed to Address Climate Risk as Fiduciary Duty*, PENSIONS & INVS. (Mar. 7, 2023, 3:17 PM), https://www.pionline.com/esg/vanguard-group-pressed-address-climate-risk-fiduciary-duty.

57. *Id.*

58. Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018, 10:09 AM), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/#5e36dbaa1695.

59. Active inclusion of companies that either lead their sectors or outperform their peers in environmental or social performance, sometimes limited to material environmental and social criteria. *See Introductory Guides to Sustainable Investment, Screening,* PRINCIPLES FOR RESPONSIBLE INV. (May 29, 2020), https://www.unpri.org/introductory-guides-to-responsible-investment/an-introduction-to-responsible-investment-screening/5834.article.

60. "Active selection of companies on the basis of investment opportunities driven by sustainability factors, such as renewable energy." *Id.*

61. "Active inclusion of environmental and social factors within conventional fund management." *Id.*

62. Myers & Czarnezki, *supra* note 33.

of corporate governance.[63] Negative screening, on the other hand, involves excluding companies that do not meet specific ESG criteria, such as engaging in environmentally harmful practices, violating human rights, or having a history of poor governance, from investment portfolios.[64]

A notable example of an SRI fund is Vanguard's FTSE Social Index Fund which holds $7.5 billion worth of assets.[65] Vanguard's fund invests in US stocks using a screening process which integrates "social, human rights, and environmental criteria."[66] Vanguard's FTSE Social Index Fund uses a negative screening process to exclude companies involved in fossil fuels.[67]

D. *Materiality*

There are two primary reasons behind the growing demand for ESG disclosure. The first reason arises from a moralistic concern for companies' negative impact on the environment and the world (*values*).[68] The other reason relates to the major risk that climate change and other ESG issues can expose a company to financially (*value*).[69]

European Union[70] and United Kingdom[71] regulations embrace the concept of "Double Materiality", which posits that corporate information can be important to investors both for its implications about a firm's financial value, and about a firm's impact on the world at large, particularly with regard to climate change and other environmental impacts.[72] For these reasons, their respective ESG regulations require disclosure of information that is material from an outside-in perspective

63. PALMITER, *supra* note 39, at 301–302.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. Zachary Barsky, *Value vs. Values: The Evolution of ESG Considerations for Pension Plan Investments*, RPIA (Nov. 2022), https://rpia.ca/market-insights/overview/listing/views/2022/11/23/value-vs.-values.
69. *Id.*
70. *See* NFRD, *supra* note 8; *see also* CSRD, *supra* note 9.
71. See SDR, *supra* note 16.
72. Henry Engler, *"Double Materiality": New Legal Concept Likely to Play in Debate over SEC's Climate Plan*, THOMSON REUTERS (Apr. 12, 2022), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/sec-double-materiality-climate/.

(financial materiality) as well as an inside-out perspective (impact materiality).

The US Securities and Exchange Commission ("SEC"), however, takes a more limited view of materiality. Rooted in common law fraud, the United States Supreme Court has explained that a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[73] The Supreme Court subsequently clarified that the test for materiality is intended to "filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger 'mix' of factors to consider in making [their] investment decision."[74] In the US, materiality cannot be distilled into a bright-line test, but rather, the determination is to be made on a fact specific basis as to whether the disclosure is of the type that a reasonable investor would consider significant in making an investment decision.[75]

II.
Voluntary Disclosure Frameworks

Voluntary ESG disclosure frameworks have emerged to fill the void created by, until recently, governmental inaction on mandatory disclosures. Approximately 90% of public companies in the S&P 500 produce ESG disclosures, though such voluntary reporting is less prevalent among smaller public companies.[76] ESG disclosures are made primarily in corporate sustainability reports, rather than standardized annual statements,[77] and must often be accessed from individual company websites, rather than a central public repository.[78]

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73. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

74. Basic Inc. v. Levinson, 485 U.S. 224, 234 (1985).

75. *See id.* at 240.

76. *65% of the Russell 1000 Index Published Sustainability Reports in 2019*, Governance & Accountability Inst. (Oct. 26, 2020), https://www.ga-institute.com/research-reports/flash-reports/2020-russell-1000-flash-report.html (reporting that 39% of the 500 smaller companies produced sustainability reports).

77. *See, e.g.*, U.S. Gov't Accountability Off., GAO-20-530, Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them 18–19 (2020), available at https://www.gao.gov/assets/gao-20-530.pdf [hereinafter "GAO-20-530"].

78. *See* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. Ill. L. Rev. 277, 289 (2022).

In 2020, the SEC Investor Advisory Committee ("IAC") pointed to the mismatch between requests from investors for comprehensive, cohesive disclosure and the current fragmented state of disclosures.[79] Investors' demands for ESG disclosure are not currently being met and voluntary disclosure frameworks are attempting to fill the gap left by government delay. Investors looking to engage in ESG investing face dozens, if not hundreds, of distinct disclosure-based data sets, rating methodologies, and ranking systems. This section introduces and discusses the most prominent voluntary disclosure frameworks.

A. *Alphabet Soup & Other Deficiencies*

Studies have found that there are hundreds of ESG rankings, 170 ESG indices, over 100 ESG awards, and 120 ESG standards.[80] The International Financial Reporting Standards ("IFRS") Foundation published a paper in 2020 concluding that the ecosystem of disconnected voluntary disclosure frameworks is becoming increasingly more expensive to follow and is not improving the quality of information that reaches investors.[81]

Both investors and companies complain about the "alphabet soup" of ESG disclosure guidelines and related organizations (*See* Figure 2; *see also* Appendix 3).[82] Several key private environmental governance regimes are notable due to their influence

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79. *See* INVEST.-AS-OWNER SUBCOMM. OF THE SEC INVEST. ADVISORY COMMITT., RECOMMENDATION RELATING TO ESG DISCLOSURE (2020).

80. *See Ranking of the Rankings*, BRANDING-INST., https://www.branding-institute.com/rating-the-rankings/ranking-of-the-rankings; *see also* Steve Lydenberg & Alexi White, *Responsible Investment Indexes: Origins, Nature and Purpose*, *in* THE ROUTLEDGE HANDBOOK OF RESPONSIBLE INVESTMENT 527, 528 (Tessa Hebb et al. eds., 2015); FRANCES BOWEN, AFTER GREENWASHING: SYMBOLIC CORPORATE ENVIRONMENTALISM AND SOCIETY 5 (J. Alberto Aragon-Correa et al. eds., 2014); Stephanie Mooij, *The ESG Rating and Ranking Industry; Vice or Virtue in the Adoption of Responsible Investment?* (Apr. 11, 2017) (unpublished working paper) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960869).

81. IFRS FOUND., TRUSTEES' FEEDBACK STATEMENT ON THE CONSULTATION PAPER ON SUSTAINABILITY REPORTING (2021), https://www.ifrs.org/content/dam/ifrs/project/sustainability-reporting/sustainability-consultation-paper-feedback-statement.pdf.

82. Matt Haddon et al., *The Evolution of Sustainability Disclosure: Comparing the 2022 SEC, ESRS, and ISSB Proposals*, THE SUSTAINABILITY INST. BY ERM, https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/2022/comparing-the-sec-efra-and-issb.pdf.

on government disclosure regulations: The Global Reporting Initiative (“GRI”); The GHG Protocol Corporate Standard; The Task Force on Climate-Related Financial Disclosures (“TCFD”); and the International Sustainability Standards Board (“ISSB”). Private environmental governance creates market demand for disclosure and provides a useful framework for governments to base regulation on.

FIGURE 2. ESG ALPHABET SOUP

Source. Maggie Pahl (Mar. 2, 2024) Word cloud generated using https://www.wordclouds.com. Credit for introducing the term “alphabet soup” in the context of ESG to Professor Stephen Brown.

The overwhelming proliferation of PEG disclosure systems is coupled with a lack of standardization among them.[83] Reporting can be based on a wide variety of data and standards, or in a manner determined entirely by the company itself.[84] Such variety in the market allows companies to pick and choose a reporting framework that presents their information in a more favorable light. Whether self-serving, or merely inconsistent,

83. *See, e.g.*, GAO-20-530, *supra* note 77.

84. *See* THE BD. OF THE INT’L ORG. OF SEC. COMM’NS, SUSTAINABLE FIN. AND THE ROLE OF SECURITIES REGULATORS AND IOSCO 23–24 (2020), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD652.pdf.

the variance between voluntary ESG disclosures can mislead investors and make it difficult for consumers to comprehend.

Also, the voluntary disclosure frameworks lack common definitions, which has been considered a barrier to effective climate change risk management.[85] Even where agreement exists on the definition of a particular term, divergent methodologies and data requirements exist when reporting on such a topic.[86] The US Government Accountability Office has found companies' ESG disclosures lacking in consistency and comparability citing "the variety of different metrics that companies used to report on the same topics, unclear calculations, or changing methods for calculating a metric."[87] Both governmental agencies and the private industry have recognized such a system as untenable.[88] However, some progress has been made in improving the voluntary climate-related disclosures framework.

B. *Global Reporting Initiative ("GRI")*

Following public outcry over the environmental damage caused by the Exxon Valdez oil spill, the Global Reporting Initiative ("GRI") launched in 1997.[89] GRI is an independent, international organization that has created the world's most widely used set of ESG reporting standards,[90] which it regularly reviews and updates.[91] GRI seeks to help governments, businesses, and other organizations better understand and

85. CLIMATE-RELATED MKT. RISK SUBCOMM., MARKET RISK ADVISORY COMM. OF THE U.S. COMMODITY FUTURES TRADING COMM'N, MANAGING CLIMATE RISK IN THE US FINANCIAL SYSTEM (2020), https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf.

86. *See, e.g.*, A.B.A, *supra* note 51, at 159–62 (comparing the divergent data considered by four ratings agencies for measuring "workplace diversity").

87. GAO-20-530, *supra* note 77.

88. *Id* at 12.; *see also* MEAGAN TENETY & STEVE VARGAS, LOST IN TRANSLATION: HOW TO NAVIGATE TOP INVESTOR ESG PRIORITIES 2 (2020), https://chiefexecutive.net/wp-content/uploads/2020/11/How-to-Navigate-Top-Investor-ESG-Priorities.pdf.

89. *See Our Mission & History*, GLOB. REPORTING INITIATIVE, https://www.globalreporting.org/about-gri/mission-history (last visited Apr. 22, 2023).

90. *See About GRI*, GLOB. REPORTING INITIATIVE, https://www.globalreporting.org/about-gri/ (last visited Feb. 26, 2023).

91. *See Continuous Improvement*, GLOB. REPORTING INITIATIVE, https://www.globalreporting.org/standards/ (last visited Apr. 22, 2023).

speak to their impacts on climate change, human rights, and corruption.[92]

In 2016, GRI released the Sustainability Reporting Standards which sets out universal sustainability standards in addition to sector standards and topic-specific standards.[93] The GRI's reporting framework is organized into three series: (i) universal standards for all organizations; (ii) sector standards for specific industries; and (iii) topic standards for disclosures relevant to a particular topic.[94] The universal standards include general disclosures about a company's sustainability policies, as well as a requirement to identify and disclose how the company is managing its most significant environmental issues.[95] Disclosure requirements for certain sectors include information relating to greenhouse gas ("GHG") emissions, climate adaptation strategies, operational sites owned near areas of high biodiversity, waste generation, and water use.[96] GRI maintained a publicly accessible sustainability disclosure database containing over 63,000 reports spanning nearly 20 years from hundreds of companies. However, the database was ultimately discontinued in April 2021 due to the overhead of maintaining the collection.[97]

Most recently, the GRI revised Universal Standards, published in October 2021, came into effect January 2023. Under the revised guidelines, organizations may either report "in accordance" with GRI or "in reference" to GRI. The standards can be downloaded for free and are made available in a dozen languages.[98] GRI limits disclosure to ESG items it defines as

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92. Robert G. Eccles, *Twenty Years of the Global Reporting Initiative: Interview with CEO Tim Mohin*, FORBES (Aug. 15, 2017), https://www.forbes.com/sites/bobeccles/2017/08/15/twenty-years-of-the-global-reporting-initiative-interview-with-ceo-tim-mohin/?sh=227fe8b4150c.

93. *The GRI Standards: Enabling Transparency on Organizational Impacts*, GLOB. REPORTING INITIATIVE, https://www.globalreporting.org/media/wmxlklns/about-gri-brochure-2022.pdf [hereinafter "GRI, Enabling Transparency"]; *Universal Standards*, GLOB. REPORTING INITIATIVE (2024), https://www.globalreporting.org/standards/standards-development/universal-standards/ (explaining the shift to standards began in 2016).

94. *See id.*

95. *See* Jo-An Chen, *Choosing to "Look Up": The Case for a Single, Mandated Climate Change Disclosure Framework*, 64 B.C. L. REV. 179, 194–95 (2023).

96. *See id.* at 195.

97. *Rolf Schwery, GRI Database – A Valuable Tool Soon to Disappear*, ACTING RESPONSIBLY, https://actingresponsibly.com/gri-database-a-valuable-tool-soon-to-disappear/ (last visited Mar. 27, 2024).

98. GRI, Enabling Transparency, *supra* note 93.

"material"[99]—here defined those which reflect the organization's most significant economic, environmental, and social impacts.[100] GRI's definition of "materiality" more closely aligns with the concept of "double materiality"[101] than with the US traditional approach to "materiality".

C. *Greenhouse Gas ("GHG") Protocol Corporate Standard*

The GHG Protocol Corporate Standard was created in 2001 by a partnership between the World Resources Institute ("WRI") and the World Business Council for Sustainable Development ("WBCSD") with contributions from governments, industry associations, non-governmental organizations ("NGO"s), businesses, and other organizations.[102] Since 2001, the partnership has updated the GHG Protocol and has produced guidance to assist companies to account for emissions throughout their value chains.[103] Additionally, the GHG Protocol released a suite of calculation tools to help companies evaluate their emissions and estimate the benefits of climate change mitigation projects.[104]

As the most widely adopted GHG accounting standard,[105] the GHG Protocol has been incorporated into other voluntary and sustainability reporting frameworks including but not limited to, the GRI, the Carbon Disclosure Project ("CDP"),[106]

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99. *See supra* Section I.D discussing materiality.

100. *The GRI Standards: A Guide for Policy Makers*, GLOB. REPORTING INITIATIVE, https://www.globalreporting.org/media/nmmnwfsm/gri-policymakers-guide.pdf (last visited Mar. 27, 2024).

101. *See supra* Section I.D discussing "double materiality."

102. *See About Us*, GREENHOUSE GAS PROTOCOL, https://ghgprotocol.org/about-us (last visited Feb. 26, 2023).

103. *Id.*

104. *Id.* Calculation tools available at *Calculation Tools*, GREENHOUSE GAS PROTOCOL, https://ghgprotocol.org/calculation-tools (last visited Feb. 26, 2023).

105. *See About Us*, GREENHOUSE GAS PROTOCOL, https://ghgprotocol.org/about-us (last visited Feb. 26, 2023).

106. CDP is a non-profit charity organization that runs a global disclosure system centered on environmental impacts. CDP was formed in 2002 and was largely inspired by GRI. CDP works with, and elicits disclosure from corporations, cities, states, and regions. *See About Us*, CDP, https://www.cdp.net/en/info/about-us (last visited Feb. 26, 2023). *What We Do*, CDP, https://www.cdp.net/en/info/about-us/what-we-do ("Founded in 2000, CDP was the first platform to leverage investor pressure to influence corporate disclosure on environmental impact. Now with the world's largest, most comprehensive dataset on environmental action, the insights that CDP holds empowers investors,

and the Task Force on Climate Related Financial Disclosures ("TCFD"), as well as government regulations.

The GHG Protocol introduces the idea of three emission "Scopes": (i) Scope 1 emissions, which are direct emissions from operations owned or controlled by the company; (ii) Scope 2 emissions, which are the indirect emissions generated from the acquired energy consumed by operations owned or controlled by the company; and (iii) Scope 3 emissions, which are the indirect emissions that occur in upstream and downstream activities of a company's value chain.[107] Put simply, Scope 1 and Scope 2 emissions refer to the emissions of a company itself, whereas Scope 3 emissions encompass all other indirect emissions not covered by Scope 1 and 2.[108] The Protocol also provides uniform measurement and reporting methods for the seven GHGs covered in the Kyoto Protocol—carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and nitrogen trifluoride.[109] Quantitative disclosure related

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companies, cities, and national and regional governments to make the right choices today to build a thriving economy that works for people and planet in the long term."). For information regarding CDP's use of the GHG protocol, see *GHG Emissions Dataset*, CDP, https://www.cdp.net/en/investor/ghg-emissions-dataset. To understand how the TCFD and GRI works in conjunction with the GHG Protocol, see Mallory Thomas & Brianna Hardy, *How TCFD and the GHG Protocol are Driving ESG Regulations*, BAKER TILLY (Sept. 26, 2023), https://www.bakertilly.com/insights/how-tcfd-and-ghg-protocol-are-driving-esg-regulations; IFRS FOUND. & GLOB. REPORTING INITIATIVE, INTEROPERABILITY CONSIDERATIONS FOR GHG EMISSIONS WHEN APPLYING GRI STANDARDS AND ISSB STANDARDS (Jan. 2024), https://www.globalreporting.org/media/xlyj120t/interoperability-considerations-for-ghg-emissions-when-applying-gri-standards-and-issb-standards.pdf.

107. *See* WORLD BUS. COUNCIL FOR SUSTAINABLE DEV. & WORLD RESOURCES INST., THE GREENHOUSE GAS PROTOCOL, A CORPORATE ACCOUNTING AND REPORTING STANDARD REVISED EDITION (last visited Apr. 22, 2023), https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf.

108. *Id.*

109. *See Id.* The Kyoto Protocol, adopted in 1997, implemented the United Nations Framework Convention on Climate Change ("UNFCCC") by obtaining commitments from industrialized countries to reduce emissions of the seven identified gasses according to agreed targets. *See What is the Kyoto Protocol?*, UNFCCC, https://unfccc.int/kyoto_protocol (last visited Feb. 26, 2023); *Kyoto Protocol – Targets for the First Commitment Period*, UNFCCC, https://unfccc.int/process-and-meetings/the-kyoto-protocol/what-is-the-kyoto-protocol/kyoto-protocol-targets-for-the-first-commitment-period. The UNFCCC included nitrogen fluoride in the Kyoto GHG protocol in 2013, see Stephen Russell, *Nitrogen Trifluoride Now Required in GHG Protocol Greenhouse Gas Emissions Inventories*, WORLD RES. INST., https://www.wri.org/insights/nitrogen-trifluoride-now-required-ghg-protocol-greenhouse-gas-emissions-inventories.

to GHG emissions is important to investors because it speaks to the registrant's exposure to regulatory, technological, and market risks that may come about in the years to come as the economy transitions to relying less on GHG.[110] Both the standardized data and common definitions discussed above have been integral to the evolution of the climate-related disclosures framework.

D. *Task Force on Climate-Related Financial Disclosures ("TCFD")*

In 2015, the Group of Twenty ("G20") Finance Ministers[111] directed the Financial Stability Board ("FSB")[112] to determine how the financial sector should best address climate-related concerns.[113] The FSB concluded that investors and other market participants required better information about climate-risk and thus established the TCFD.[114]

The TCFD is an international industry-led task force entrusted to better inform investment, credit, and insurance underwriting decisions.[115] In 2017, the TCFD published a disclosure recommendation framework which categorizes material

110. *See, e.g.*, Calvert Rsch. & Mgmt., Comment Letter on Request for Public Input on Climate Change Disclosure (June 17, 2021); Ceres, Comment Letter on Request for Public Input on Climate Change Disclosure (June 10, 2021); State of NY Off. of the State Comptroller, Comment Letter on Request for Public Input on Climate Change Disclosure (June 8, 2021); Sustainability Acct. Standards Bd., Comment Letter on Request for Public Input on Climate Change Disclosure (May 19, 2021).

111. The Group of Twenty, also known as the G20, is an intergovernmental panel comprising 19 countries and the European Union. The G20 was founded in 1999 in response to the global economic crisis. The finance ministers of the G20 meet annually to discuss the status of the global economy. *See About the G20*, G20 FOUND., https://www.g20.org/en/about-the-g20.

112. The Financial Stability Board was established by the G20 in 2009 and was tasked with monitoring and making recommendations about the global financial system. *See History of the FSB*, FIN. STABILITY BD., https://www.fsb.org/about/history-of-the-fsb/.

113. TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, 2020 STATUS REPORT (OCT. 2020), https://www.fsb.org/wp-content/uploads/P291020-1.pdf.

114. *See About*, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, https://www.fsb-tcfd.org/about/ (last visited Feb. 26, 2023).

115. *See* TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (June 2017), https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf.

climate-related risks and opportunities as either short-term, medium-term, or long-term projected financial impacts.[116] The TCFD framework establishes eleven recommended disclosures divided into four core themes: (i) Governance, which recommends disclosures of the organization's climate-related risks and opportunities. Specifically, a description of the board's oversight of, and management's role in assessing and managing, climate-related risks and opportunities; (ii) strategy, which recommends disclosure of the actual and potential impacts of climate-related risks and opportunities and the organization's strategy and financial planning where such information is material. Specifically, a description of the climate-related risks and opportunities and the impacts of those risks and opportunities on the organization's strategy, and the resiliency of that strategy, considering different climate-related scenarios; (iii) risk management, which recommends disclosure of how the organization identifies, assesses, and manages climate-related risks. Specifically, a description of the organization's processes for identifying, assessing, and managing climate-related risks, and how those processes are integrated in the organization's overall risk management; and (iv) and metrics and targets, which recommends disclosure of the metrics and targets used to assess and manage climate-related risks and opportunities where such information is material (*See* Figure 3 & Appendix 4).[117] Specifically, disclosure of how those metrics are utilized in line with the organization's strategy and risk management processes, and disclosure of Scope 1, 2 and 3 GHG emissions in metric tons of carbon.[118] An important caveat in the TCFD framework is that disclosure of Scope 3 emissions is recommended only "if appropriate."[119]

116. *Id.*
117. *Id.*
118. *Id.* at 14.
119. *Id.* at 22.

FIGURE 3. CORE ELEMENTS OF RECOMMENDED CLIMATE-RELATED FINANCIAL DISCLOSURES

Source. Recommendations of the Task Force on Climate-related Financial Disclosures, Final Report (June 2017) https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf.

TCFD's climate related reporting framework has become widely accepted by companies and investors. Notably, 1,069 financial institutions with $194B in collective AUM have expressed their support for the TCFD framework.[120] The principles of TCFD are integrated into many other disclosure frameworks including government regulations. The US, EU, and UK have all integrated different elements of the TCFD into their disclosure proposals.[121]

E. *International Sustainability Standards Board ("ISSB")*

In June 2021, the Value Reporting Foundation ("VRF") was formed through a merger of the Sustainability Accounting Standards Board[122] ("SASB") and the International Integrated

120. *See* MOODY'S, STATE OF TCFD DISCLOSURES 2021 (Oct. 18, 2021) https://assets.website-files.com/5df9172583d7eec04960799a/616d36184f3e6431a424b9df_BX9303_MESG_State%20of%20TCFD%20Disclosures%20 2021.pdf; 2021 STATUS REPORT: TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, FIN. STABILITY BD. (Oct. 14, 2021), https://www.fsb.org/2021/10/2021-status-report-task-force-on-climate-related-financial-disclosures/.

121. *See* Haddon, *supra* note 82.

122. The Sustainability Accounting Standards Board is a non-profit organization, founded in 2011 to develop sustainability accounting standards.

Reporting Council[123] ("IIRC") for the purpose of developing a global baseline of ESG reporting standards.[124] Also in June 2021, the International Organization of Securities Commission ("IOSCO") published a report insisting that investors are demanding greater consistency and harmonization among disclosure mechanisms.[125] The report established three priorities: (1) encouraging globally consistent standards; (2) promoting comparable metrics and narratives; and (3) coordinating across approaches.[126] The recommendations of the report materialized in several additional consolidation events in the voluntary disclosure space, eventually culminating into the ISSB.

In November 2021, The IFRS Foundation formed the ISSB to harmonize the many global sustainability disclosure requirements.[127] At the same time, the IFRS also announced that the Climate Disclosure Standards Board ("CDSB") [128] and the VRF would be consolidated into the ISSB.[129] In June 2023, the ISSB issued IFRS S1 (General Requirements for Disclosure of Sustainability-related Financial Information) and IFRS S2 (Climate

See About Us, SASB STANDARDS (last visited Apr. 28, 2023), https://www.sasb.org/about/.

123. The International Integrated Reporting Council is a group of leaders from the corporate, investment, accounting, securities, regulatory, academic and standard-setting sectors who have gathered to create an Integrated Reporting Framework. *See Who We Are,* INT'L INTEGRATED REPORTING COUNCIL, https://www.ifrs.org/about-us/who-we-are/#history (last visited Apr. 15, 2024).

124. BD. OF THE INT'L ORG. OF SEC. COMM'NS, REPORT ON SUSTAINABILITY-RELATED ISSUER DISCLOSURES: FINAL REPORT (2021), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD678.pdf; *see also* VALUE REPORTING FOUNDATION, https://www.valuereportingfoundation.org/ The Value Reporting Foundation has consolidated into the IFRS. (last visited Feb. 26, 2023).

125. BD. OF THE INT'L ORG. OF SEC. COMM'NS, *supra* note 124.

126. *Id.* at 3.

127. *Id.*

128. The Climate Disclosure Standards Board ("CDSB") is a global consortium of businesses and non-governmental organizations established during the World Economic Forum in 2007 to set standards for climate related disclosures. The First CDSB Framework, the Climate Change Reporting Framework, was released in 2010. That Framework was updated in April 2018 to better align with TCFD; *see About the Climate Disclosure Standards Board,* CDSB (last visited Feb. 26, 2023), https://www.cdsb.net/our-story.

129. *IFRS Foundation Completes Consolidation with Value Reporting Foundation,* IFRS (Aug. 1, 2022), https://www.ifrs.org/news-and-events/news/2022/08/ifrs-foundation-completes-consolidation-with-value-reporting-foundation/.

Related Disclosures). The standards became effective in reporting periods starting January 1, 2024.[130]

The IFRS Foundation recommended that the ISSB use the TCFD framework as a starting point for developing a model "prototype" climate-related financial disclosure standard.[131] The standards are inspired by the TCFD framework but with a few significant departures.[132] The ISSB Standards are consistent with the TCFD's governance recommendations but require the disclosure of additional information, including the identity of the body or individual responsible for oversight of climate-risk, how that body's responsibilities are reflected in board mandates and related policies, how the body ensures that the appropriate skills and competencies are available to oversee climate risk response, and information about whether dedicated controls and procedures are applied to climate risk and integrated with other processes.[133]

The ISSB Standards are also consistent with the TCFD's strategy recommendations, but require additional, more granular details regarding how the organization is directly, and indirectly, responding to climate risk, how its strategy and plans will be resourced, the expected changes in financial position and performance over time, including investment plans and sources of funding, and its resilience analysis and areas of uncertainty.[134] Also, unlike the TCFD Framework, the ISSB mandates that companies provide information about emission reduction targets and the use of carbon offsets.[135] The ISSB Standards largely mirror the TCFD's risk management recommendations except that they require the inclusion of input parameters and identification of the prioritization of climate risks and opportunities.[136] The ISSB further departs from the TCFD framework

130. *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information,* IFRS (last visited Dec. 27, 2023), https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s1-general-requirements/ [hereinafter "IFRS S1"]; *IFRS S2 Climate-Related disclosures*, IFRS (last visited Dec. 27, 2023), https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s2-climate-related-disclosures/ [hereinafter "IFRS S2"].

131. *See* TECH. READINESS WORKING GRP., CLIMATE-RELATED DISCLOSURES PROTOTYPE (Nov. 2021), https://www.ifrs.org/content/dam/ifrs/groups/trwg/trwg-climate-related-disclosures-prototype.pdf.

132. IFRS S2, *supra* note 130.

133. *Id.* at 4–6.

134. *Id.* at 7–8.

135. *Id.* at 17.

136. *Id.* at 14–35.

by requiring disclosure based on industry metrics.[137] Further, the ISSB Standards require a different disclosure treatment of GHGs, in that organizations must prepare separate disclosures of Scope 1 and Scope 2 emissions, in metric tons of carbon, for: (i) its consolidated accounting group; and (ii) its associates, joint ventures, unconsolidated subsidiaries or affiliates not included in the consolidated accounting group. Scope 3 emissions disclosure is required under the ISSB Standards regardless of whether the organizations deem disclosure "appropriate", as recommended by the TCFD. Finally, the ISSB Standards differ from the TCFD's recommendations in that organizations must disclose how its climate targets compare with those created in the latest international agreement on climate change, and whether those targets have been validated by a third party.[138]

III.
Government Disclosure Regulations

A. *United States*

SEC disclosures are rooted in the shift away from the *caveat emptor*, or "let the buyer beware", framework that existed prior to 1933.[139] In response to the stock market collapse of 1929, Congress enacted the Securities Act of 1933[140] and Securities Exchange Act of 1934,[141] which were intended to, *inter alia*, protect investors by requiring publicly traded companies to disclose information regarding their financial condition.[142] These seminal laws introduced the expectation of publicly traded companies' transparency that continues to be built upon today.[143] The Securities Act of 1933 introduced the concept of "materiality" to disclosures by requiring companies that go

137. *Id.* at 14–40.
138. *Id.* at 14–15.
139. "This proposal adds to the ancient rule of caveat emptor the further doctrine, 'let the seller also beware.' It puts the burden of telling the whole truth on the seller. It should give impetus to honest dealing in securities and thereby bring back public confidence." Message from President Franklin Roosevelt to Congress (Mar. 29, 1933), as *quoted in* H.R. Rep. No. 73-85 (1933).
140. Securities Act of 1933, 15 U.S.C. §77a.
141. Securities Exchange Act of 1934, 15 U.S.C. §77c.
142. *See* Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 Am. Bus. L.J. 645, 654 (2019).
143. *See* Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 Bus. Law. 317 (2007).

public to produce a registration statement that provides investors with the full disclosure of material facts regarding the company and securities to be offered.[144] The complex debate surrounding the meaning of materiality in the ESG context is discussed above.

Congress created the SEC in 1934 and empowered it to promulgate disclosure requirements that are "necessary or appropriate in the public interest or for the protection of investors."[145] The Securities Exchange Act of 1934 requires publicly traded companies to file periodic reports with the SEC, including: (i) quarterly reports on Form 10-Q;[146] (ii) an annual report on Form 10-K;[147] and (iii) an interim report on Form 8-K for any month where certain specified events occur.[148] The details of what must be included in these reports are set forth in SEC Regulation S-K[149] and S-X for financial information.[150] These reporting requirements include the description of the company's business, threatened or pending legal proceedings against the company, risk factors, and management's discussion and analysis of the company's financial condition and results of operations, several of which potentially implicate ESG disclosures.

SEC regulations are framed around ensuring that investors have access to the information necessary to make informed investment decisions. The SEC first dabbled with the idea of disclosure on material environmental issues in the 1970's when it published an interpretive release encouraging registrants to include the financial impact of compliance with environmental laws.[151] At the time, the United States Government had recently

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144. *See generally* THOMAS L. HAZEN, THE LAW OF SECURITIES REGULATION, Chs. 2–3 (8th ed. 2020).

145. *See, e.g.*, Securities Act of 1933 §7, 15 U.S.C. §77g; Securities Exchange Act of 1934 §§ 12–13, 15., 15 U.S.C. §§ 781–m, 780.

146. 17 C.F.R § 249.308a (2005).

147. 17 C.F.R § 249.310 (2005).

148. 17 C.F.R § 249.308 (2005) (The events that require a Form 8-K filing include: (i) Bankruptcy or receivership; (ii) acquisition or disposition of assets; (iii) delisting of securities; (iv) non-reliance on previously issued financial documents; (v) change in board composition; and (vi) failure to make a required distribution).

149. 17 C.F.R. § 229.

150. 17 C.F.R. § 210.

151. *See* Securities Act Release No. 33, 5170, 36 Fed. Reg. 13980 (July 19, 1971). The Commission codified this interpretive position in its disclosure forms two years later. *See* Securities Act Release 33, 5386, 38 Fed. Reg. 12100 (Apr. 20, 1973) ("1972 Amendments").

enacted a series of environmental laws including the National Environmental Protection Act ("NEPA") and the Clean Air Act ("CAA") in 1970, as well as the Clean Water Act ("CWA") and Ocean Dumping Act in 1972.[152] Environmental regulations expanded in 1974 as Congress passed the Safe Water Drinking Act ("SWDA") and the Resource Conservation and Recovery Act ("RCRA") as well as the Toxic Substances Control Act ("TSCA") in 1976.[153] In 1982, the Commission adopted rules mandating the disclosure of the costs of compliance with federal, state, and local environmental laws.[154]

1. *2010 SEC Guidance*

In 2010, as a response to public requests to address the role of disclosure in climate-change risk, the SEC published guidance [hereinafter "2010 Guidance"].[155] In the 2010 Guidance, the SEC made clear that climate risk is material in certain circumstances, and therefore must be disclosed.[156] The SEC advised companies to consider the following four categories of climate risk when contemplating disclosures: (i) the impact of legislation and regulation on compliance and litigation; (ii) the impact of international climate change accords on compliance and litigation; (iii) the indirect consequences of regulation or business trends, such as consumer demand and public perception; and (iv) the physical impacts of climate change, including property damage and supply chain disruptions.[157]

In addition to its guidance on climate-risk considerations, the SEC mandated certain specific disclosures under Regulation S-K. At this time, the SEC required companies to disclose the material effects that compliance with federal, state, and local regulations will have on potential litigation,[158] and upon

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152. *Milestones in EPA and Environmental History*, ENV'T PROT. AGENCY (last visited Mar. 24, 2023), https://www.epa.gov/history/milestones-epa-and-environmental-history.

153. *Id.*

154. *See* Securities Act Release No. 33, 6383, 47 Fed. Reg. 11380 (Mar. 16, 1982) ("1982 Release").

155. *See* Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33, 9106, 75 Fed. Reg. 6290 (Feb. 8, 2010) [hereinafter "2010 Guidance"].

156. Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33, 9106, 75 Fed. Reg. 6290 (Feb. 8, 2010).

157. *Id.* at 6295–97.

158. 17 C.F.R. § 229.103(a).

its capital expenditures, earnings, and competitive position as part of the description of its business.[159] Additionally, companies are mandated to disclose the most significant factors that make its public offering speculative or risky, including those related to climate change.[160]

As a result of the 2010 Guidance, climate change disclosures by United States companies have increased.[161] However, the disclosures are inconsistent and vary from company to company. Mentions of climate change in 10-K forms (the annual report required by the SEC, that gives a comprehensive summary of a public company's financial performance) often use boilerplate[162] language.[163] As a result, investors in the United States continue to struggle locating, understanding, and comparing disclosure data.

In 2016, the SEC issued a request for preliminary comments on modernizing the disclosure requirements in Regulation S-K.[164] A significant majority of comments received addressed sustainability with many focused on climate change, while many others discussed disclosures related to diversity, gender pay equity, human rights, human capital management, sustainable palm oil, forestry, and supply-chain management.[165] A common theme of the comment letters was the need to improve the quality and consistency of ESG disclosures.[166]

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159. *Id.* § 229.101(c)(2)(i).

160. *Id.* § 229.503(c).

161. *See* PALMITER, *supra* note 39 at 352.

162. The term boilerplate refers to standardized text, copy, documents, methods, or procedures that may be used over again without making major changes to the original. James Chen, *Boilerplate Language, Uses, History, Examples, Pros & Cons*, INVESTOPEDIA (last visited Apr. 27, 2023) https://www.investopedia.com/terms/b/boilerplate.asp.

163. *Id.*

164. Business and Financial Disclosure Required by Regulation S-K, Release Nos. 33,10064; 34,77599, 113 SEC Docket 4731 (Apr. 13, 2016); TYLER GELLASCH, TOWARDS A SUSTAINABLE ECONOMY: A REVIEW OF COMMENTS TO THE SEC'S DISCLOSURE EFFECTIVENESS CONCEPT RELEASE, AMERICANS FOR FINANCIAL REFORM ET AL. (Sep. 2016), https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5866d3c0725e25a97292ae03/1483133890503/Sustainable-Economy-report-final.pdf.

165. *Business And Financial Disclosure Required By Regulation S-K - The Sec's Concept Release And Its Implications*, SUSTAINABILITY ACCT. STANDARD BD. (2016), https://www.sasb.org/wp-content/uploads/2016/09/Reg-SK-Comment-Bulletin-091416.pdf.

166. *See* Daniel C. Esty & Todd Cort, *Toward Enhanced Corporate Sustainability Disclosure: Making ESG Reporting Serve Investors*, 16 VA. L. & BUS. REV. 423, 431 (2022).

The first few weeks of March 2021 marked a concerted effort by the SEC to further develop its ESG regulations. On March 3, 2021, the SEC stated in a press release that "[t]his year, the Division is enhancing its focus on climate and ESG-related risks by examining proxy voting policies and practices to ensure voting aligns with investors' best interests and expectations, as well as firms' business continuity plans in light of intensifying physical risks associated with climate change."[167] The next day, on March 4, 2021, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement.[168] The initial focus of the Task Force is to develop initiatives to proactively identify ESG-related misconduct.[169] On March 15, 2021, acting chair of the SEC, Allison Herren Lee, requested public input on climate disclosure and initiatives focused on broader ESG disclosure.[170] Over 600 unique responses were received with proponents of additional disclosures stating that climate change poses significant financial risks to companies and investors, and that the current disclosure framework has not produced consistent, comparable, or reliable information for investors.[171] In response, the SEC released a summary website compiling agency information about climate and ESG issues.[172]

Shortly thereafter, the SEC issued comment letters to dozens of companies on their fiscal 2020 Form 10-Ks requesting additional disclosures, or clarifying language, related to climate change.[173] Although it took several years, the SEC issued a monumental proposal in March 2022 that would advance and standardize disclosures related to climate change.[174]

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167. Press Release, SEC, SEC Division of Examinations Announces 2021 Examination Priorities (Mar. 3, 2021), https://www.sec.gov/news/press-release/2021-39.

168. Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

169. *Id.*

170. *See* Statement Comm'r. Allison Herren Lee, SEC Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

171. Climate Rules, *supra* note 7.

172. *See A Timeline of What's Happening with Corporate ESG Disclosure Requirements in the U.S.,* BDW, https://bwdstrategic.com/timeline-of-usa-climate-change-disclosure-regulation/ (last visited Apr. 29, 2023).

173. *See, e.g., Sample Letter to Companies Regarding Climate Change Disclosures*, SEC, https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures (last modified Sept. 22, 2021).

174. Climate Rules, *supra* note 7.

2. *Climate Rules*

On March 21, 2022, the SEC proposed amendments to its rules under the Securities Act of 1933 and Securities Exchange Act of 1934.[175] The SEC invited comments on the proposed amendments which would "require registrants to provide certain climate-related information in their registration statements and annual reports."[176] In the proposal, the SEC expresses its intent to balance the need to "elicit climate-related disclosures that are consistent, comparable, and reliable" while reducing the regulatory burden and cost of such disclosure.[177]

Asset management firms in the United States were vocal about their views on the proposed SEC Climate Rules. Specifically, eight out of the top ten asset managers submitted formal response letters during the public comment period.[178] Morningstar, an Investment Research Firm, analyzed those eight response letters.[179] All eight asset managers expressed support for the SEC's efforts to provide standardized climate-risk data to investors.[180] The letters also demonstrate that US asset management firms support the disclosure of Scope 1 and 2 emissions, but generally oppose the inclusion of Scope 3 emissions in the rule.[181] The rationale provided in the letters is that reporting Scope 3 emissions will be too challenging and costly.[182] In addition, the asset managers assert that data gaps and inconsistent methodologies will result in inaccurate Scope 3 measurements.[183]

By a vote of 3-2, the SEC passed the final Climate Rules on March 6, 2024. The structure is largely inspired by the TCFD Reporting Framework core categories: governance, risk management, strategy, and metrics.[184] The rule also incorporates concepts developed by the GHG Protocol.[185] The final rule is

175. *Id.*
176. *Id.* at 34.
177. *Id.* at 43.
178. *See* Mary Riddle, *What U.S. Asset Managers Say About the SEC's Proposed Rules on Climate-Related Disclosures*, TRIPLE PUNDIT (Aug. 9, 2022), https://www.triplepundit.com/story/2022/sec-proposed-climate-related-disclosures/751891.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. Climate Rules, *supra* note 7, at 21343.
185. *Id.* at 21345.

discussed in further detail below. All registrants are provided with a phased in compliance timeline depending on their filer status and the content of the disclosure (*See* figure 4).[186]

FIGURE 4. COMPLIANCE DATES UNDER THE FINAL RULES

Source. Fact Sheet: The Enhancement and Standardization of Climate-Related Disclosures: Final Rules, U.S. Securities and Exchange Commission (Mar. 6, 2024) https://www.sec.gov/files/33-11275-fact-sheet.pdf.

Compliance Dates under the Final Rules[1]							
Registrant Type	**Disclosure and Financial Statement Effects Audit**		**GHG Emissions/Assurance**			**Electronic Tagging**
	All Reg. S-K and S-X disclosures, other than as noted in this table	*Item 1502(d)(2), Item 1502(e)(2), and Item 1504(c)(2)*	*Item 1505 (Scopes 1 and 2 GHG emissions)*	*Item 1506 - Limited Assurance*	*Item 1506 - Reasonable Assurance*	*Item 1508 - Inline XBRL tagging for subpart 1500[2]*
LAFs	FYB 2025	FYB 2026	FYB 2026	FYB 2029	FYB 2033	FYB 2026
AFs (other than SRCs and EGCs)	FYB 2026	FYB 2027	FYB 2028	FYB 2031	N/A	FYB 2026
SRCs, EGCs, and NAFs	FYB 2027	FYB 2028	N/A	N/A	N/A	FYB 2027
	1 As used in this chart, "FYB" refers to any fiscal year beginning in the calendar year listed. 2 Financial statement disclosures under Article 14 will be required to be tagged in accordance with existing rules pertaining to the tagging of financial statements. *See* Rule 405(b)(1)(i) of Regulation S-T.					

The Climate Rules amend Regulation S-K to require a new, separately captioned "Climate-Related Disclosure" section in applicable SEC filings, including Form 10-K, with such requirements enumerated in the newly created subpart 1500 of Regulation S-K.

a. Item 1500: Definitions

Item 1500 of Regulation S-K defines terms used in the Climate Rules,[187] including "materiality" in the context of the rule, consistent with Supreme Court precedent: "If there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote or such a reasonable investor would view omission of the disclosure as having significantly altered the total mix of information made available."[188] Other relevant definitions will be discussed below.

186. *Id.* at 21346.
187. Climate Rules, *supra* note 7.
188. *Id.* at 96; *See* 17 C.F.R. § 230.405 (definition of "material"); 17 C.F.R. § 240.12b-2 (definition of "material"). *See also Basic*, 485 U.S. at 231-32, 240

b. Item 1501: Governance

Item 1501 requires registrants to describe the board of director's oversight of climate-related risks.[189] When applicable, this section will be used for companies to identify any board or sub-committee created for the purpose of climate-related risk management or obtaining climate-related targes or goals.[190]

c. Item 1502: Strategy

Item 1502(a) of Regulation S-K requires the disclosure of any climate-related risks that have materially impacted or are reasonably likely to have a material impact on the registrant.[191] Climate-related risks are defined as the actual or potential negative impacts of climate-related conditions and events on a registrant's business, results of operations, or financial condition.[192] This includes both physical risks and transition risks.[193] "Physical risks" are broken down into acute risks (event-driven risks, i.e. shorter-term severe weather events) and chronic risks (risks resulting from longer-term weather patterns such as drought, sea level rise, sustained higher temperatures, etc.).[194] "Transition risks" are defined as risks that are attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate related risks.[195] Examples of "transition risks" include the possible implementation of a carbon tax, carbon disclosure mandates, and the transition to renewable energies.[196] However, the final rule does not explicitly list what may be considered a transition risk.[197]

(holding that information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision; and quoting *TSC Indus.*, 426 U.S. at 449 to further explain that an omitted fact is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.").

189. 17 C.F.R. § 229.1501 at 21712.

190. *Id.*

191. 17 C.F.R. § 229.1502(a) at 21691

192. 17 C.F.R. § 229.1500 at 21692.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Climate Risk: What are Physical & Transition Risks?* PERSEFONI (last updated Dec. 27, 2023) https://www.persefoni.com/learn/climate-risk-what-are-physical-transition-risks.

197. 17 C.F.R. § 229.1502(a).

Companies are given the option, but are not required, to disclose "climate-related opportunities".[198]

Under 1502(a) of Regulation S-K, registrants must classify climate-related risks into short-term risks (i.e. within 12 months), and long-term risks (i.e. beyond the next 12 months).[199] This temporal standard is consistent with the existing Management Discussion & Analysis ("MD&A") standard.[200]

Item 1502(b) mandates disclosure of the actual and material impacts of any climate-related risks identified in item 1502(a).[201] A non-exhaustive list of material impacts is provided and suggests that registrants may be obligated to disclose impact on: (1) business operations; (2) products and services; (3) suppliers, purchasers, or counterparties to material contracts; (4) activities to mitigate or adapt to climate-related risks; and (5) expenditure for research and development.[202]

Item 1502(c) requires discussion of whether and how the registrant considers any impacts described in response to 1502(b) as part of its strategy, financial planning, and capital allocation.[203]

Similarly, Item 1502(d) requires discussion of how the climate-related risks identified in item 1502(a) have materially impacted or are reasonably likely to materially impact the registrant's business, results of operations, or financial condition.[204] Registrants are directed to provide both quantitative and qualitative reports of the material expenditures incurred in relation to any activities to mitigate or adapt to climate-related risks.[205]

Transition plans are optional under the Climate Rules. However, Item 1502(e) requires registrants to describe such transition plans if they have adopted one.[206]

Scenario analysis is also optional under the Climate Rules. However, Item 1502(f) requires registrants to describe the methodology of its scenario analysis and report on its results.[207]

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198. *Id.*
199. *Id.*
200. Climate Rules, *supra* note 7 at 103, 104.
201. 17 C.F.R. § 229.1502(b).
202. *Id.*
203. 17 C.F.R. § 229.1502(c).
204. 17 C.F.R. § 229.1502(d).
205. *Id.*
206. 17 C.F.R. § 229.1502(e).
207. 17 C.F.R. § 229.1502(f).

Pursuant to item 1502(g), registrants must report on the use of an internal carbon price only if it is material to how it evaluates and manages a climate-related risk as identified in 1502(a).[208]

d. Item 1503: Risk Management

Item 1503 focuses on internal processes for identifying, assessing, and managing material climate-related risks.[209]

e. Item 1504: Targets and goals

Setting climate-related targets and goals is optional under the Climate Rules. However, under Item 1504, registrants that publicly establish climate-related targets and goals (such as on their websites or in press releases) must disclose such target or goal if it has materially affected or is reasonably likely to materially affect the registrant's business, result of operations, or financial condition.[210]

f. Item 1505: GHG Emissions Metrics

Under Item 1505, Registrants who qualify as large accelerated filers[211] or accelerated filers[212] must disclose its Scope 1 emissions and/or its Scope 2 emissions, if such emissions are

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208. 17 C.F.R. § 229.1502(g).
209. 17 C.F.R. § 229.1503.
210. 17 C.F.R. § 229.1504.
211. *See* 17 C.F.R. § 240.12b-2 (defining "large accelerated filer" as an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and (iv) the issuer is not eligible to use the requirements for SRCs under the SRC revenue test).
212. *See* 17 C.F.R. § 240.12b-2 (defining "accelerated filer" as an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $75 million or more, but less than $700 million, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and (iv) the issuer is not eligible to use the requirements for SRCs under the SRC revenue test).

material, for the past completed fiscal year.[213] The methodology, inputs, and significant assumptions used for emissions calculations must be provided as well.[214] Registrants are permitted to use "reasonable estimates" when making their emissions disclosure so long as such assumptions are explicitly provided and explained.[215] Smaller reporting companies are exempt from GHG emission requirements.[216]

The final Climate Rules are notably scaled back from the 2022 proposal.[217] The most significant departure from the 2022 proposal is the elimination of the Scope 3 disclosure requirements.[218]

g. Item 1506: Attestation of Scope 1 and Scope 2 emissions disclosure

Item 1506 requires all GHG emissions disclosures to be analyzed in a GHG attestation report, completed by an independent GHG emissions attestation provider.[219]

h. Item 1507: Safe Harbor for certain climate-related disclosures

The Climate Rules provide significant safe harbors for registrants who make "forward looking statements".[220]

i. Item 1508: Structured Data Requirement

Lastly, Item 1508 requires registrants to make all data disclosed in relation to the Climate Rules available in an interactive data file.[221]

j. Financial Statement Effects (Regulation S-X Article 14)

The Climate Rules add Article 14 to Regulation S-X. This new subpart will require companies to disclose in a note to

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213. 17 C.F.R. § 229.1505.
214. *Id.*
215. *Id.*
216. *Id.*
217. *SEC Adopts Scaled-Back Climate-Related Disclosure Requirements*, LINKLATERS (Mar. 7, 2024), https://www.linklaters.com/knowledge/publications/alerts-newsletters-and-guides/2024/march/07/sec-adopts-scaled-back-climate-related-disclosure-requirements.
218. *Id.*
219. 17 C.F.R. § 229.1506.
220. 17 C.F.R. § 229.1507.
221. 17 C.F.R. § 229.1508.

their audited financial statements: (1) capitalized costs, expenditures expensed, charges and losses incurred as a result of severe weather events and other natural conditions, subject to applicable one percent and *de minimis* disclosure thresholds;[222] (2) financial impacts and accounting policy related to the use of carbon offsets or renewable energy credits or certificates (if used as a material component of stated targets and/or goals); and (3) a description of whether and how the estimates and assumptions the company uses to produce the financial statements were materially impacted by risks and uncertainties associated with severe weather events and other natural conditions or any disclosed climate-related targets or transition plans.

k. Legal Challenges

ESG investing is more controversial, and politicized in the United States than in the European Union and the United Kingdom. The reason for this is the wide-spread US Corporate belief that the SEC does not have the authority to mandate disclosure of "non-material" information and that corporate boards are breaching their fiduciary duties if they prioritize "non-material" considerations over shareholder return.[223] An anti-ESG coalition composed of the Attorneys General of 19 states headed by Texas' Ken Paxton wrote a response letter on August 4th, 2022 to asset management firm BlackRock's call for ESG investing.[224] The eight-page letter asserted that "fiduciary duty is not lip service" and that factoring ESG into investment strategy does not yield the best possible return for shareholders.[225] The letter

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222. No disclosure of expenditures expensed as incurred and losses is required if the aggregate amount is less than (i) one percent of the absolute value of income or loss before income tax expense or benefit or (ii) $100,000 for the relevant fiscal year, and no disclosure of the absolute value of capitalized costs and charges is required if the aggregate amount is less than (a) one percent of the absolute value of stockholders' equity or deficit at year end or (b) $500,000 for the relevant fiscal year. Under Regulation. 17 C.F.R. § 210.14–02(b).

223. *See* discussion of Shareholder Wealth Maximization and Shareholder Primacy *infra* Section II.2.

224. *AG Paxton Demands Blackrock Account for Its Underperforming, Potentially Illegal 'ESG' State Pension Fund Investments*, TEXAS ATTORNEY GENERAL (Aug. 8, 2022), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-demands-blackrock-account-its-underperforming-potentially-illegal-esg-state-pension-fund.

225. Larry Light, *19 GOP Attorneys General Slam BlackRock Over ESG Investments,* CHIEF INV. OFF. (Aug. 9, 2022), https://www.ai-cio.com/news/19-gop-attorneys-general-slam-blackrock-over-esg-investments/.

alleges that BlackRock's deviation from neutrality concerning the fossil fuel industry may violate state and federal antitrust laws, as well as corporate law demanding fiduciary duties of loyalty and care.[226]

The Climate Rules are particularly vulnerable to legal challenge in the wake of *West Virginia v. EPA*.[227] In the 2022 case, the Supreme Court ruled that the Environmental Protection Agency ("EPA") lacked statutory authority under the Clean Air Act to set emissions caps for the purpose of generation shifting.[228] This set the precedent that under the "major questions doctrine," agencies must have explicit authorization from Congress to make rules of "vast economic and political significance."[229] Adversaries of the Climate Rules argue that the SEC's jurisdictional power is limited to the protection of investors.[230] Challengers assert that regulations requiring the disclosure of ESG information breaches corporate principles of fiduciary duty and exceed the statutory authority of the SEC.

Acting SEC Chair Allison Herrin Lee underscored that the federal securities law provides the SEC with authority to require disclosures that are "for the protection of investors" and/*or* "in the public interest."[231] Lee, instead of embracing double materiality, is arguing "that the SEC has never been limited to requiring disclosures that are deemed material to the reasonable investor."[232] This, however, is not the view of all ESG commissioners.[233]

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226. *Id.*

227. West Virginia v. Env't Prot. Agency, 142 S.Ct. 2587, 2614-16 (2022).

228. "Generation shifting" requires a shift in electricity production from certain fossil fuel power generation sources, primarily fired by coal and natural gas, to other sources that emit less carbon dioxide. *Id.*

229. *Id.* at 2605, 2610.

230. *See* Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?*, MERCATUS CTR., GEORGE MASON UNIV. 1 (2021).

231. *See generally* Securities Act of 1933, 15 U.S.C. § 77a; Securities Exchange Act of 1934,15 U.S.C. § 78a.

232. Maggie Pahl, *The Meaning of Materiality in the Context of Climate Change*, A.B.A. (Nov. 20, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/ed/the-meaning-of-materiality-in-the-context-of-climate-change/.

233. *See* Hester M. Pierce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors*, SEC (Mar. 6, 2024), https://www.sec.gov/news/statement/peirce-statement-mandatory-climate-risk-disclosures-030624; *see also* Mark T. Uyeda, *A Climate Regulation under the Commission's Seal: Dissenting Statement on The Enhancement and Standardization of Climate-Related Disclosures for Investors*, SEC (Mar. 6, 2024),

The Security Act of 1933 and the Security Exchange Act of 1934 do not define the term "in the public interest."[234] When a term contained in a statute is ambiguous, it is up to the agency to interpret it.[235] Regardless, a court may challenge an agency's interpretation under the Administrative Procedures Act ("APA") if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[236]

The SEC's final Climate Rules were met with legal challenges within 24 hours of its publication.[237] Ten Republican-led states (West Virginia, Georgia, Alabama, Alaska, Indiana, New Hampshire, Oklahoma, South Carolina, and Wyoming, and Virginia) filed a petition with the Court of Appeals in the 11th Circuit to vacate the Climate Rules, arguing that they go beyond the SEC's legal authority. During the week of March 6, 2024 to March 14, 2024, petitions were filed in several courts of appeals.[238] On March 8, petitioners Liberty Energy Inc. and Nomad Proppant Services LLC filed a motion seeking an administrative stay and a stay pending judicial review of the final rules in the Fifth Circuit, which was granted on March 15, 2024.[239] On March 19, 2024, the SEC filed a motion for Multicircuit Petitions for Review with the Judicial Panel on Multicircuit Litigation. Pursuant to 28 U.S.C. § 2112(a)(3), on March 21, 2024, the Judicial Panel on Multicircuit Petitions for Review entered an order consolidating the petitions for review

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https://www.sec.gov/news/statement/uyeda-statement-mandatory-climate-risk-disclosures-030624.

234. *Id.*; *see also* Bernard S. Sharfman, *Non-Material Mandatory Climate Change Disclosure*, OHIO STATE BUS. L. J. ONLINE (2021), https://moritzlaw.osu.edu/sites/default/files/2021-12/Non-Material%20Mandatory%20Climate%20Change%20Disclosures%20%28Author%20Final%20Clean%29.pdf.

235. Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844-845 (1984).

236. SEC v. Citigroup Glob. Mkts. Inc., 673 F.3d 158, 168 (2d Cir. 2012).

237. *Republican-led states sue US SEC over climate risk disclosure rules*, REUTERS (Mar. 6, 2024), https://www.reuters.com/sustainability/climate-energy/republican-led-states-say-they-will-sue-us-securities-regulator-over-climate-2024-03-06/.

238. Nat. Res. Def. Council, Inc. v. SEC, No. 24-707 (2d Cir. filed Mar. 12, 2024); Liberty Energy Inc. v. SEC, No. 24-60109 (5th Cir. filed Mar. 6, 2024); Louisiana v. SEC, No. 24-60109 (5th Cir. filed Mar. 7, 2024); Tex. All. of Energy Producers v. SEC, No. 24-60109 (5th Cir. filed Mar. 11, 2024); Chamber of Com. of U.S. of Am. v. SEC, No. 24-60109 (5th Cir. filed Mar. 14, 2024); Ohio Bureau of Workers' Comp. v. SEC, No. 24-3220 (6th Cir. filed Mar. 13, 2024); Iowa v. SEC, No. 24-1522 (8th Cir. filed Mar. 12, 2024); West Virginia v. SEC, No. 24-10679 (11th Cir. filed Mar. 6, 2024); Sierra Club v. SEC, No. 24-1067 (D.C. Cir. filed Mar. 13, 2024).

239. Liberty Energy Inc. v. SEC, No. 24-60109 (5th Cir. filed Mar. 6, 2024).

in the U.S. Court of Appeals for the Eight Circuit. Thereafter, on March 22, 2024, the Fifth Circuit dissolved its administrative stay.[240] On April 4, 2024, the SEC exercised its discretion to voluntarily stay the Climate Rules pending the adjudication of the Eighth Circuit petitions.[241] In doing so, the Commission stated that by voluntarily issuing the stay, they are "not departing from [the] view that the Final Rules are consistent with applicable law and within the Commission's long-standing authority to require the disclosure of information important to investors in making investment and voting decisions".[242]

On June 28, 2024, in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___ (2024), the Supreme Court put an end to *Chevron*[243] deference, the doctrine that allowed federal agencies to fill the gaps in ambiguous provisions of congressional statutes, if delegation was implied and the traditional tools of statutory interpretation failed, based on their specialized expertise. The SEC's defense of the Climate Rules is much less tenable without the ability to rely on the Chevron justification that the Commission, with 90 years of experience overseeing securities exchanges, securities brokers and dealers, investment advisors, and mutual funds, is best equipped to interpret the Securities Act and Securities Exchange Act as it relates to what requirements are necessary or appropriate necessary in the public interest or for the protection of investors.[244]

3. *Investment Regulations*

On May 25, 2022, the SEC proposed two additional rules targeting ESG funds: (1) The Enhanced Disclosures by Certain

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240. Liberty Energy Inc. v. SEC, No. 24-60109 (5th Cir. Mar. 22, 2024), ECF No. 87.

241. SEC, Order Issuing Stay In the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors, Release No. 11280, 99908 (Apr. 4, 2024).

242. *Id.*

243. *Chevron U.S.A.*, 467 U.S. 837 (1984).

244. Maggie Pahl, *What Does Loper Mean for the SEC Climate Rules?*, AMER. BAR. ASSOC., Aug. 27, 2024, https://www.americanbar.org/groups/environment_energy_resources/resources/newsletters/environmental-social-governance-sustainability/what-does-loper-mean/ (last visited Sept. 27, 2024); *See also* Michael Gold & Saul Ewing, *Did Loper Bright Kill the SEC's Climate Disclosure Rules?*, ESG INV., Aug. 30, 2024, https://www.esginvestor.net/did-loper-bright-kill-the-secs-climate-disclosure-rules/#:~:text=The%20central%20holding%20of%20Loper,acted%20within%20its%20statutory%20authority (last visited Sept. 27, 2024).

Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices[245] [hereinafter the "Proposed Enhanced Disclosure Rule"], and (2) Investment Company Names[246] [hereinafter the "Names Rule"]. These two rules are most pertinent to asset management firms, particularly those who are offering ESG investment funds.

a. Proposed Enhanced Disclosure Rule

The SEC proposed additional amendments to the Securities Act and the Exchange Act to promote greater disclosure regarding ESG investment practices.[247] The Proposed Enhanced Disclosure Rule is aimed at helping investors make more informed decisions about sustainable finance products.[248] The proposed rule would apply to investment advisers, registered investment companies, open-end funds, exchanged traded funds ("ETF"s), closed-end funds, and business development companies ("BDC"s).[249] The proposed amendments provide a categorization framework for ESG funds. The three categories are: (1) Integration fund, (2) ESG-focused fund, and (3) Impact fund.[250]

	SEC Fund Categorization
Integration fund	Fund that considers one or more ESG factors alongside other, non-ESG factors in its investment decisions, but those ESG factors are generally no more significant than other factors in the investment selection process, such that ESG factors may not be determinative in deciding to include or exclude any particular investment in the portfolio.

245. Proposed Enhanced Disclosure Rule, *supra* note 12.
246. Names Rule, *supra* note 13.
247. Proposed Enhanced Disclosure Rule, *supra* note 12.
248. *Id.*
249. *Id.*
250. *Id.*

ESG-focused fund	1. A fund that focuses on one or more ESG factors (such as, for example, carbon emissions, board or workforce diversity or industry specific issues) by using them as a significant or main consideration: a. in selecting investments or b. in its engagement strategy with the companies in which it invests. 2. A fund that tracks an ESG-focused index or that applies a screen to include or exclude investments in particular industries based on ESG factors.
	3. A fund that has a policy of voting proxies and engaging with the management of its portfolio companies to encourage ESG practices or outcomes. 4. A fund that has a name including terms indicating that the fund's investment decisions incorporate one or more ESG factors. 5. A fund whose advertisements or sales literature indicates that the fund's investment decisions incorporate one or more ESG factors by using them as a significant or main consideration in selecting investments.
Impact fund	An ESG-Focused Fund (see above) that seeks to achieve a specific ESG impact or impacts.

The category in which a fund falls determines the amount of enhanced disclosures required.[251] These enhanced disclosures will be required in fund prospectuses, annual reports, and adviser brochures.[252] Disclosure requirements include: (i) the specific ESG factors considered and how they are incorporated into investment recommendations; (ii) a description of any ESG criteria or methodology used in investment evaluation or selection; and (iii) a description of how ESG factors are considered in voting client securities.[253] If a fund considers environmental factors as part of their investment strategy,

251. *Id.*
252. *Id.*
253. *Id.*

such fund would be required to disclose detailed information regarding the GHG emissions of their portfolios. The required GHG disclosures consist of the fund's carbon footprint and weighted average carbon intensity and would require disclosure of the portfolio companies' Scope 1 and Scope 2 emissions regardless of whether the underlying company actually published this information. Scope 3 emissions would also have to be disclosed but only if the underlying company published this information.[254] Other "impact funds" would be subject to similar requirements related to disclosure of metrics related to the particular impact in question.[255] A technological error delayed the public comment period for this proposal.[256] The rule has not yet been finalized.

b. Names Rule

On May 25th, 2022, the SEC also proposed The Names Rule amendment to update rule 35d-1 under the Investment Company Act of 1940.[257] Rule 35d-1 requires SEC registered investment companies whose names suggest a focus in a particular type of investment to implement a policy of investing at least 80% of their total assets in those investments.[258] However, it has not been updated since its adoption in 2001.[259] The Names Rule was formally adopted by the SEC in September 2023.[260]

The Name Rule aims to prevent asset management firms from "greenwashing" by using inaccurate fund names while not following through on ESG commitments. Greenwashing is "the process of conveying a false impression or misleading information about how a company's products are environmentally sound. It involves making an unsubstantiated claim to deceive consumers into believing that a company's products are environmentally friendly or have a greater positive

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254. *Id.* at 253–260.
255. *Id.* at 359.
256. Press Release, SEC, SEC Reopens Comment Periods for Several Rulemaking Releases Due to Technological Error in Receiving Certain Comments (Oct. 7, 2022), https://www.sec.gov/news/press-release/2022-186.
257. Names Rule, *supra* note 13.
258. *Id.*
259. *Id.*
260. *SEC Adopts Amendments to the Names Rule Under the 1940 Act*, SIDLEY AUSTIN (Sept. 29, 2023), https://www.sidley.com/en/insights/newsupdates/2023/09/sec-adopts-amendments-to-the-names-rule-under-the-1940-act.

environmental impact than they actually do."[261] Prior to the introduction of the Names Rule, the SEC relied upon the authority in Section 10(b) of the Exchange Act and SEC Rule 10b-5 to target Greenwashing.[262] However, to prevail in such actions, the claims must be proven fraudulent and deceitful, not merely misleading.[263]

The Names Rule clarifies the aforementioned 80% requirement, updates the rule's notice requirements, and establishes recordkeeping requirements.[264] It provides very limited circumstances in which a firm may depart from its 80% commitment and lays out specific time frames for getting back into compliance.[265] The Names Rule builds off of the Proposed Enhanced Disclosure Rule by clarifying that "integration funds", which by definition do not consider ESG factors determinative in deciding whether to include or exclude any particular investment in a portfolio, may not use terminology indicating that it promotes sustainability or is incorporates ESG principles.

4. *Future Regulations*

In addition to the Climate Rules, Enhanced Disclosure Rule, and Names Rule, SEC proposals related to human capital management and board diversity are anticipated.[266] The SEC has stated that implementing additional disclosure regulations is of high priority in the future.[267] The SEC's upcoming agenda suggests that the Climate Rules, Proposed Enhanced Disclosure Rule, and Names Rule are only the beginning of US ESG disclosure rules. The Proposed Enhanced Disclosure Rule and Names Rule target ESG funds and thus do not apply broadly to companies that are not engaged in asset management.

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261. Adam Hayes, *What is Greenwashing? How it Works, Examples, and Statistics*, INVESTOPEDIA (Jan. 22, 2024), https://www.investopedia.com/terms/g/greenwashing.asp.
262. Barbara Ballan & Jason Czarnezki, *Disclosure, Greenwashing & The Future of ESG Litigation* 81 WASH. & LEE L. REV. 545 (2024).
263. *Id.*
264. Names Rule, *supra* note 13.
265. *Id.*
266. Bridget Neill et al., *Four Key SEC Priorities in 2023*, EY (Feb. 23, 2023), https://www.ey.com/en_us/public-policy/four-key-sec-priorities-in-2023.
267. *Id.*

B. *European Union*

1. *Non-Financial Reporting Directive ("NFRD")*

The EU was at the forefront of government mandated ESG disclosures with its adoption of the NFRD in 2014.[268] In an attempt to encompass a wide variety of stakeholder interests, the NFRD introduced the concept of "double materiality," which required companies to disclose not only on how sustainability issues impact financial performance, but also on how the company impacts the environment and society on a newly mandated non-financial statement.[269] Accordingly, the NFRD required companies to disclose information related to: (i) their efforts to protect the environment; (ii) how they treat their employees; (iii) how they plan to adhere to human rights; (iv) how they mitigate corruption; and (v) how they promote diversity in their work environment.[270] Though strong on climate disclosures, the NFRD provided companies with significant flexibility and discretion in reporting on social and governance factors, and did not require uniform data collection methodologies. The NFRD requires all public-interest companies with greater than 500 employees to disclose non-financial and diversity information in their annual management reports or separate filings.[271] While the NFRD does not use the terms "sustainability" or "ESG" in its title, it addresses Environmental, Social, and Governance issues explicitly in the text.

The NFRD was significant in that it was the first noteworthy effort to encourage disclosure beyond those that are not deemed to be financially material to investors. The stated aim of the NFRD is to improve accessibility of data for banks and investors and to influence financial resources towards sustainable investments.[272] However, the NFRD fell short in that its

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268. NFRD, *supra* note 8.

269. *Id.*; *Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as Regards Corporate Sustainability Reporting*, at 1, COM (2021) 189 final (Apr. 21, 2021).

270. *See* NFRD, *supra* note 8.

271. *What is the EU Non-Financial Reporting Directive?*, ASSENT (last visited Mar. 16, 2023), https://www.assent.com/resources/knowledge-article/what-is-the-eu-non-financial-reporting-directive/.

272. Michelangelo Bruno & Valentina Lagasio, *An Overview of the European Policies on ESG in the Banking Sector*, SUSTAINABILITY (Nov. 16, 2021), https://doi.org/10.3390/su132212641.

scope of required disclosure was limited and it did not provide adequate guidance for data collection and measurement.[273]

The European Commission acted to improve upon the NFRD by publishing Guidelines on Non-Financial Reporting in June 2017 [hereinafter the "EU Guidelines"].[274] The stated aim of the EU Guidelines is to "help companies disclose high quality, relevant, useful, consistent and more comparable non-financial (environmental, social and governance-related) information in a way that fosters resilient and sustainable growth and employment, and provides transparency to stakeholders."[275] Notably, the EU Guidelines mention the IIRC as an example of integrated reporting to serve as a disclosure structure.[276]

Further, in December 2019, as part of the "European Green Deal", the European Commission ("EC") committed to reviewing the NFRD.[277] In February 2020, the EC began a public consultation period on the review of the NFRD.[278] After a lengthy review process, they adopted a series of measures including a proposal for a Corporate Sustainability Reporting Directive ("CSRD") which expands the scope of NFRD to all listed companies and introduces reporting standards to be further developed by the European Financial Reporting Advisory Group ("EFRAG") (*See* Appendix 5).

2. *Corporate Sustainability Reporting Directive ("CSRD")*

In 2021, the EU adopted the CSRD, which like the NFRD, takes a "double materiality" approach to ESG disclosure.[279] EU member states have a deadline of 2024 to incorporate CSRD principles into their national laws.[280] The rules introduced by the NFRD remain in force until all companies are subject to the

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273. NFRD, *supra* note 8.
274. *Guidelines on Non-financial Reporting (Methodology for Reporting Non-financial Information)*, COM (2017) (Jul. 5, 2017).
275. *Id.*
276. *Id.*
277. *Non-Financial Reporting Directive, Briefing: Implementation Appraisal*, European Parliament (2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf.
278. *Id.*
279. Materiality discussed *supra* Section II.4 and *infra* Section V.1.b.
280. *EU Corporate Sustainability Reporting Directive Signed into Law – Implications and Near-term Compliance Steps for U.S.-based Multinationals*, Ropes & Gray (Dec. 20, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/december/eu-corporate-sustainability-reporting-directive-signed-into-law.

new rules of the CSRD.[281] It replaces and builds upon the NFRD by including additional disclosure requirements, standardizing reporting metrics, and increasing the number of EU companies subject to regulation.[282]

According to the European Commission, the CSRD is expected to apply to approximately 49,000 companies.[283] All "large companies" are subject to disclosure regulations set out in the CSRD. In this context, a "large company" is any company, whether or not it is based in the EU, with an annual turnover greater than €150M in the EU or an EU-based company that satisfies two of the following three criteria: (1) exceeds €40M in net turnover annually; (2) exceeds €20M in Assets; or (3) employs over 250 individuals.[284]

Importantly, the CSRD requires companies to follow the reporting standards and metrics established thereunder, rather than those promulgated by other organizations.[285] This amendment furthers the improvement of comparability of information between companies. Additionally, the CSRD makes it mandatory for companies to have an independent audit of the sustainability information they report at the same audit standard required of financial statements.[286]

The disclosure regulations of the CSRD are far-reaching and will affect companies outside of the EU. The CSRD applies to EU subsidiaries with non-EU parent companies and all companies that are listed on an EU trade market or otherwise have significant business with the EU. Many other international companies will be impacted by the implementation of CSRD due

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281. *Corporate Sustainability Reporting*, EUROPEAN COMMISSION (last visited Apr. 17, 2023) https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en.

282. Alexander Schmidt & Evan Farbstein, *The Corporate Sustainability Reporting Directive (CSRD), Explained*, NORMATIVE (Feb. 8, 2023), https://normative.io/insight/csrd-explained/.

283. Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM (2021) 189 final (Apr. 21, 2021).

284. *Id.*

285. *Id.*

286. Peter Wollmert & Andrew Hobbs, *How the EU's New Sustainability Directive is Becoming a Game Changer*, EY (Aug. 1, 2022), https://www.ey.com/en_gl/insights/assurance/how-the-eu-s-new-sustainability-directive-is-becoming-a-game-changer.

to reporting companies' "value chain" due diligence obligations. These companies connected through the value chain to CSRD-regulated companies will be required to complete ESG due-diligence questionnaires and will be held accountable by their EU-based connections.

Companies subject to the CSRD receive additional guidance on their disclosure reports from the European Sustainability Reporting Standards ("ESRS"). EFRAG published draft European Sustainability Reporting Standards in November 2022.[287] The European Commission adopted the standards in July 2023 for use by all companies subject to the CSRD.[288] The ESRS requires disclosure through standardized sustainability reports, as opposed to the non-financial statements utilized for disclosure under the NFRD.[289] ESRS categorizes ESG issues into the following four areas:

a. Cross-Cutting

Prior to setting forth specific metrics in subsequent ESRS's, EFRAG provides guidance on methodology and data collection to ensure that companies are utilizing standardized processes and data in formulating their reports. Similarly, companies are now required to disclose relevant information on standardized Sustainability Reports, which replace non-financial statements.[290]

b. Environment

In addition to mandating detailed descriptions of a company's transition and mitigation strategies, the CSRD mandates detailed climate disclosure metrics.[291] Companies must now disclose: (i) total amount of energy consumption by source, in mWh; (ii) Scope 1 emissions; (iii) Scope 2 emissions; (iv) Scope 3 emissions; (v) total GHG emissions in metric tons of carbon and per monetary unit; (vi) total GHG removals, with description of removal activity, from its own operations and

287. *Draft European Sustainability Reporting Standards (ESRS)*, EFRAG (2022), https://www.efrag.org/lab3 [hereinafter "ESRS"].
288. *The Commission adopts the European Sustainability Reporting Standards*, European Commission (July 31, 2023), https://finance.ec.europa.eu/news/commission-adopts-european-sustainability-reporting-standards-2023-07-31_en.
289. ESRS, *supra* note 287 at 1.
290. *Id.* at 1, 2.
291. *Id.* at E1-1 to 1-2.

value stream; (vii) GHG mitigation projects financed through carbon credits; (viii) avoided GHG emissions, with details on assumptions, data sources, and methodology utilized; and (ix) measurable targets for climate change mitigation and adaptation. Except where noted otherwise, the above disclosures must be reported in metric tons of carbon.[292]

The CSRD contains mandated detailed disclosure metrics for pollution, water preservation, and resource use. Companies must disclose measurable targets for pollution, and their actual pollution in identifiable quantities such as total volume of emitted pollutants or amount of particular pollutants identified in the accompanying appendix, as well as the potential financial effects from such pollution.[293] Similarly, companies must disclose measurable targets for water and marine resource preservation and their water management performance by total cubic meters of water consumed, and by monetary unit.[294] Relatedly, companies must disclose the nature and quantity of marine commodities used, such as gravels, deep-sea-minerals, and seafood, in tons.[295] Finally, companies are required to disclose the total weight of materials used during the reporting period, in both absolute tons and as a percentage of renewable input materials used to manufacture products and packaging, and their total amount of waste generated in tons.[296]

c. Social

The CSRD requires companies to disclose detailed information regarding policies towards their workforce. Such disclosures must include descriptions of employee grievance processes and various strategies to improve company performance related to the following workforce disclosure metrics, which also must be disclosed: (i) characteristics of employees by gender; (ii) percentage of employees covered by health and safety management system; (iii) the number and rate of workplace injuries and fatalities; (iv) percentage of workers working more than 48 hours per week; (v) percentage of employees entitled to take family-related leaves, and those who actually

292. *Id.* at E1-3 to 1-14.
293. *Id.* at E2-1 to 2-7.
294. *Id.* at E3-1 to 3-6.
295. ESRS, *supra* note 287.
296. *Id.* at E5-1 to 5-6.

took such leave; (vi) percentage of employees whose wage is below the fair wage; (vii) ratio of compensation between men and women; (viii) total number of discrimination and harassment incidents; (ix) amount and percentage of employees with disabilities; (x) percentage of employees covered by collective bargaining agreements; and (xi) the number of data breaches involving worker data.[297]

Companies are also responsible to workers in their value chain and communities affected by their business operations and must disclose their mechanisms for ensuring such workers and communities are not subject to human rights violations.[298]

d. Governance

The CSRD imposes disclosure requirements related to a company's governance, risk management, and internal controls, including detailed descriptions of their codes of conduct, and management nomination and risk management processes. Companies are also required to disclose their governance structure and composition, including disclosures related to the gender, age, inclusion in a minority or vulnerable group, and educational background of their administrative, management, and supervisory bodies, as well as their attendance rate at meetings.[299]

Companies must also make significant disclosures regarding their anti-corruption and anti-bribery safeguards, including the number of investigations and decisions related to the same.[300] Relatedly, companies must disclose the identity of their beneficial owners and the total monetary value of financial and in-kind political contributions by members of their administrative, management, and supervisory bodies.[301] Finally, given the importance of timely cash flows to business partners, companies must disclose the average time it takes to pay an invoice in number of days.[302]

The CSRD entered into force on January 5, 2023. However, as a European Directive, it must be implemented by each EU member state's national legislation to create obligations on

297. *Id.* at S1-1 to 1-26.
298. *Id.* at S2-1 to 2-6, and S3-1 to 3-6.
299. *Id.* at G1-1 to 1-10.
300. *Id.* at G2-3, G2-7.
301. ESRS, *supra* note 287 at G2-8 to 2-9.
302. *Id.* at G2-10.

the underlying companies. The EU member states have until June 16, 2024, to transpose the CSRD into their national laws.[303]

3. *Sustainable Finance Disclosure Regulation ("SFDR")*

In 2019, the EU passed the SFDR and in March 2021, its main provisions became applicable.[304] The stated aim of the SFDR is to improve transparency in the market for sustainable investment products and to prevent "greenwashing."[305] The SFDR achieves these goals through disclosure requirements on ESG metrics at both the entity and the [financial] product level.[306]

The scope of the SFDR is different from that of the NFDR. Instead of applying to companies generally, the SFDR applies to asset management firms, financial advisers, and insurance providers in the EU, whether or not they purport to offer sustainable investment products.[307]

Under the SFDR, all asset management firms must release "core disclosures" regarding the entities' sustainability risks and principal adverse impacts. Also, for those asset management firms that offer sustainable investment products, the SFDR establishes three product categorizations: Article 9, Article 8, and Article 6.[308] "Article 9" or "dark green" products have a clear sustainable investment objective.[309] "Article 8" or "light green" products promote environmental and/or social goals but do not prioritize sustainable investing as a core objective.[310] Lastly, "Article 6" products integrate ESG risk considerations in investment decision-making but do not meet the criteria of

303. Michael R. Littenberg & Clara Melly, *EU Corporate Sustainability Reporting Directive Signed into Law – Implications and Near-term Compliance Steps for U.S.-based Multinationals*, Ropes & Gray (Dec. 20, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/december/eu-corporate-sustainability-reporting-directive-signed-into-law.

304. EU Regulation 2019/2088 on Sustainability-related Disclosures in the Financial Services Sector 2019, SI 2019/2088 (UK).

305. *Id.*

306. *Id.*

307. Maia Godemer, *The Relationships Between SFDR, NFRD and EU Taxonomy*, Bloomberg (Mar. 31, 2021), https://www.bloomberg.com/professional/blog/the-relationships-between-sfdr-nfrd-and-eu-taxonomy/.

308. *EU SFDR Explained: A guide to the EU Sustainable Finance Disclosure Regulation for investors*, J.P. Morgan Asset Management, https://am.jpmorgan.com/us/en/asset-management/institutional/investment-strategies/sustainable-investing/understanding-SFDR/ (last updated Sep. 25, 2023).

309. *Id.*

310. *Id.*

Article 8 or Article 9 products.[311] Disclosures regarding risk and principal adverse impacts must also be made at the [financial] product level.[312] More detailed disclosures are required for all Article 8 and Article 9 products.

	SFDR Fund Categorization
Article 9 "Dark green"	Clear sustainable investment objective
Article 8 "Light green"	Promote environmental and/or social goals but do not prioritize sustainable investing as a core objective
Article 6	Integrate ESG risk considerations in investment decision-making but do not meet the criteria of Article 8 or Article 9 products

4. *Taxonomy Regulation*

The SFDR requires firms to disclose whether and to what extent financial products qualify as "sustainable" under the EU Taxonomy. The EU Taxonomy is an accompanying regulation to the SFDR, also part of the Green New Deal, which became effective January 2022.[313] The Taxonomy Regulation creates a uniform set of ESG-related definitions and establishes four requirements that an economic activity must meet to be referred to as "environmentally sustainable."[314] These requirements include: (1) make a substantial contribution to at least one of the six environmental objectives (climate change mitigation, climate change adaptation, sustainable use of water and marine sources, circular economy, pollution prevention, and healthy ecosystems and biodiversity); (2) do no significant harm to any of the other environmental objectives; (3) comply with minimum social safeguards; and (4) comply with the

311. *Id.*
312. EU Regulation 2019/2088 on Sustainability-related Disclosures in the Financial Services Sector 2019, SI 2019/2088 (UK).
313. EU Regulation on the Establishment of a Framework to Facilitate Sustainable Investment 2020, SI 2020/852 (UK); *see also* Serena Espeute, *SFDR and EU Taxonomy Disclosures: Four Data Challenges for Asset Managers*, CFA INST. (Feb. 27, 2023), https://blogs.cfainstitute.org/marketintegrity/2023/02/27/levelling-the-playing-field-firms-find-difficulties-reporting-sfdr-and-eu-taxonomy-disclosures/.
314. EU Regulation on the Establishment of a Framework to Facilitate Sustainable Investment 2020, SI 2020/852 (UK).

technical screening criteria.[315] This regulation is particularly relevant to asset managers who seek to offer "green" or "social" funds purporting to promote ESG goals.[316] The definitions and requirements established by the Taxonomy Regulation will serve as guiding principles for EU asset management firms making sustainability claims.

5. *Directive Banning Greenwashing*

In January 2024, the European Parliament approved a new anti-greenwashing law banning misleading product sustainability claims (hereinafter "Greenwashing Directive").[317] This directive applies to consumer products as opposed to the scope of the Taxonomy regulation, which applies to financial products. The goal of the directive is to require that companies furnish proof when they make claims regarding the environmental attributes of a product (such as "environmentally friendly", "natural", "biodegradable", "climate neutral" or "eco"). The directive is meant to work together with the Green Claims Directive ("GCD")

C. *United Kingdom*

The United Kingdom published the UK Companies Act in 2006.[318] Section 172(1) of the Act recognizes the duty of directors to consider various stakeholder interests.[319] This provision creates a directorial duty to disclose non-financial information.[320] In 2014, at the time the EU NFRD[321] was passed, the UK was still part of the EU. For that reason, UK companies were subject to NFRD disclosure requirements. However, shortly after the UK left the EU due to Brexit in 2020, the Financial Conduct

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315. Peter Walsh, *EU Taxonomy Explained: Breaking Down the 4 Criteria for Sustainability & ESG*, BENCHMARK GENSUITE, (June 11, 2021), https://benchmarkgensuite.com/ehs-blog/eu-taxonomy-explained-4-criteria-for-esg/. For more information about technical screening criteria see *Breaking Down the EU Taxonomy's Technical Screening Criteria: What you need to know*, CELSIA Feb. 24, 2023), https://www.celsia.io/blogs/breaking-down-the-eu-taxonomys-technical-screening-criteria-what-you-need-to-know.
316. Espeute*, supra* note 313.
317. Greenwashing Directive, *supra* note 10.
318. Companies Act 2006, c. 46 (UK).
319. *Id.* at § 172(1).
320. PALMITER, *supra* note 39, at 354.
321. NFRD discussed *supra* IV.2.a.

Authority ("FCA") acted to develop its own regulations related to general company ESG disclosure and more targeted regulations for funds and sustainable investment.[322]

1. *Climate-Related Financial Disclosures Requirement ("CFD")*

On January 17, 2022, the UK amended Sections 414C, 414CA, and 414CB of the 2006 Companies Act.[323] Amendments made by the Companies Regulation 2022[324] and the Limited Liability Partnership Regulation 2022[325] are collectively referred to as the Climate-Related Financial Disclosures Requirement ("CFD"). Lacking some of the quantitative teeth contained in the SEC proposal, the CFD established a standardized climate reporting regime whose scope covers more than just publicly traded companies. The CFD applies to 1,300 of the largest UK-registered companies and financial institutions. The UK's largest traded companies, banks, and insurers in addition to private companies with over 500 employees and more than £500M in turnover must disclose climate-related information in their strategic report.[326] The CFD also applies to banking institutions and insurance companies.[327]

The Department for Business, Energy & Industrial Strategy has published guidance for complying with the CFD.[328] Under the CFD, companies are to disclose the following information:

"(a) a description of the company's governance arrangements in relation to assessing and managing climate-related risks and opportunities;

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322. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2023, PS 23/16 (UK).

323. Martin Farrar, *Climate Disclosure Requirements Set to Take Effect in UK*, FIN. MGMT. MAG. (Jan. 25, 2022), https://www.fm-magazine.com/news/2022/jan/climate-disclosure-requirements-uk.html.

324. The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022, SI 2022/31 (UK), https://www.legislation.gov.uk/uksi/2022/31/made.

325. The Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022, SI 2022/46 (UK), https://www.legislation.gov.uk/uksi/2022/46/contents/made.

326. CFD, *supra* note 11.

327. *Id.*

328. *Mandatory Climate-related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and LLPS*, DEP'T FOR BUS., ENERGY & INDUS. STRATEGY (Feb. 2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf.

(b) a description of how the company identifies, assesses, and manages climate-related risks and opportunities;
(c) a description of how processes for identifying, assessing, and managing climate-related risks are integrated into the company's overall risk management process;
(d) a description of —
 (i) the principal climate-related risks and opportunities arising in connection with the company's operations, and
 (ii) the time periods by reference to which those risks and opportunities are assessed;
(e) a description of the actual and potential impacts of the principal climate-related risks and opportunities on the company's business model and strategy;
(f) an analysis of the resilience of the company's business model and strategy, taking into consideration different climate-related scenarios;
(g) a description of the targets used by the company to manage climate-related risks and to reali[z]e climate-related opportunities and of performance against those targets; and
(h) a description of the key performance indicators used to assess progress against targets used to manage climate-related risks and reali[z]e climate-related opportunities and of the calculations on which those key performance indicators are based."

Unlike the NFRD/CSRD and the SEC Climate Rules, the CFD does not require that companies calculate and disclose their GHG emissions.[329]

The CFD takes a scenario analysis approach. Companies must analyze how their business will be impacted by varying increases in global temperature.[330] Companies must disclose their analyses of how future scenarios, such as a global temperature increase of 1.5 degrees versus 3.0 degrees impacts their

329. CFD *supra* note 11.
330. Mandatory Climate-related Financial Disclosures by Publicly Quoted C Companies, Large Private Companies and LLPS, supra note 328, at 14-15.

business model. While mandating disclosure of assumptions and estimates relied upon, the government recognizes that significant divergence in methodologies, assumptions, and estimates, without providing guidance on how to remediate such divergence.[331]

Finally, the CFD requires disclosure of climate targets, including timeframe, and key performance indicators ("KPIs") related to meeting same.[332]

2. *Sustainable Disclosure Requirements & Investment Labels ("SDR")*

The UK also has plans to regulate sustainable investment. In November 2021, the FCA introduced a discussion paper (DP 21/4) on the topic of Sustainable Disclosure Requirements and Investment Labels [Hereinafter collectively the "SDR"].[333] One year later, the FCA released a consultation paper (CP22/20) on the same topic.[334] The comment period for the consultation paper ended in January 2023 and the FCA stated that they planned to publish its final rules in guidance in a policy statement by the end of June 2023.[335] However, the FCA posted an update on March 29, 2023 stating that they planned to publish the Policy Statement later, in 2023, to account for the significant response during the comment period.[336] Policy Statement 23/16 (SDR) was finally published on November 28, 2023.[337]

The SDR introduces the following: (1) a general anti-greenwashing rule; (2) sustainable investment classification and labels; (3) consumer-facing disclosures on investment products; (4) detailed disclosures focusing on pre-contractual

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331. *Id.* at 15.

332. *Id.* at 16-17.

333. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2021, DP 21/4 (UK), https://www.fca.org.uk/publication/discussion/dp21-4.pdf.

334. SDR, *supra* note 16.

335. Rita Hunter et al., *Sustainability Disclosure Requirements for the UK: Where are we now?*, HOGAN LOVELLS (Feb. 1, 2023), https://www.engage.hoganlovells.com/knowledgeservices/news/sustainability-disclosure-requirements-for-the-uk-where-are-we-now.

336. FCA Updates On Its Sustainability Disclosure Requirements (SDR) and Investment Labels Consultation, FIN. CONDUCT AUTH. (Mar. 29, 2023), https://www.fca.org.uk/news/news-stories/fca-updates-sustainability-disclosure-requirements-and-investment-labels-consultation.

337. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2023, PS 23/16 (UK).

disclosures, ongoing sustainability-related performance information, and sustainability entity reports; (5) naming and marketing rules restricting the use of certain terms (such as "green" or "sustainable"); and (6) requirements on distributors to provide sustainable investment labels and consumer-facing disclosures to retail investors.[338]

a. General Anti-Greenwashing Rule

The FCA Handbook Principles for Business (PRIN) 2.1, Principle 7,[339] and COBS (Conduct of Business Sourcebook) 4.2.1[340] already require that all communications by regulated firms (which includes asset management firms) must be clear, fair, and not misleading. The FCA added a new section to its handbook: The ESG sourcebook.[341] The ESG sourcebook further imposes a requirement for sustainability claims of financial products to be not only clear, fair, and not misleading but also "consistent with TCFD Recommendations and Recommended Disclosures".[342] This general anti-greenwashing rule establishes a cause of action to assist FCA enforcement. This rule will come into effect May 31, 2024.[343]

b. Sustainable Investment Classification and Labels

By using sustainable investment classification and labels, the FCA attempts to help consumers distinguish between investment products based on their sustainability characteristics, themes, and outcomes in addition to the different types of sustainability products offered by asset managers.[344] Under the SDR, Asset management firms offering sustainable investment products have the option to classify their product under one of

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338. *Id.*
339. FIN. CONDUCT AUTH., FCA HANDBOOK at PRIN 2.1 The Principles (2023), https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html.
340. FIN. CONDUCT AUTH., FCA HANDBOOK at COBS 4.2 Fair, Clear and Not Misleading Communications (2018), https://www.handbook.fca.org.uk/handbook/COBS/4/2.html.
341. FIN. CONDUCT AUTH., *Environmental, Social and Governance Sourcebook, in* FCA HANDBOOK (2023), https://www.handbook.fca.org.uk/handbook/ESG.pdf.
342. *Id.* at 2.
343. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2023, PS 23/16, at 12 (UK).
344. *Id.*, at 91–114.

three labels: (1) Sustainable focus; (2) Sustainable improvers; and (3) Sustainable impact.[345]

	FCA Sustainable Investment Labels
Sustainable focus	Invest in assets which a reasonable investor would consider environmentally and/or socially sustainable 70%+ of the assets must meet a credible standard of environmental and/or social sustainability or align with an explicit environmental and/or social sustainability theme Pursuit of sustainability goals through market-led channel of influencing asset prices Investor stewardship activities that pursue improvements in the sustainability performance of assets
Sustainable improvers	Invest in assets not environmentally and/or socially sustainable at the present Goal of improving sustainability profile of products assets over time (measurable) Intentional selection of portfolio assets of products best placed to improve sustainability over time Investor stewardship activities that pursue improvements in the sustainability performance of assets
Sustainable impact	Objective to obtain a measurable, positive, pre-defined environmental and/or social impact Sustainability goals pursued by directing new capital to projects and activities that offer solutions to environmental and/or social problems Investor stewardship activities that pursue improvements in the sustainability performance of assets

The FCA contemplates that not all ESG-oriented investment products will fall into one of the three aforementioned categories. For example, products that generally consider ESG

345. Hunter et al., *supra* note 335.

metrics or ESG risks but do not have a sustainability objective will not qualify for a sustainable investment label.[346] The labeling rules will come into effect July 31, 2024.[347] Use of the labels is completely optional and would require an opt-in by asset management firms. However, it is likely that it will become an industry standard in the UK once adopted by competitors.

c. Consumer Facing Disclosures on Investment Products

Consumer facing disclosure requirements will apply to asset management firms marketing investment products making claims about sustainability regardless of whether or not they use sustainable investment labels for their products.[348] The firms must make information about the sustainability-related features including a stated goal, sustainability metrics used, and the sustainable investment label used (if applicable) available to consumers.[349] This disclosure must be located somewhere accessible and prominent, such as on the asset manager's website.[350] The consumer facing disclosure requirements come into effect provisionally on December 2, 2024.[351] All consumer-facing disclosures must be reviewed and updated annually. In addition, any changes to the disclosure statements must be reviewed as well.

d. Detailed Disclosures Focusing on Pre-Contractual Disclosures, Ongoing Sustainability-Related Performance Information, and Sustainability Entity Reports

Additionally, more in-depth disclosure will be required on the product-level and entity-level.[352] These disclosures are aimed at institutional investors such as pension funds, involved shareholders, and retail investors.[353] The more detailed disclosures

346. William Yonge et al., *UK Asset Managers: FCA Proposes New Sustainability Disclosure And Labelling Requirements*, MORGAN LEWIS (Dec. 20, 2022), https://www.morganlewis.com/pubs/2022/12/uk-asset-managers-fca-proposes-new-sustainability-disclosure-and-labelling-requirements.

347. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2023, PS 23/16 (UK), at 12.

348. *Id.* at 49–54.

349. *Id.* at 50–54.

350. *Id.* at 54.

351. *Id.* at 181.

352. *Id.* at 7.

353. Yonge et al., *supra* note 346.

will provide institutional investors with better information to monitor the progress of companies ongoing sustainability performance.

These product-level details will be integrated into two existing types of documentation: (1) Fund offering memorandum or prospectus or prior information document; and (2) Sustainability product report (based on the TCFD product report).[354] Only products using a sustainable investment label will be required to disclose a full sustainability product report containing information on investment strategy, performance against key performance indicators ("KPI"), and stewardship-related efforts. The precontractual disclosures and sustainability product reports will come into effect June 30, 2024, and June 30, 2025, respectively.[355]

In addition, asset management firms must issue a sustainability report on an entity-level describing how they are managing sustainability risks and opportunities. Starting December 2, 2025, asset managers with more than £50B AUM must make this disclosure and starting December 2, 2026, asset managers with more than £5B AUM must follow suit. Asset management firms with less than £5B AUM will be exempt under this entity-level disclosure regime for the time being.[356]

e. Naming and Marketing Rules Restricting the Use of Certain Terms

The SDR also imposes restrictions on the use of certain terms when marketing sustainable investment products. Starting June 30, 2024 asset management firms will be prohibited from using the terms "Sustainable Goals ('SG')", "climate", "impact", "sustainable", "sustainability", "responsible", "green", "sustainable development goals", "Paris-aligned", or "net zero" if they do not qualify for one of the four sustainable investment labels.[357] Portfolio managers will have until December 2, 2024, to become compliant.[358]

354. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2023, PS 23/16 (UK) at 55.
355. *Id.* at 71, 195–205.
356. *Id.* at 12.
357. *Id.* at 174.
358. *Id.*

f. Requirements on Distributors to Provide Sustainable Investment Labels and Consumer-Facing Disclosures to Retail Investors

Lastly, the SDR imposes requirements on distributors to ensure relevant sustainable investment labels and consumer-facing disclosures are made available to retail investors. Distributors, including investment platforms must clearly display sustainable investment labels on their platforms and provide full access to consumer-facing disclosures.[359] Distributors will also be held liable for using inaccurate labels or terms. All distributors must come into compliance with this rule by June 30, 2024.[360]

IV.
Interplay Between Different Regulations

For the purposes of analysis, this paper will divide governmental disclosure regulations into two categories: (1) general company disclosure regulations and (2) fund and investment specific disclosure regulations. In the US, the Climate Rules are a general company disclosure regulation. Its EU counterparts are the NFRD and the CFRD. The UK general disclosure rule is the CFD. Conversely, in the US, the Enhanced Disclosure Rule and the Names Rule are fund and investment specific disclosure regulations. The EU SFDR and Taxonomy regulation similarly limit their scope to funds and investment, as does the UK SDR.

	US	EU	UK
General company disclosure regulations	Climate Rules	NFRD, CFRD, Greenwashing Directive	CFD
Fund and investment specific regulations	Enhanced Disclosure Rule (proposed), Names Rule	SFDR, Taxonomy Regulation	SDR

359. *Id.* at 62.
360. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2023, PS 23/16 (UK) at 71, 195–205.

A. *General Company Disclosure Regulations*

1. *Scope*

The Climate Rules apply to SEC registrants, which includes approximately 12,000 public companies, 4,600 mutual funds, 11,300 investment advisers, 600 transfer agencies, and 5,500 broker dealers for a total of 30,000 registrants.[361] Approximately 1,150 of the public companies registered with the SEC are non-US companies.[362] The Climate Rules do not apply to privately traded companies and most Small to Medium-Sized Enterprises ("SMEs").

When first enacted in 2014, The NFRD was limited in its scope, covering only public-interest companies with greater than 500 employees.[363] However, the CSRD broadened the EU's reach by extending its application to listed SMEs and "large" companies: EU-based companies that satisfy two of the following three criteria: (1) exceeds €40M in net turnover annually; (2) exceeds €20M in Assets; or (3) employs over 250 individuals.[364] The CSRD also applies to non-EU companies with a turnover of above €150M.[365] An estimated 50,000 companies will be subject to the regulation.[366]

In the UK, all UK-based companies with more than 500 employees and are either publicly traded or have a gross revenue of £500M and over fall under the CFD disclosure requirements.[367] Banking institutions and insurance companies are also subject to the CFD.[368]

The differing jurisdictional scope of the US Climate Rules, the EU NFRD and CSRD, and the UK CFD will result in some Multinational Asset Management Firms being subject to two

361. *US Securities and Exchange Commission (SEC)*, DELOITTE, https://www.iasplus.com/en/resources/regional/sec (last visited Apr. 29, 2023).
362. *Id.*
363. NFRD, *supra* note 8.
364. *Id.*
365. *Id.*
366. *Id.*
367. The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022, SI 2022/31, § 3(h), Explanatory Note (UK); The Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022, SI 2022/46, §§ 2(1A), 4(2).
368. The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022, SI 2022/31, Explanatory Note (UK); The Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022, SI 2022/46, § 2(2).

or three of the regulatory regimes discussed *supra* Section III. Large Multinational Asset Management Firms including BlackRock, State Street, and Vanguard will likely find themselves exposed to governmental regulation across three key jurisdictions. For example, any company based in the UK or otherwise with a UK-based subsidiary that is registered with the SEC and has a turnover of above €150M must bide by all three disclosure regulations. Comparing each regulation's scope would take the form of a complicated triple Venn diagram.

2. *Materiality*

"Materiality" as it relates to ESG disclosure regulations is discussed *supra* Section I.D. The TCFD[369] recommends incorporating the concept of "double materiality" into ESG disclosure rules. The EU NFRD and CSRD and the UK CFD and SDR have embraced the concept of "double materiality," which refers to "how corporate information can be important both for its implications about a firm's financial value, and about a firm's impact on the world at large, particularly with regard to climate change and other environmental impacts."[370] The SEC Climate Rules reject the concept of "double materiality" and is precise in its use of the word "material." The Climate Rules make clear that the SEC's "objective is limited to advancing the [SEC]'s mission to protect investors, maintain fair, orderly, and efficient markets, and promote capital formation by providing disclosure to investors of information important to their investment and voting decisions".[371]

This political battle over materiality is likely to continue in the US in the next few years. However, the increasingly globalized nature of financial markets means that in the future, ESG disclosure will become a prerequisite for participating fully in the international economy. It will become more difficult for one to argue that ESG disclosure requirements are not "material" if failing to make such disclosures will prohibit a company from reaching consumers in the EU and UK. Therefore, it would be a violation of fiduciary duty for companies to refuse to make

369. TCFD discussed *supra* Section II.D.

370. Henry Engler, *"Double Materiality": New legal concept likely to play in debate over SEC's climate plan*, THOMSON REUTERS (Apr. 12, 2022), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/sec-double-materiality-climate/.

371. The Climate Rules, *supra* note 7.

ESG considerations and accompanying disclosures, effectively pre-empting full participation in regulated jurisdictions. While the conceptual debate regarding materiality and fiduciary duties is likely to continue in the US, the EU CSRD and UK CRD's far-reaching disclosure requirements will subject many US companies including MAMFs to their "double materiality" disclosure regime. US companies with EU or UK presence will be required to adhere to more stringent disclosure and marketing standards than those required domestically. Companies that don't directly market to the EU or the UK may even find themselves filling out due-diligence questionnaires as a result of being connected through the value chain to CSRD-regulated companies.

3. *Opting Out*

It is unclear whether asset management firms will be able to "opt out" of certain disclosure regulations if they demonstrate they have been compliant with an alternative jurisdiction's regulation.[372] The US Climate Rules invited public comment on whether it should consider routes of alternative compliance.[373] However, the draft rule does not currently contain a provision recognizing other jurisdictions' disclosure requirements in lieu of its own.[374] The ESRS does not allow for other reporting standards to be used in lieu of those set by the CSRD.[375] Meanwhile, the FCA CFD does not contain or allude to an opting-out provision.[376] Without the option to "opt-out" with proof of alternative regulatory compliance, MAMFs will find themselves filling out somewhat repetitive ESG disclosure forms pursuant to each government regulation.

B. *Fund and Investment Specific Disclosure Regulations*

The US, EU, and UK have all introduced their own classification or labeling system for ESG funds. The US proposed

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372. The authors of this paper are skeptical that the SEC will be able to work out a substituted compliance agreement with the EU. *See* Lamar Johnson, *Gensler: EU regulations would take precedence without SEC climate rule*, ESGDive, (Dec. 8, 2023), https://www.esgdive.com/news/gensler-eu-regulations-would-apply-without-sec-climate-disclosure-rule-csrd/702029/.

373. *Id.*

374. The Climate Rules, *supra* note 7 at 21668.

375. Haddon et al., *supra* note 82.

376. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2023, PS 23/16 (UK).

Enhanced Disclosure Rule introduces the following sustainable fund categories: "Integration fund," "ESG-focused fund," and "Impact fund" while the Names Rule requires asset management firms offering sustainable funds to consistently commit 80% of their assets towards the pre-defined goal.[377] The EU SFDR similarly creates a fund classification system. All funds in the EU will be classified as "Article 9," "Article 8," or "Article 6."[378] The Taxonomy Regulation supplements the SFDR and provides additional guidance on categorizing sustainable investment products.[379] The Federal Conduct Authority of the UK has established its own Sustainable Investment Labeling System. UK funds will fall into one of the three following categories: "Sustainable focus," "Sustainable improvers," or "Sustainable impact."[380] Other provisions of the UK SDR restrict the use of certain terms ("Sustainable Goals ('SG')," "climate," "impact," "sustainable," "sustainability," "responsible," "green," "sustainable development goals (SDG)," "Paris-aligned," or "net zero") if funds do not qualify for one of the three sustainable investment labels.[381] It is notable that the UK seems to establish a more lenient threshold than the US by requiring 'Sustainable Focus' funds to commit 70% as opposed to 80% of their assets towards the stated goal.

MAMFS often market in all three sovereignties and as a result, must design their funds according to the restrictions and classifications imposed by the US Proposed Enhanced Disclosure Rule and Names Rule, EU SFDR and Taxonomy Regulation, and UK SDR. However, the classification systems are not transferable. For example, terms recognized under the US and EU regulations such as "integration fund" or "Article 8" will not qualify for a sustainable investment label in the UK unless they are paired with an explicit sustainability objective.[382]

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377. *See* Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (June 17, 2022) (to be codified 17 C.F.R. 200, 230, 232, 239, 249, 274, 279); *see also* Investment Company Names, 88 Fed. Reg. 70436 (Oct. 11, 2023) (to be codified at 17 C.F.R. Pts. 230, 232, 239, 270 and 274).

378. *See* EU Regulation 2019/2088 on Sustainability-related Disclosures in the Financial Services Sector 2019, SI 2019/2088 (UK).

379. *See* EU Regulation on the Establishment of a Framework to Facilitate Sustainable Investment 2020, SI 2020/852 (UK).

380. Hunter et al., *supra* note 335.

381. Discussed *supra* Section III.C.2.e.

382. Yonge et al., *supra* note 346.

The FCA SDR Consultation paper recognizes the incompatibility of these three systems. The FCA Consultation paper concedes that "many UK firms are already subject to the EU SFDR [in respect of their EU business] and have already invested in systems and processes to classify products according to the SFDR provisions."[383] For that reason, it provides flowcharts demonstrating how the SFDR classifications and the SEC labels relate to the FCA sustainable financial product labels (*See* Appendices 6 and 7).[384]

C. *Further Standardization*

There is a general trend of consolidation and harmonization amongst voluntary disclosure frameworks and the government regulations.[385] Chief Executive Officer of the Global Reporting Initiative, Tim Mohin challenges the perception that the various disclosure and reporting mechanisms conflict with each other. He explains that:

> "[T]here is an increasing amount of harmonization in this space, whether it be GRI, or the UN Global Compact, SASB or the IIRC. Not only do we have longstanding partnerships with those organizations and others, but we are in fact all just after the same thing, which is sustainable development."[386]

383. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2023, PS 23/16 (UK) at 35.

384. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2022, CP 22/20 (UK) at 83.

385. *See, e.g.*, Robert G. Eccles, *A Comparative Analysis of Three Proposal for Climate-Related Proposals*, FORBES (June 11, 2022), https://www.forbes.com/sites/bobeccles/2022/06/11/a-comparative-analysis-of-three-proposals-for-climate-related-disclosures/?sh=1154314e4e89; *see also*, Myriam Azzouz & Antonin Brisson-Félix, *Navigating the Sea of Proposed Climate-Related Disclosures: A Deep Dive Into the SEC's, ISSB's and EFRAG's Proposals*, NATIXIS CORP. INVESTING AND BANKING (June 3, 2022), https://gsh.cib.natixis.com/our-center-of-expertise/articles/navigating-the-sea-of-proposed-climate-related-disclosures-a-deep-dive-into-the-sec-s-issb-s-and-efrag-s-proposals; *see also*, Kimberley R. Anderson et al., *The SEC's Anticipated Climate-Related Disclosures Proposal and its Implications for the Energy and Natural resources Industries, The Foundation for Natural Resources and Energy law Annual Institute*, 68 NAT. RES. & ENERGY L. INST. 2, (July 21-23, 2022); *see also*, The SustainAbility Institute by ERM & Persefoni, *The Evolution of Sustainability Disclosure: Comparing the 2022 SEC, ESRS, and ISSB Proposals,* https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/2022/comparing-the-sec-efra-and-issb.pdf.

386. Robert G. Eccles, *supra* note 92.

The US Climate Rules, the EU NFRD and CFRD, and the UK CFD each incorporate certain elements of the GHG Protocol Corporate Standard[387], The TCFD framework[388] the ISSB recommendations[389] into their ESG disclosure frameworks to varying degrees.[390] The adoption of well-established voluntary disclosure frameworks into government regulations reduces the regulatory burden on Multinational Asset Management Firms.

V.
Commonalities & Recommendations

Recent commentary has attempted to compare mandatory regimes against each other.[391] Mandatory climate-related disclosure regimes, which built on the progress of voluntary climates disclosures like the TCFD, are likely to be effective in producing more accurate and comparable climate-related disclosures than the existing voluntary frameworks.[392] While the CSRD (EU) is clearly at the forefront of attempting to improve the disclosure of social, and governance factors, the SEC (US) and CFD (UK) are lacking in those areas.[393]

Though not explicit, many of the ESG metrics included in the mandatory disclosure regimes discussed herein remedy certain of the voluntary disclosure frameworks' deficiencies discussed above.[394] Commonalities among these mandatory disclosure regimes that could be used to improve the voluntary disclosures framework include: (i) Standardized reporting forms; (ii) publication in a centralized repository; (iii) clearly identifiable disclosure; (iv) standardized units of measurement; (v) unambiguous application to certain companies; (vi) common definitions; (vii) methodology guidance and transparency; (viii) third-party attestation; and (ix) targets transparency. As more fully explained below, companies and ratings agencies

387. *See* discussion of GHG Protocol *supra* Section II.B.
388. *See* discussion of TCFD *supra* Section II.D.
389. *See* discussion of ISSB *supra* Section II.E.
390. *See* Osborne Clarke, *US Proposals for TCFD-aligned Disclosure Rules Mark a Big Step Towards Global Adoption*, Lexology (Apr. 8, 2022), https://www.lexology.com/library/detail.aspx?g=8ce2790d-77ca-486c-9e94-cc7460b7580a.
391. Eccles, *supra* note 385.
392. *See, e.g.*, Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 Tex. L. Rev. 273, 305-06 (2022); *see also* Chen, *supra* note 95 at 203-07.
393. *See* Azzouz & Brisson-Félix, *supra* note 385, Part 3.
394. *See supra* Sections III and I.

should adopt these commonalities to improve the voluntary ESG disclosures framework. Such improvements could produce a more transparent, standardized, and uniform voluntary disclosure regime that investors and other stakeholders will consider accurate and reliable.

A. *Standardized Reporting Forms*

Whether it be the CSRD's Sustainability Reports,[395] the SEC's "Climate-Related Disclosures" section in applicable filings such as the annual Form 10-K,[396] or the CFD's Non-Financial and Sustainability Information Statements,[397] each of the mandatory disclosure regimes require all ESG disclosures be published on an easily identifiable, standard form. However, this standardization can go a step further. ESG goals and Multinational Asset Management Firms alike would benefit from an international private-public partnership aimed at creating a baseline ESG disclosure form to be ratified by individual countries. The GHG Protocol Corporate Standard, the TCFD Framework and the ISSB universal standards, would be a good starting point.

Contentious non-material disclosure requirements may be included in a country-specific addendum. The use of a baseline disclosure form with the option for ambitious jurisdictions to supplement disclosures will promote standardization and prevent unnecessary clerical overlap while acknowledging the politicization of ESG disclosure as it pertains to non-material information in countries such as the United States.

Similarly, a singular universal sustainable fund classification system would reduce the regulatory burden of MAMFs and would provide greater clarity to investors. After designing the baseline universal ESG disclosure form, the public-private partnership could then turn its efforts to creating a singular ESG fund classification system inspired by requirements set out in the US Proposed Enhanced Disclosure Rule and Names Rule, the EU SFDR, and the UK SDR.

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395. ESRS, *supra* note 287, at 1 & 2.

396. The Climate Rules, *supra* note 7.

397. The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022, SI 2022/31; The Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022, SI 2022/46.

B. *Publication in a Central Repository*

In addition to the disclosure form itself, an effective voluntary disclosure framework must include a central repository where such disclosures can be easily located by consumers and investors. The mandatory regimes require that such ESG disclosures be publicly filed.[398] Accordingly, stakeholders should be able to locate these documents, quickly, and easily, in a mandatory regime. The current norm of posting voluntary disclosures on an individual company, or third-party ratings agency website has resulted in uneven access to information and a general lack of transparency.[399] Improving the user experience of accessing ESG disclosure documents is an area where private actors could provide real improvement on both the current voluntary framework, and the government run databases that maintain disclosure forms in mandatory regimes.

C. *Methodology Guidance and Transparency*

Prior to any discussion of specific metrics, the CSRD provides guidance on methodology and data collection to ensure that companies are utilizing standardized processes formulating their disclosures.[400] Instead of mandating a specific methodology, the SEC compels companies to disclose a description of their methodology.[401] The CFD is even weaker and acknowledges that significant divergence in methodologies will be utilized without providing guidance on how to remediate such divergence.[402] The voluntary ratings agencies generally use their own methodologies for collecting and reporting ESG metrics.[403] An effective voluntary disclosures framework should model itself on the CSRD guidance on methodology to ensure that companies are utilizing uniform methodologies and playing by the same rules before the game even begins. To the extent companies diverge from the recommended methodology, they should disclose such divergence.

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398. *See supra* Section III.
399. *See supra* note 78.
400. *See* ESRS, *supra* note 287, at 1 & 2 (mandating methodology disclosure for price of carbon calculation); *see also* The Climate Rules, *supra* note 7.
401. *See* The Climate Rules, *supra* note 7 at 21916.
402. *See* DEP'T OF BUS., ENERGY & INDUS. STRATEGY, *supra* note 328 at 15.
403. *See Who are the ESG Rating Agencies?, Sustainable Perspective For The Mainstream Investor*, SUSTAINABLE INSIGHT CAPITAL MANAGEMENT 5 (Feb. 2016), https://www.sicm.com/docs/who-rates.pdf.

D. *Clearly Identifiable Disclosures*

At their core, the mandatory disclosure regimes discussed herein provide a baseline of ESG metrics that must be disclosed.[404] There is no optionality or flexibility on whether certain metrics must or must not be disclosed. Each of the CSRD, SEC, and CFD unambiguously mandate disclosure of specific metrics.[405] In contrast, there is lack of metrics standardization among voluntary disclosures.[406] Simply put, companies are not necessarily disclosing the same things, and reporting certain metrics or withholding others, can be determined entirely by the company itself.[407] An effective voluntary disclosure framework must make clear what metrics are to be disclosed and cannot leave that option up to each individual company or ratings agency.

As noted above, materiality, which is the standard at the center of SEC disclosure requirements, is a fact specific inquiry as to whether the disclosure is of the type that a reasonable investor would consider significant in making an investment decision that cannot be distilled into a bright-line test.[408] As discussed *supra* Section II.4, materiality is a difficult standard for determining what ESG factors must be disclosed.[409] Courts in the United States have been inconsistent in their reasoning when determining issues of materiality and a lack of consensus on what must be disclosed will likely lead to additional litigation.[410]

E. *Standardized Units of Measurement*

One of the most common critiques of voluntary disclosure framework, is the inability to compare companies against each other.[411] Part of that difficulty stems from a lack of standardization in data.[412] Of course, not all ESG metrics can be quantified,

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404. *See supra* Section III.
405. *See id.*
406. *See, e.g.*, GAO-20-530, *supra* note 77.
407. *See* IOSCO, *supra* note 84 at 23–24.
408. *See supra* Sections III.A.2.a, I.D.
409. *See* Lee, *supra* note 170.
410. *See*, *supra* note 144, § 12.69 (discussing "soft information" generally); *see also* Ballan & Czarnezki, *supra* note 262.
411. *See, e.g.*, Jaffari and Pike, *supra* note 51, at 159–162 (comparing the divergent data considered by four ratings agencies for measuring "workplace diversity").
412. GAO-20-530, *supra* note 77.

but to the extent that certain metrics can be, there must be a consensus on units of measurement companies use. The mandatory disclosure regimes discussed herein were wise to build upon the climate-related frameworks to further standardize metric and units of measurement.[413] The CSRD makes explicit that all environmental disclosures be measured in metric tons of carbon unless otherwise stated.[414] Where a unit of measurement other than metric tons of carbon is to be used, the CSRD makes that clear by unambiguously stating that units of measurement such as mWh[415] or cubic meters[416] be utilized. Although the SEC does mandate that metric tons of carbon be the standard measurement for GHG emissions, it does not explicitly mandate units of measurement for most other disclosures. However, it does require that companies clearly identify what unit of measurement is used.[417] The CFD, unfortunately, does not mandate that companies quantify, or otherwise disclose, the amount of their GHG emissions.[418]

The CSRD is revolutionary in its attempt to quantify certain social and governance measures. For example, the CSRD mandates the number or percentage of employees who fall within a particular metric,[419] demographics of their management,[420] and the number of investigations related to anti-bribery.[421] In providing clear direction on what needs to be disclosed and how that metric is to be measured, the CSRD will make it easier for investors and customers to compare companies on consistent metrics. An effective voluntary disclosure framework must follow the CSRD's lead and clearly define what units of measurement are to be used in each of the environmental, social, and governance factors, that can be measured. Currently, only voluntary climate-related disclosures are reported in standardized units of measurements pursuant to the TCFD recommendations and ISSB Standards.[422]

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413. *See supra* Section III.
414. ESRS, *supra* note 287, §§ E1.3–1.14.
415. *See id.* §§ E1.3–1.5.
416. *Id.* §§ E3.1–3.6.
417. The Climate Rules, *supra* note 7.
418. *See supra* Section III.C.
419. ESRS, *supra* note 287, §§ S1.1–1.26.
420. *Id.* §§ G1.1–1.10.
421. *Id.*
422. *See supra* Section II.

F. *Unambiguous Application to Certain Companies*

Approximately 90% of public companies in the S&P 500 produce voluntary ESG disclosures, though such reporting is less prevalent among smaller public companies.[423] By definition, a voluntary framework will not have eligibility requirements, but it could have transparency regarding expectations of which companies should be participating in the framework. The CSRD clearly establishes thresholds of application upon all publicly traded companies, any non-European company with a subsidiary or branch in the EU who generates over €150 million in the EU, and any company who meets two of the following criteria: (i) more than 250 employees; (ii) €40 million in revenue; and (iii) balance sheet above €20 million.[424] Similarly, the CFD clearly applies to companies with more than 500 employees, which either are publicly traded or have a gross revenue of more than £500 million,[425] and banking institutions and insurance companies.[426] While the SEC only applies to publicly traded companies, it does unambiguously impose additional requirements on companies with at least $75 million in equity shares available to the public.[427] Clearly defining the pool of eligible participants would instill a voluntary reporting framework with stakeholder confidence and should burnish the reputation of companies that voluntarily submit to the ESG disclosures framework. Conversely, such eligibility transparency could provide reputational harm to otherwise eligible companies who refuse to voluntarily publish ESG disclosures.

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423. *Flash Report: 65% of the Russell 1000 Index Published Sustainability Reports in 2019*, GOVERNANCE & ACCOUNTABILITY INST. (Oct. 26, 2020), https://www.ga-institute.com/research-reports/flash-reports/2020-russell-1000-flash-report.html (reporting that 39% of the 500 smaller companies produced sustainability reports).

424. Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM (2021) 189 final (Apr. 21, 2021).

425. The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022, SI 2022/31; The Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022, SI 2022/46.

426. The Companies Regulations 2022, SI 2022/31; The Limited Liability Partnerships Regulations 2022, SI 2022/46.

427. *See* Climate Rules, *supra* note 7.

G. *Common Definitions*

One of the most important developments in ESG disclosures was the EU's establishment of a common classification system for sustainable information pursuant to the Taxonomy Regulation.[428] The Taxonomy Regulation provides common definitions on a wide range of ESG related issues, including what economic activity is considered environmentally sustainable,[429] and what is meant by contributing substantially to climate change mitigation.[430] The SEC also establishes uniform definitions for its reporting regime.[431] As noted above, definitions in the voluntary framework can vary between companies and ratings agency.[432] An improved voluntary disclosure framework must agree on a common set of definitions, which will improve the comparability, reliability, and consistency of sustainability related information for consumers and investors alike.

H. *Third Party Attestation*

Mandatory Sustainability Reports submitted pursuant to the CSRD must be independently audited at the same audit standard required of financial statements.[433] The SEC requires that Scope 1 and 2 GHG emissions reports submitted by companies with at least $75 million in equity shares available to the public obtain third-party attestation reports.[434] Voluntary sustainability reports are unaudited, and generally not subject to third party attestation beyond such verification purported to be done by the ratings agencies who are generally involved throughout the data collection and calculation processes.[435] To instill trust in the process, voluntary ESG disclosures should require a certain level of third-party attestation, similar to that contained in the ISSB Standards.[436] Though it need not

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428. Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088, 2020 O.J. (L 198) 14, 16, 25.
429. *Id.* at 26.
430. *Id.* at 27–28.
431. *See supra* Section III.
432. *See supra* Section II.
433. Wollmert & Hobbs, *supra* note 286.
434. *See* Climate Rules, *supra* note 7.
435. *See* Timothy M. Doyle, *Ratings that Don't Rate: The Subjective World of ESG Ratings Agencies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 7, 2018).
436. IFRS S2, *supra* note 130 at 16–18.

necessarily rise to the level of a full audit, companies should be particularly proactive on this point so that the government does not impose strict requirements, potentially subject to liability for false statements,[437] where no transparent and reliable third-party attestation is in place.

I. *Target Transparency*

Each of the mandated disclosure regimes contains specific rules as it relates to targets and projections.[438] The CSRD mandates disclosure of measurable climate mitigation,[439] pollution,[440] and water and marine resources, preservation targets.[441] Similarly, the SEC mandates disclosure of climate goals or targets,[442] and disclosure of any metrics and targets relied upon in a company's mitigation strategies.[443] Even the CFD requires disclosure of climate targets, including timeframe, and key performance indicators related to meeting same.[444] Fortunately, the ISSB Standards explicitly require disclosure of a company's climate targets and how they compare with those created in the latest international agreement on climate change, and whether those targets have been validated by a third party.[445] The ISSB Standards also requires disclosure of a company's use of carbon credits and offsets[446] similar to the CSRD[447] and SEC[448] requirements. Confidence in the reliability of climate targets is in companies' best interests and they should ensure that the ISSB Standards do not get weakened prior to adoption. Additionally, an effective voluntary ESG disclosures framework should aim to adopt similar targets transparency disclosures for social, and governance factors based on the ISSB Standards and mandatory disclosures regimes.

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437. *See* The Climate Rules, *supra* note 7 at 21720 (subjecting a company to liability for false statements related to inaccurate or incomplete Scope 1 or Scope 2 disclosures).
438. *See supra* Section III.
439. ESRS, *supra* note 287, §§ E1.3–1.14.
440. *Id.* at §§ E2.1–2.2.
441. *Id.* at §§ E3.1–3.6.
442. *See* The Climate Rules, *supra* note 7 at 21723.
443. *See id.* at 21674.
444. Dep't for Bus., Energy & Indus. Strategy, *supra* note 328, at 16–17.
445. IFRS S2, *supra* note 130 at 16–18.
446. *Id.*
447. ESRS, *supra* note 287, §§ E1.13–1.14.
448. *See* The Climate Rules, *supra* note 7.

Conclusion

ESG disclosure requirements and ESG fund classification systems are a relatively new advancement. In the past few years, the United States, European Union, and United Kingdom have developed their own regulatory mechanisms alongside a growing voluntary ESG disclosure system offered by private organizations. Presently, governmental ESG disclosure regulation regimes are underdeveloped and overlapping.

MAMFs are faced with the challenge of navigating three, if not more, distinct regulations at the same time. The lack of harmonization of governmental regulations significantly increases the regulatory burden on asset management firms. If the regulations are implemented without additional consolidation efforts, firms may be forced to do triple the work to follow mandatory disclosure regulations and offer ESG investment opportunities.

For those reasons, MAMFs, ESG goals, and investors alike would benefit from a unified general ESG disclosure regulation and ESG fund classification system. A public-private partnership could tackle this complex ESG disclosure ecosystem by creating a universal baseline disclosure form with the option for country-specific addendums. In addition, the partnership could consolidate and simplify the fund classification systems to bridge the gap between investors and the information they need to make informed sustainable investment decisions. All disclosure regimes would also benefit from publication in a central repository, providing guidance on methodology, more clearly identifying mandatory disclosures, imposing standardized units of measurement, better clarifying which companies are subject to which disclosure requirements, standardizing relevant definitions, incorporating third party attestation, and requesting transparency of ESG targets. Considering the momentum in the ESG disclosures space, the time for unification may be upon us.

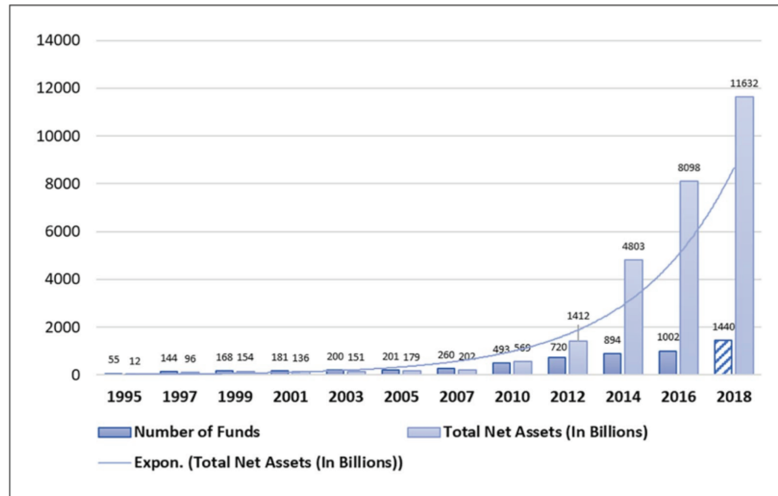
Appendices

APPENDIX 1. Investment funds incorporating ESG data, 1995 to 2018, U.S. SIF Foundation.

Source. Robert G. Eccles et al., The Social Origins of ESG: An Analysis of Innovest and KLD, Harvard Bus. Sch. Working Paper, No. 12-035 (2011).

Data from U.S. SIF Foundation (2016, p. 14); updated from U.S. SIF Foundation (2019).

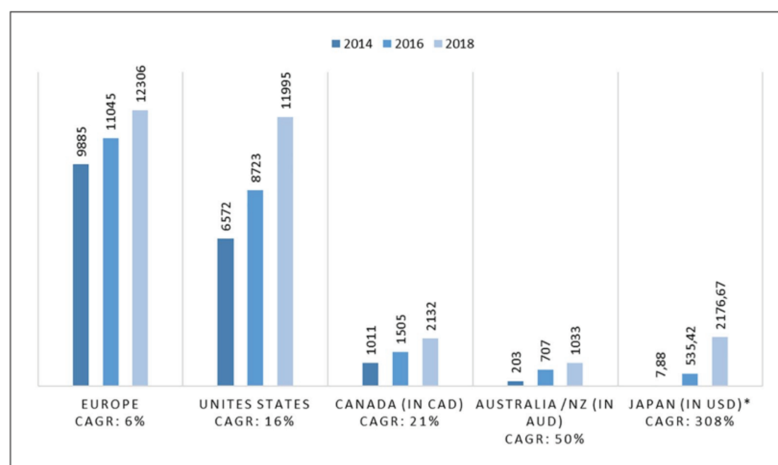
Note. Number of funds in 2018 were estimated based on trends in total net assets. ESG funds include mutual funds, variable annuity funds, closed-end funds, exchange-traded funds, alternative investment funds, and other pooled products but exclude separate accounts.



APPENDIX 2. Growth of sustainable investing assets by region, 2014 to 2018, Global Sustainable Investing Alliance.

Source. Robert G. Eccles, Ioannis Ioannou, and George Serafeim, The Social Origins of ESG: An Analysis of Innovest and KLD, Harvard Business School Working Paper, No. 12-035 (2011). Data from Global Sustainable Investing Alliance (2018, p. 8).

Note. Conversion of Yen to USD on daily rate from August 19, 2019: 1/0.0094.



APPENDIX 3. Alphabet Soup: Relevant Abbreviations

AIFMD	[United Kingdom] Alternative Investment Fund Managers Directive
AM	Asset Manager
APA	[United States] Administrative Procedure Act
AUM	Assets Under Management
BDC	Business Development Company
CAA	[United States] Clean Air Act
CDP	Carbon Disclosure Project
CDSB	Climate Disclosure Standards Board
CEO	Chief Executive Officer
COBS	[UK] Conduct of Business Sourcebook
CSRD	Corporate Sustainability Reporting Directive
CWA	[United States] Clean Water Act

EBA	European Banking Authorities
EC	European Commission
EFRAG	European Financial Reporting Group
EIOPIA	European Insurance Occupational Supervisory Pension Authority
EIRIS	Ethical Investment Research Services Ltd
EPA	[United States] Environmental Protection Agency
ESA	European Supervisory Authorities
ESG	Environmental, Social, and Governance
ESMA	European Security and Markets Authority
ESRS	European Sustainability Reporting Standards
ETFs	Exchange-Traded Fund
EU	European Union
FCA	[United Kingdom] Financial Conduct Authority
FSB	Financial Stability Board
FY	Fiscal Year
G20	Group of 20
GCD	[European Union] Green Claims Directive
GHG	Greenhouse gas
GRI	Global Reporting Initiative
IAC	[Security Exchange Commission] Investor Advisory Committee
ICFR	Internal Control over Finance Reporting
IFRS	International Financial Reporting Standards
IIRC	Integrated International Reporting Council
IOSCO	International Organization of Securities Commission
ISSB	International Sustainability Standards Board
KPI	Key Performance Indicator
MD&A	Management's Discussion and Analysis of Financial Condition and Results of Operations
NEPA	[United States] National Environmental Protection Act
NFRD	Non-Financial Reporting Directive
NGO	Non-Governmental Organization
PEG	Private Environmental Governance

PRI	Principles for Responsible Investment
RCRA	Resource Conservation and Recovery Act
RTS	Regulatory Technical Standards
SASB	Sustainability Accounting Standards Board
SBTi	Science Based Targets Initiative
SEC	[United States] Security and Exchange Commission
SDR	Sustainable Disclosure Requirements
SFDR	Sustainable Finance Disclosure Regulation
SG	Sustainable Goals
SMEs	Small- and Medium-Sized Enterprises
SRC	Smaller Reporting Companies
SRI	Socially Responsible Investing
SWDA	[United States] Safe Water Drinking Act
SWM	Shareholder Wealth Maximization
TCFD	Task Force on Climate Related Financial Disclosure
TSCA	[United States] Toxic Substances and Control Act
UK	United Kingdom
UN	United Nations
UNEP-FI	United Nations Environmental Protection Finance Initiative
US	United States
VRF	Value Reporting Foundation
WBCSD	World Business Council for Sustainable Development
WRI	World Resource Institute

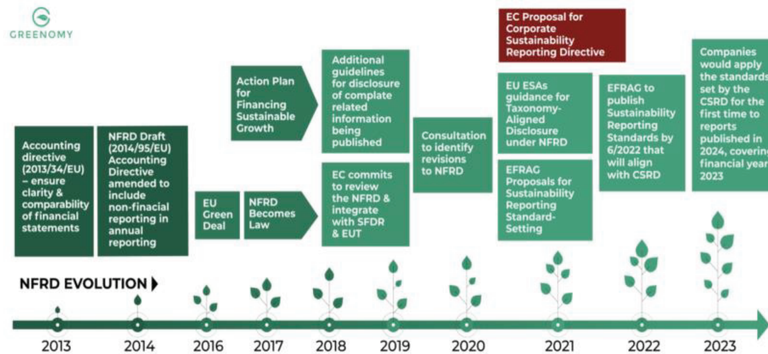
APPENDIX 4. The 11 TCFD Recommendations Translated into Plain English

Source. Graham Caswell, The TCFD Recommendations Translated into Plain English, LinkedIn (July 7, 2019) https://www.linkedin.com/pulse/tfcd-recommendations-translated-plain-english-graham-caswell/.

Governance	Strategy	Risk Management	Metrics and Targets
Disclose the organization's governance around climate-related risks and opportunities.	Disclose the actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning where such information is material.	Disclose how the organization identifies, assesses, and manages climate-related risks.	Disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material.
Recommended Disclosures	**Recommended Disclosures**	**Recommended Disclosures**	**Recommended Disclosures**
a) Describe the board's oversight of climate-related risks and opportunities.	a) Describe the climate-related risks and opportunities the organization has identified over the short, medium, and long term.	a) Describe the organization's processes for identifying and assessing climate-related risks.	a) Disclose the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process.
b) Describe management's role in assessing and managing climate-related risks and opportunities.	b) Describe the impact of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning.	b) Describe the organization's processes for managing climate-related risks.	b) Disclose Scope 1, Scope 2, and, if appropriate, Scope 3 greenhouse gas (GHG) emissions, and the related risks.
	c) Describe the resilience of the organization's strategy, taking into consideration different	c) Describe how processes for identifying, assessing, and managing climate-related risks	c) Describe the targets used by the organization to manage climate-related risks and

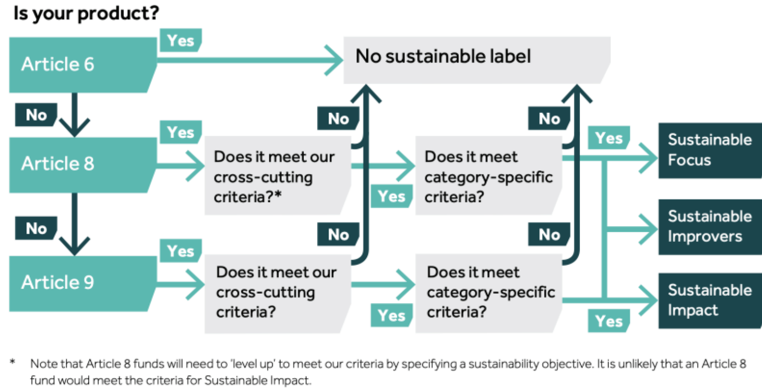
APPENDIX 5. NFRD Evolution

Source. Denis Noonan, The Evolution of NFRD into CSRD, Greenomy (last visited Apr. 22, 2023) https://greenomy.io/blog/evolution-nfrd-csrd.



APPENDIX 6. FCA Mapping to SFDR Requirements

Source. Fin. Conduct Auth., Sustainability Disclosure Requirements (SDR) and Investment Labels, 2022, CP 22/20 (UK) at 83.



APPENDIX 7. FCA Mapping to SEC Fund Categories

Source. Id.