How Existing Securities Law Authorizes the SEC to Mandate and Regulate Sustainability Reporting

Kenya Rothstein*

ABSTRACT

In recent years, sustainability reporting has become an increasingly popular way for publicly traded companies to communicate their sustainability performance to investors. In the United States, companies produce sustainability reports voluntarily, as there is not yet a government mandate for and regulation of sustainability reporting. Nevertheless, industry professionals, investors, registered companies, and other stakeholders have begun to carve out the practice of sustainability reporting. Industry professionals are working together to create sustainability accounting and reporting standards. Investors are taking action to show that they find the information provided in sustainability reports necessary to their investment making process. Registered companies have been attempting to provide sustainability reports in some form or another to investors.

Voluntary sustainability reporting has reached its full potential; yet, it still falls short in producing accurate and reliable information to investors and other stakeholders. This is due to the facts that voluntary sustainability reporting is unregulated, not uniform, lacks sufficient third-party assurances that the information is accurate, and lacks enforceability. The next step for sustainability reporting is the mandate and regulation of it, which I argue in this paper should be conducted by the Securities and Exchange Commission (SEC). To support this argument, this paper uses securities law as a backdrop to show how SEC mandate of sustainability reporting fits into the existing legal structure used to regulate reporting by publicly traded companies.

* Kenya Rothstein is a candidate for the degree of Juris Doctor at the University of Miami School of Law (Class of 2021). She is graduating with a concentration in Business Compliance and Sustainability with an area of focus in Environmental Law. Kenya is a distinguished public interest fellow in Miami Law's Public Interest Program, in which she served as a Law Clerk with the Department of Justice in Washington, D.C.; the Environmental Protection Agency in Atlanta, GA; the U.S Attorney's Office for the Southern District of Florida in Miami, FL; and the Securities and Exchange Commission (SEC) in Miami, FL. She completed her undergraduate studies at the University of California, Berkeley, where she double majored in Environmental Studies and Legal Studies. Kenya may be reached at kenya.rothstein@gmail.com.

Intro

Today we face a global climate emergency. This is evidenced by the countless extreme weather events occurring more frequently every year. From heatwaves[1] to droughts[2] to wildfires[3] to floods[4] to storms,[5] communities all over the world are experiencing the detrimental effects of Climate Change.[6] The catastrophic weather that we have seen across the globe is a devastating repercussion of Climate Change.[7]

The most significant driver of Climate Change is greenhouse gas[8] emissions from human activities.[9] Carbon dioxide is a major greenhouse gas emitted through human activities. The total carbon emissions from all human activities likely capped off at approximately 43.1 billion tons in 2019 alone.[10] In 2020, due to the COVID-19 pandemic, carbon emissions went down—but have begun to pick back up again.[11] The main human activity that emits carbon dioxide is the combustion of fossil fuels (coal, natural gas, and oil) for energy and transportation.[12] Carbon major corporations—which are the producers of oil, natural gas, coal, and cement—are responsible for

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[1] GlobalChange.org, USGCRP Indicators Catalog, https://www.globalchange.gov/browse/indicators/catalog [hereinafter, USGCRP Indicators Catalog] (reporting under the heat waves indicator that heat waves occur more often than they used to in major cities across the U.S.— with an average of two (2) heat waves per year in the 1960s to more than six (6) per year from 2010-2020).

[2] Center for Climate and Energy solutions, *Drought and Climate Change* (April 20, 2021), https://www.c2es.org/content/drought-and-climate-change/ (reporting under the drought and Climate Change indica that Climate Change increases the odds of worsening drought worldwide in the decades to come, affecting agriculture production, transportation via waters, increases in wildfires, and energy supplies).

[3] *Id*.

[4] USGCRP Indicators Catalog (reporting under the heavy precipitation indicator that heavy precipitation is more intense and frequent across the U.S, specifically in the Northeast and Midwest, increasing the risks of floods and in turn effects on lands and ecosystems).

[5] USGCRP Indicators Catalog (reporting under the sea level rise indicator how sea level rise affects local infrastructure and economies in U.S. coastal communities due to tidal flooding and the effects of increasing storm surges during extreme weather events).

[6] Christine Klein, Federico Cheever, Bret Birdsong, Alexandra Klass, & Eric Biber, *Natural Resources Law A Place-Based Book of Problems and Cases* 741-42 (2018) (summarizing that extreme weather events have links to Climate Change and are becoming more catastrophic, including prolonged periods of heat, heavy downpours, floods, and droughts); *see also* GlobalChange.org, *Costly weather and climate disasters have increased*, USGCRP Indicators Catalog, https://www.globalchange.gov/browse/indicator-details/4049 (concluding that the increase in vulnerability to drought, lengthening wildfire seasons, and potential for extremely heavy rainfall and inland flooding events are most acutely related to Climate Change).

[7] *Id*.

[8] EPA, *Climate Change Indicators: Greenhouse Gases*, (https://www.epa.gov/climate-indicators/greenhouse-gases#ref1 [hereinafter, EPA Climate Change Indicators: Greenhouse Gases] (identifying greenhouse gases as carbon dioxide, methane, nitrous oxide, and fluorinated gases).

[9] EPA Climate Change Indicators: Greenhouse Gases (citing IPCC (Intergovernmental Panel on Climate Change), *Climate change 2013: The physical science basis. Working Group I contribution to the IPCC Fifth Assessment Report*, Cambridge University Press (2013) www.ipcc.ch/report/ar5/wg1).

[10] Chelsea Harvey, *Greenhouse gas emissions to set new record this year, but rate of growth shrinks* (Dec 4, 2019), https://www.sciencemag.org/news/2019/12/greenhouse-gas-emissions-year-set-new-record-rate-growth-shrinks.

[11] Jeff Tollefson, *COVID curbed carbon emission sin 2020—but not by much* (January 15, 2021), https://www.nature.com/articles/d41586-021-00090-3.

[12] CDP Carbon Major Report 2017, *The Carbon Majors* Database (2017), https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1499691240 (reporting that 100 energy producers account of 71% of global industrial GHG emissions).

over 30% of global industrial greenhouse gas emissions.[13] While carbon major corporations carry a large responsibility for Climate Change, every corporation has an impact on Climate Change.

Climate Change affects corporations too.[14] Increases in severity of weather and climate can impact corporations' productivity.[15] Physical and market transitions associated with Climate Change also have impacts on corporations' bottom line.[16]

Corporations produce basically everything that we use in our daily lives. We are inextricably tied to a world that requires corporations to mass produce, to coordinate same day deliveries, and to be reliable for society's everyday needs. It is vital that we live in a world where the United Nations definition of sustainability is true, that we "[meet] the needs of the present without compromising the ability of future generations to meet their own needs."[17]

So, how can corporations exist profitably and in the long-term, provide for society, and mitigate their impact on Climate Change all at the same time? In this paper, I argue that the answer to this question, in part, is through mandated and regulated sustainability reporting by the Securities and Exchange Commission.

Sustainability reporting has two distinct but related objectives—one inward directed and the other outward. The purpose of sustainability reporting, inwardly, is to help corporations manage change more efficiently[18] (i.e., economic changes as it relates to a company's sustainable developments[19]). In addition, sustainability reporting helps corporations measure, understand, and communicate their financial and ESG performance.[20] A company's ESG performance includes environmental, social and governance factors, which are used by investors (and other stakeholders) to evaluate a company's sustainability performance in connection with its financial performance.[21] Environmental factors include data on a company's waste management practices, energy efficiency, and contribution to Climate Change through greenhouse gas emissions.[22] Social factors include human rights disclosures, supply chain labor standards, exposure to illegal child labor, and

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[13]Lisa Benjamin, *The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?* (October 24, 2016), https://www.cambridge.org/core/journals/transnational-environmental-law/article/responsibilities-of-carbon-major-companies-are-they-and-is-the-law-doing-enough/A4835364B014F57F61F0E5196485412C.

[14] Tyson Dyck, Henry Ren, *Esg and Climate Change Torys LLP*, 3/23/2021 EAPSCOVID 3 (2021) (reviewing S&P Global Market Intelligence data revealing that 80% of the world's largest companies report exposure to physical or market transition risks connected to Climate Change).

[15] *Id*.

[16] *Id*.

[17]United Nations, *Sustainability* (1987), https://www.un.org/en/academic-impact/sustainability#:~:text=In%201987%2C%20the%20United%20Nations,development%20needs%2C%20but%20with%20the.

[18] Carmela Gulluscio, et. al., *Climate Change Accounting and Reporting: A Systematic Literature* Review, 12 Sustainability 20 (July 2020) (summarizing that Climate Change adaptation is necessary for the following: developing business strategies and managing risk; understanding Climate Change impacts on infrastructure and supply chains; protecting reputational; addressing legal concerns; and complying with regulations).

[19] Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 Fordham Urb. Law J. 538, 585 (2009) (explaining that sustainable development "requires attention to the competing values of economic development, environmental protection and equity (social development)").

[20] TQM AND SUSTAINABILITY REPORTING, 2004 WL 3158382 (discussing sustainability reporting as a basic management strategy).

[21] Robeco, *What is ESG?*, Sustainable Investing Glossary, https://www.robeco.com/en/key-strengths/sustainable-investing/glossary/esg-definition.html.

[22] *Id*.

compliance with workplace health and safety regulations.[23] Governance means the corporate governance system that is used to reconcile interests between stakeholders and how it is used as a tool to support a company's long-term strategy.[24]

The purpose of sustainability reporting, outwardly, is for corporations to share with shareholders and investors its ESG performance data and goals.[25] Sustainability reporting also serves as a way for corporations to provide sustainable disclosures, including its climate data and risks, and how it plans to address such variables to investors and shareholders. To summarize, the information provided in a sustainability report may be referred to as ESG performance, sustainable development information, sustainable disclosures, climate disclosures, and environmental risks, to name a few—I will use these terms throughout this paper.

Investors think sustainability reporting is important to their investment decisions.[26] In this paper, I discuss how investors have been pushing for accurate and reliable sustainability reporting as evidenced by their petitioning the SEC, bringing shareholder litigation against issuing companies regarding climate disclosures, and raising of shareholder proposals regarding ESG performance. These efforts reveal the importance of sustainability reporting to investors.

In response to investor interest in sustainability reporting, companies have been finding ways to present this information to investors and shareholders. [27] In a recent study by the Harvard Business Review, 70 senior executives at 43 global institutional investing firms—including CalSTRS, one of the most influential firms when it comes to corporate change because of its mere size—found that ESG was at the forefront of the executive's minds.[28] Most companies produce voluntary sustainability reports—78 percent of the S&P 500 issued a sustainability report, most with environmental metrics.[29]

However, I assert that voluntary sustainability reporting is not reliable. Voluntary reporting does not produce an accurate snapshot of a company's sustainability performance. Because there

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[23] *Id*.
[24] *Id*.
[25] Nancy S. Cleveland, David M. Lynn, Stephen A. Pike, *Sustainability Reporting: The Lawyer's Response*, Bus. L. Today, January 2015, at 1, 2 (prefacing that sustainability reporting serves the needs and interests of a wide and growing variety of stakeholders, including investors); *see also* TQM AND SUSTAINABILITY REPORTING, 2004 WL 3158382 (defining "sustainability reporting" as reporting that provides more than financial numbers and focuses on quality of operational issues, for example environmental performance).
[26] Ariel C. Pinchot and Giulia Christianson, *What investors actually want from sustainability date* (April 17, 2019), https://www.greenbiz.com/article/what-investors-actually-want-sustainability-data (summarizing a survey where the authors concluded that more investors are pursuing strategies that consider relevant environmental, social and governance (ESG) factors).
[27] Governance and Accounting Institute, *G&A Institute's 2020 Research Report Shows 65% of Russell 1000® Published Sustainability Reports in 2019, Up From 60% in 2018* (October 26, 2020), https://www.globenewswire.com/en/news-release/2020/10/26/2114424/0/en/G-A-Institute-s-2020-Research-Report-Shows-65-of-Russell-1000-Published-Sustainability-Reports-in-2019-Up-From-60-in-2018.html (reporting that in 2019 reporting activities, the Governance and Accounting Institute (G&A) determined that 90% of companies in the S&P 500 were publishing a sustainability report).
[28] Robert G. Eccles and Svetlana Klimenko, *The Investor Revolution* (May-June 2019), https://hbr.org/2019/05/the-investor-revolution (explaining that executives from top investment firms are thinking about ESG performance in their decision making process, including executives from BlackRock, Vanguard, State Street, and asset owners from CalPERS, and CALSTRS, as well as government pension funds in Japan, Sweden); *see also* Thomson Reuters Tax and Accounting, *Sustainability Reporting Gains Momentum*, 5 WGL-ACCTALERT 1 (explaining that auditors see a growing practice area in helping clients properly connect environmental performance to financial results).
[29] John Lukomnik, *State of Integrated and Sustainability Reporting 2018*, Investor Responsibility Research Institute (Dec. 3, 2018), https://corpgov.law.harvard.edu/2018/12/03/state-of-integrated-and-sustainability-reporting-2018/.

is no uniformity in reporting, it is difficult to compare reports of different companies. There is limited third party assurance that the sustainability reports are accurate. In the instances where there is third party assurance, it is rarely helpful to the investor due to the lack of standards to begin with. Voluntary sustainability reporting also lacks enforceability, which is an essential aspect of reliable reporting. The shortcomings of voluntary sustainability reporting evidence the need for it being mandated and regulated.

SEC mandate and regulation of sustainability reporting fits into the existing legal structure of securities law. First, the decision to provide investors and shareholders with information has already been made.[30] Securities law was developed to protect investors by providing them with accurate and reliable information about publicly traded companies. The information provided in a sustainability report provides investors with a fuller picture of a company, which they need to make sound investments. Second, the SEC has the authority under securities law to mandate and enforce financial accounting and reporting standards created by industry professionals, as seen in its ratification of FASB. Therefore, the SEC has the authority to ratify and enforce sustainability accounting and reporting standards already created by industry professionals. Third, securities law regulates "material" disclosures[31] through informational regulation.[32] The definition of materiality is based on what the reasonable investor determines to be material.[33] Investors are requesting the material information that is provided in a sustainability report. Material sustainable information include risks associated with the transition to a lower carbon economy, litigation, technology, market changes, reputational risk from bad publicity, and impacts of extreme weather on their supply chains.[34] This evidences that investors find this information material.

This paper is structured as follows. Part I describes the importance of investor and shareholder access to accurate and reliable material information so they can make sound investments decisions. Thereby, illustrating that by the SEC mandating and regulating sustainability reporting, it will protect investors because the risks and factors that go into a sustainability report are "material;" and therefore, are already in fact required. This part of the paper considers the current situation of voluntary reporting and identifies its limitations. Based on securities laws and the limitations of voluntary sustainability reporting, I conclude that SEC mandate and regulation of sustainability reporting is the way to go. Part II uses the fact that shareholders are raising litigation and proposals regarding sustainable disclosures as evidence that investors find this information material. I use the Exxon and PG&E shareholder litigations to provide accounts of how shareholders are demanding accurate and reliable climate disclosures. I go through several shareholder proposals to evidence that the information shareholders are requesting via their proposals is the type of information provided in a sustainability report. I argue

[30] Sarah E. Light, *The Law of the Corporation As Environmental Law*, 71 Stan. L. Rev. 137, 165 (2019) (explaining that the purpose of U.S. securities laws is to provide information to investors concerning securities offered for sale to the public and to protect investors from manipulation of stock prices).

[31] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) (defining an omitted fact as being material if there is a substantial likelihood that a reasonable shareholder or investor would consider it important in deciding how to vote; this was the first major Supreme Court case to define materiality); *See also infra* notes 65-72 and accompanying text discussing materiality.

[32] Sarah E. Light, *The Law of the Corporation As Environmental Law*, 71 Stan. L. Rev. 137, 165 (2019) (explaining that securities law provides information to investors and regulates market integrity largely through informational regulation).

[33] *See supra* note 31 and accompanying text.

[34] Lisa Benjamin, *The Road To Paris Runs Through Delaware: Climate Litigation And Directors' Duties* Utah Law Rev. (forthcoming) (2019).

that the next step is for the SEC to mandate, regulate, and enforce sustainability reporting. Part III goes into the public policy benefits of mandating and regulating sustainability reporting. That it provides incentives for companies to engage in better environmental practices and can have a potentially enormous effect in mitigating Climate Change.

I. Importance of Investor and Shareholder Access to Reliable and Accurate Information About Publicly Traded Companies

In this part of the paper, I assert that by the SEC mandating sustainability reporting, it will protect investors. Sustainability reporting provides investors with information that securities law deems necessary. SEC mandate and regulation of sustainability reporting will provide safeguards necessary to ensure the accuracy, reliability, and overall effectiveness of this type of reporting. Mandated sustainability reporting prevails where voluntary sustainability reporting fails. Voluntary sustainability reporting does not provide investors with accurate or reliable information that is sufficient to use for making investment decisions. The SECs limited guidance on sustainable disclosures has not been enough to overcome the hurdles investors face with voluntary sustainability reporting. The next step is for the SEC to mandate and regulate sustainability reporting.

A. Securities Law was Developed to Protect Investors

This section starts off by laying out the history of securities law. I use this history as a road map to show how sustainability reporting can be mandated by the SEC under existing securities law. First, the SEC has the authority to designate accounting standard setters and to ratify their standards—which I argue the SEC should do for sustainability accounting and reporting standards. Second, SEC oversight of independent auditing of financial statements is an important element on ensuring disclosures are accurate and true; similarly, the SEC should regulate an auditing scheme for sustainability reporting. Third, accountability of auditors and executives is an essential factor that incentivizes accurate and reliable reporting, which sustainability reporting lacks and needs. Fourth, sustainable disclosures are material disclosures; and material disclosures are already required under securities law to be reported on. These four elements lay the foundation for how the SEC can mandate and regulate sustainability reporting under the securities law regime.

i. A Brief History of Securities Law

Securities law was created to protect investors.[35] One of Congress' firsts steps toward protecting investors is by way of the Securities Act of 1933 ("the Securities Act").[36] This act was

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[35] SEC, *The Role of the SEC,* https://www.investor.gov/introduction-investing/investing-basics/role-sec (explaining on the SEC website that the purposes of the Securities Act and the Exchange Act can be reduced to two (2) common-sense notions: companies offering securities for sale to the public must tell the truth about their business, the securities they are selling, and the risks involved in investing in those securities; and those who sell and trade securities – brokers, dealers, and exchanges – must treat investors fairly and honestly).
[36] 15 U.S.C. §§ 77a-77mm.

enacted to protect the investing public and maintain honest businesses.[37] The purpose of this act is to ensure that investors are informed of the facts concerning the sale of securities as well as protected against fraud and misrepresentation.[38] Then, Congress enacted the Securities and Exchange Act of 1934 ("The Exchange Act"),[39] which aimed to further protect investors—against manipulation of stock prices.[40] It was under The Exchange Act that the Securities and Exchange Commission was created, the federal agency whose mission is to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[41]

To protect investors, Congress promulgated disclosure requirements for publicly traded companies. The Securities Act prescribed regulation S-K[42] in an effort to "streamline the preparation of disclosure documents."[43] Regulation S-K is the "central repository for corporate disclosure to investors," which ensures investors can make informed voting and investment decisions.[44] A key component of regulation S-K is to "assure uniform information for investors and other information users."[45]

Under both the Securities Act and the Exchange Act, Congress delegated the establishment of uniform financial accounting and reporting standards to the SEC, granting it authority to develop standards for publicly traded companies.[46] However, the SEC turned to accounting professionals to develop accounting principles and standards.[47] In 1973, in Accounting Series Release No. 150,[48] the Commission stated "standards and practices promulgated by the [Financial Accounting Standards Board (FASB)] in its Statements and Interpretations will be considered by the Commission as having substantial authoritative support, and those contrary to such FASB

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[37] Darla M. Fera, *¶113 Securities Act Of 1933 And Securities Exchange Act Of 1934,* 2018 WL 7983062 (2020) (summarizing how the Securities Act requires the registration of all public offerings of securities and how it creates express private rights of action for damages resulting from misstatements in required documents).

[38] 8 Ill. Prac., Business Organizations *The Securities Act of 1933* § 15:2.

[39] 15 U.S. Code § 78a.

[40] Darla M. Fera, *¶113 Securities Act Of 1933 And Securities Exchange Act Of 1934,* 2018 WL 7983062 (2020) (explaining how the Exchange Act regulates market participants, including large public issuers, institutional investment managers, underwriters, broker-dealers, exchanges, transfer agents, and securities clearing agencies in part to protect against stock price manipulation).

[41] SEC, *The Role of the SEC*, https://www.investor.gov/introduction-investing/investing-basics/role-sec (listing the quote as the mission of the SEC on its website); *see also* Robyn Bishop, *Investing in the Future: Why the Sec Should Require A Uniform Climate Change Disclosure Framework to Protect Investors and Mitigate U.S. Financial Instability*, 48 Envtl. L. 491, 494 (2018).

[42] 17 C.F.R. § 229.

[43] Commissioner Kara M. Stein, *Statement at Open Meeting on a Concept Release on the Business and Financial Disclosure Required by Regulation S-K* (April 13, 2016), https://www.sec.gov/news/statement/stein-statement-1-041316.html#_ftn2 (citing Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules, Release No. 33-5893 (Dec. 23, 1977) [42 FR 65554 (Dec. 30, 1977)] ("1977 Regulation S-K Adopting Release").

[44] *Id*.

[45] *Id*.

[46] Andreas M. Fleckner, *Fasb and Iasb: Dependence Despite Independence*, 3 Va. L. & Bus. Rev. 275, 284 (2008) (citing Securities Act § 19(a) (codified at 15 U.S.C. § 77s(a)); Securities Exchange Act § 13(b) (codified at 15 U.S.C. § 78m(b)); Securities Exchange Act § 3(b) (codified at 15 U.S.C. § 78c(b)).

[47] Andreas M. Fleckner, *Fasb and Iasb: Dependence Despite Independence*, 3 Va. L. & Bus. Rev. 275, 284 (2008); J. Lynn Taylor, *Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter* (April 25, 2003), https://www.sec.gov/rules/policy/33-8221.htm.

[48] George A. Fitzsimmons, *Statement of Policy on the Establishment & Improvement of Accounting Principles & Standards*, Release No. AS-150 (Dec. 20, 1973).

promulgations will be considered to have no such support."[49] FASB has since been recognized by the SEC as the designated accounting standard setter for public companies.[50] It develops and issues financial accounting standards through a transparent and inclusive process intended to promote financial reporting that provides useful information to investors and others stakeholders.[51] The SEC, then, enforces these accounting and auditing standards.[52]

In 2002, federal law makers under the Bush administration enacted the Sarbanes Oxley Act (SOX).[53] This legislature was in response to corporate scandals defrauding investors (e.g. Enron and Worldcom).[54] The act was an attempt to restores investor confidence in financial markets and deter companies from defrauding investors—and investor fear of this happening—by providing further assurance that the information investors are receiving is accurate.[55] One way to restore investor confidence is through section 404(a) of the SOX, which requires companies reporting under the Exchange Act to include in one of their mandated reports an analysis from management on the effectiveness of the company's internal accounting and financial controls—to ensure that the report is true and not misleading.[56]

The SOX adds an additional layer of protection by strengthening the independence of accounting firms that audit public companies.[57] Title I of the SOX creates a Public Company Accounting Oversight Board (PCAOB) that is overseen by the SEC.[58] PCAOB is the principal U.S. regulator that oversees the audits of public companies and SEC-registered brokers and dealers.[59] Section 404(b) of the SOX requires public auditors to attest to the company's management and internal controls effectiveness.[60] Auditors provide an additional layer of assuredness to investors that the information being disclosed is accurate and true.

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[49] George A. Fitzsimmons, *Statement of Policy on the Establishment & Improvement of Accounting Principles & Standards*, Release No. AS-150 (Dec. 20, 1973); *see also* Andreas M. Fleckner, *Fasb and Iasb: Dependence Despite Independence*, 3 Va. L. & Bus. Rev. 275, 285 (2008).
[50] Financial Accounting Standards Board, *About the FASB* (July 2020), https://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176154526495.
[51] *Id*.
[52] *Id.* (explaining that FASB's rules are enforced by one single agency, the Securities and Exchange Commission).
[53] 2 Legal Malpractice, *The Sarbanes-Oxley Act of 2002—Introduction* § 13:160 (2021) (explaining that Congress enacted the Sarbanes-Oxley Act in response to the high profile, accounting-related frauds involving major corporations in America, which were discovered between 1999-2002).
[54] Cristina Michelle DeCelestino, *Krispy Kreme, Sarbanes-Oxley, and Corporate Greed*, 15 U. Miami Bus. L. Rev. 225 (2007).
[55] *Id*.
[56] 24A Securities Pub. & Priv. Offerings, *Section 404 Compliance under Sarbanes Oxley Act of 2002* § 7:63 (2020).
[57] Jeffrey W. Stempel, *The Sarbanes - Oxley Act Lawyer Professional Responsibility, and A Heightened Role for Business Lawyers*, Nev. Law. 8, 9 (2003) (outlining the numerous sections of the SOX that regulate the independent auditing aspect of the Act); Executive Legal Summary 376, EXECLSUM 376.
[58] Jeffrey W. Stempel, *The Sarbanes - Oxley Act Lawyer Professional Responsibility, and A Heightened Role for Business Lawyers*, Nev. Law. 8, 9 (2003) (citing sections 101 and 107 of the SOX).
[59] Jay Clayton, *Statement on the Vital Role of Audit Quality and Regulatory Access to Audit and Other Information Internationally—Discussion of Current Information Access Challenges with Respect to U.S.-listed Companies with Significant Operations in China* December 7, 2018), https://www.sec.gov/news/public-statement/statement-vital-role-audit-quality-and-regulatory-access-audit-and-other#:~:text=The%20SEC%20oversees%20the%20PCAOB,SEC%2Dregistered%20brokers%20and%20dealers.
[60] 24A Securities Pub. & Priv. Offerings, *Section 404 Compliance under Sarbanes Oxley Act of 2002* § 7:63 (2020).

CEO and CFOs are held liable under the SOX for misinformation provided in financial reports that they have certified.[61] A few sections of the SOX regarding penalties for misinformation include sections 807 and 906. Under Section 807 of the SOX, companies and individuals who defraud shareholders are now subject to criminal penalties.[62] Additionally, CEOs will be held responsible for the content of their financial reports and can face potential fines of up to $5 million and imprisonment of 20 years for willfully false certification of financial reports under Section 906.[63] Requiring attestation from auditors and executives of companies, holds them accountable for providing misinformation in the required reports under securities laws. This accountability function is important in the effectiveness of reports containing accurate and reliable information because it increases the responsibility of management for public companies' financial and corporate disclosures.[64]

ii. Materiality

Materiality is a term of art that has been developed under securities law. The Supreme Court has held that a fact is material if there is a "substantial likelihood" that a reasonable investor would view it as "significantly alter[ing] the 'total mix"' of available information.[65] Whether leading to a positive or negative impact on a company, material information can include, demands, commitments, events, and uncertainties.[66] More specifically, material information may also include contracts the company has entered into, legal proceedings, risks the company is facing, executives compensation, and historical information.[67]

There are several types of reports registered companies have to issue to ensure investors have access to the company's material information. The main reports include a 10Q, 10-K, and 8-K. A 10Q is a report that is submitted quarterly about a company's financial performance.[68] A 10-K Annual Report contains an annual snapshot of a company and requires the company to disclose material information and risks to investors.[69] The Management Discussion and Analysis (MD&A) is part of the 10-Q or 10-K annual report; it requires the executives to analyze the company's financial condition and operations of the registrant.[70] The MD&A includes a discussion of compliance, risks, future plans, goals and projects.[71] An 8-K calls for "rapid and current

[61] Aulana Peters, *Sarbanes-Oxley Act of 2002, Congress' Response to Corporate Scandals: Will the New Rules Guarantee "Good" Governance and Avoid Future Scandals,* 28 Nova L. Rev. 283, 286 (2004).
[62] Jeffrey W. Stempel, *The Sarbanes - Oxley Act Lawyer Professional Responsibility, and A Heightened Role for Business Lawyers*, Nev. Law. 8, 11 (2003).
[63] *Id.*
[64] Executive Legal Summary 376, EXECLSUM 376.
[65] Kurt S. Schulzke & Gerlinde Berger-Walliser, *Toward A Unified Theory of Materiality in Securities Law*, 56 Colum. J. Transnat'l L. 6, 9 (2017) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)).
[66] George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. Rev. 602, 617 (2017).
[67] *Id*.
[68] Thomson Reuters/Tax and Accounting, *1.313: Form 10-Q: Financial Information*, 2003 WL 21375951.
[69] Robyn Bishop, *Investing in the Future: Why the Sec Should Require A Uniform Climate Change Disclosure Framework to Protect Investors and Mitigate U.S. Financial Instability*, 48 Envtl. L. 491, 494 (2018).
[70] 1 Publicly Traded Corporations Handbook, *MD&A—Item 303 of Regulation S-K* § 6:20 (2020).
[71] 1 Publicly Traded Corporations Handbook, *MD&A—Item 303 of Regulation S-K* § 6:20 (2020) (explaining that the MD&A focuses on material events and uncertainties management knows that would affect but not necessarily be indicative of the future financial condition, including descriptions and amounts of (A) matters that would have an impact on future operations and have not had an impact in the past, and (B) matters that have had an impact on reported

disclosure" of material information by reporting companies.[72] This means that 8-K reports can be produced at any time whenever a material change happens that investors and shareholders should be made aware of. Overall, securities law makes sure that investors have access to accurate and reliable reports that contain the material information necessary to make sound investments.

iii. Sustainability Reporting Fits Within Existing Securities Law

I assert that by mandating sustainability reporting, the SEC will protect investors—as it is directed to do under securities law.[73] Having access to accurate and reliable sustainability reports, will ensure that investors are informed of the facts concerning the sale of securities as well as protected against fraud and misrepresentations, which is the purpose of the Securities Act.[74]

Voluntary sustainability reports do not meet this investor protection threshold that securities law deems to be the backbone its efforts.[75] The lack of accountability and assurance of voluntary sustainability reporting paints an inaccurate and incomplete picture, weakening their reliability. Additionally, voluntary reporting is not uniform, making voluntary reports difficult for investors to compare.

The SEC has the authority to mandate financial accounting and reporting standards created via industry professionals.[76] Like it did with the FASB, the SEC should endorse and enforce sustainability accounting and reporting standards created by industry professionals.[77] Furthermore, mandating standard sustainability accounting and reporting standards is be in line with regulation S-K because it would "assure uniform information for investors and other information users."[78]

To ensure the highest protection to investors, mandating sustainability reporting should also include an independent auditing requirement of reports. The Enron and Worldcom scandals evidence what can happen when companies lack accountability and independent auditing—potential of companies to defraud investors. The SEC already has the authority to oversee auditing under the SOX.[79]

Ensuring company liability for false information is essential to guaranteeing that reports are accurate and reliable. Having executives sign off, and in turn face potential personal liability for inaccurate information, would reassure an honest effort to make sustainability reports accurate and true. This is already a requirement under securities law[80] and should be enforced for sustainability reporting as well.

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operations and are not expected to have an impact upon future operations); U.S. Securities and Exchange Commission, *Financial Reporting Manual-Topic 9- Management's Discussion and analysis of Financial Position and Results of Operations (MD&A)* (May 11, 2018), https://www.sec.gov/corpfin/cf-manual/topic-9. (explaining that the MD&A is a portion of a public company's annual report or quarterly filing, where management addresses the company's performance and provides a discussion of topics like risks and future plans).

[72] Roy Smith, *A. Changes to the Securities and Exchange Commission's Form 8-K*, 24 Ann. Rev. Banking & Fin. L. 216, 216 (2005).

[73] *See supra* notes 35-64 and accompanying text.

[74] *See supra* note 40 and accompanying text.

[75] *See supra* note 35-64 and accompanying text.

[76] *See supra* note 46-52 and accompanying text.

[77] *See infra* notes 98-111 and accompanying text discussing the various sustainability accounting and reporting standards created by industry professionals.

[78] *See supra* note 43.

[79] *See supra* note 57-60 and accompanying text.

[80] *See supra* note 61-64 and accompanying text.

The good news is that sustainability reporting is not a new topic; so, the SEC does not have to start from scratch. Executives have already been thinking about sustainability reporting and how to implement it.[81] Numerous sustainability accounting and reporting standards have been created and used by companies around the world.[82] But now, reporting companies need to be mandated and regulated by the SEC in their production of sustainability reports, and investors need assurance that they have access to reliable and accurate information that gives them a full picture of company's performance. Through stakeholder input, community engagement, and requests for public comments, the SEC can find an effective way for reporting companies to communicate accurate, decision-useful sustainable disclosures to investors.[83] The public has done all it can on its own with voluntary sustainability reporting, now it needs the SEC to step in.

iv. Sustainability Disclosures are Material to Investors

The information provided in a sustainability report is material because it has a direct effect on a company's bottom line and investors are requesting it in order to make sound investment decisions. For example, Climate Change will impact businesses in material ways and companies should be sharing with investors how they are addressing their climate risks.[84] Investors are requesting disclosures regarding climate risks.[85] Climate risks include: shifts to clean energy, which could lead to changes in the future value of a company's assets or production; financial instability for certain industries like banking, insurance, and fossil fuel productions; [86] interruptions to the operation of businesses[87] by way of fires or severe storms; and the inherent risks of increasingly restrictive environmental regulations that could materially impact the company's results of operations or financial condition.[88] Climate Change can also have a positive impact on certain industries that are involved in agricultural biotech, energy efficient production, and desalination, to name a few.[89] Whether it's good or bad news, sustainable disclosures are material information that needs to be disclosed to investors because it lets them know how a company's ESG performance affects its financial performance.

There are several ways a sustainability report can be presented to investors and shareholders: as part of the MD&A, standalone, or integrated into the financial reports, to name a

[81] *See supra* note 28 and accompanying text.
[82] *See infra* notes 98-111 and accompanying text discussing the various sustainability accounting and reporting standards created by industry professionals.
[83] Robyn Bishop, *Investing in the Future: Why the Sec Should Require A Uniform Climate Change Disclosure Framework to Protect Investors and Mitigate U.S. Financial Instability*, 48 Envtl. L. 491, 493 (2018).
[84] *Id*. at 497.
[85] Shareholders request of climate disclosures is discussed in more depth in Section II of this paper.
[86] Robyn Bishop, *Investing in the Future: Why the Sec Should Require A Uniform Climate Change Disclosure Framework to Protect Investors and Mitigate U.S. Financial Instability*, 48 Envtl. L. 491, 497 (2018).
[87] Apple Inc., *Annual Report*, page 15 (2016), http://www.annualreports.com/HostedData/AnnualReportArchive/a/NASDAQ_AAPL_2017.pdf (listing interruptions to the operation of businesses in its annual report).
[88] Chevron, *Annual Report*, page 43 (2018), https://www.chevron.com/-/media/chevron/annual-report/2018/documents/2018-Annual-Report.pdf (listing environmental regulations that could materially impact the company's results of operations or financial condition in its annual report).
[89] Robyn Bishop, *Investing in the Future: Why the Sec Should Require A Uniform Climate Change Disclosure Framework to Protect Investors and Mitigate U.S. Financial Instability*, 48 Envtl. L. 491, 497 (2018).

few. Amore nuanced approach is through a Sustainable Development Analysis ("SD&A"), modeled after the MD&A.[90] This analysis would require a disclosure and discussion of a corporation's specific known or reasonably knowable sustainability issues and the effects on economic performance.[91] Analogous to the MD&A, the SD&A disclosure would be based on known risks, trends, and opportunities that are material to the issuers' business plan or operations.[92]

The varied effects of Climate Change on and varied ESG performance by different industries demonstrates the need for mandated and regulated sustainability accounting and reporting standards that convey accurate, comprehensive, and decision-useful sustainable risk information to investors and shareholders.[93]

B. Mandating and Regulating Sustainability Reporting Will Protect Investors

Voluntary sustainability reporting is not sufficient to ensure investors have access to the accurate and reliable material information that they need to make investment choices; this is why the SEC should step in and mandate and regulate sustainability reporting. Voluntary sustainability reports are subpar in providing investors with accurate information due to skewed representations. Despite there being a series of competing sustainability and reporting standards that are used sporadically in voluntary sustainability reports, the lack of uniformity in the standards makes it difficult for investors to compare reports. Without auditing from independent auditors, voluntary sustainability reports lack that additional layer of reassurance that mandated reports have under the SOX. The limits of voluntary sustainability reporting are felt by investors as they have continued to petition the SEC for better reporting schemes regarding sustainability disclosures. The SECs responses over the years to these requests have not provided an adequate framework for investors to be protected. The SEC needs to mandate and regulate sustainability reporting to be able to provide investors with accurate and reliable sustainability reports that they can use to make informed investment decisions.

i. Voluntary Sustainability Reporting Does Not Provide Reliable Information

Without sustainability accounting and reporting standards to use, companies can just report whatever sustainability information they want without necessarily any connection to how it affects its bottom line or how it will address compliance, risks, future plans, goals and projects. For example, in Kellogg's sustainability report from 2018, it reported that it reduced its energy use by 7.7 percent and its greenhouse emissions by 6.0 percent from 2017; with a 2020 commitment to reduce energy use and greenhouse emissions by 15 percent (from a 2015 baseline).[94] It is not clear what the effect these reductions will have on Kellogg's bottom line; if it is meeting environmental compliance goals, rules, and regulations; or how its preparing for effects of Climate Change. Another example of a company that produces voluntary sustainability reports is Apple. Apple's sustainability report discusses how its data centers, which are located worldwide, produce zero

[90] Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L.J. 923, 956 (2019) [hereinafter, Making Sustainability Disclosure Sustainable Paper].
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] Kellogg's, *Corporate Responsibility* (Dec. 13, 2019), http://crreport.kelloggcompany.com/conserving-natural-resources.

greenhouse gas emissions for their electricity use.[95] Again, it is not clear what this really means from an investing standpoint. Both of these companies are highlighting the positive actions and improvements that they are taking, which doesn't paint a full picture of their sustainability disclosures and risks. A limitation of voluntary sustainability reporting is that company's producing voluntary reports do not always delve further into what investors would want to know—how these efforts affect the company's finances and economic growth.

The Kellogg and Apple examples also highlight how voluntary sustainability reports tends to have qualitative information presented, which can be treated quite differently by investors. However, the SEC has overcome qualitative reporting challenges before. For example, the SEC created the MD&A and the Compensation and Disclosures Analysis ("CD&A") reporting requirements. Under both these reporting requirements, the SEC provides a principle-based approach to the reporting requirements.[96] In my opinion, through the MD&A and the CD&A, the SEC has proved it can overcome qualitative reporting challenges. If the SEC works in close collaboration with existing entities that have been developing sustainability accounting and reporting standards, investors will have access to the material information that will help them make sound investment choices.

Voluntary sustainability reporting also raises the problem of "greenwashing." Companies motivated by increased profits have made deceptive, misleading, and false representations, a practice known as "greenwashing."[97] Therefore, mandating and regulating sustainability reporting would ensure investors have access to accurate sustainable disclosures that paint a real picture of a company's ESG performance and how that fits into its economic performance.

ii. Investors Need Uniform Sustainability Reports

Today, there are numerous[98] sustainability accounting and reporting standards that company's use, making it difficult for investors and stakeholders to rely on and compare sustainability reports. This difficulty arises from variables including, whether the standards are U.S. or international based, who the target users are (i.e. investors or stakeholders generally), whether the standards are industry specific, and whether the standards are tied to financial data. Which sustainability accounting and reporting standard a corporation uses can depend on a variety of factors: where they want the metric to be presented (i.e., in the MD&A, in a separate sustainability report, or integrated in the financial reports); what a company has experience using; whether a specific metric is being requested by shareholders; or what their competitors are using to name a few. This makes it difficult for investors and stakeholders to compare sustainability reports and sustainable disclosures in general.

This strain in consistency can be seen when trying to compare sustainability reports using different sustainability accounting and reporting standards. For example, comparing sustainability

[95] Apple, *Environmental Responsibility Report* (2018), https://www.apple.com/environment/pdf/Apple_Environmental_Responsibility_Report_2018.pdf.
[96] *Id*.
[97] *Hill v. Roll Internat. Corp.*, 195 Cal. App. 4th 1295, 1298 (2011).
[98] Some sustainability reporting guidelines include the Financial Stability Board's Task Force on Climate-Related Financial Disclosures (the "Task Force") developed a set of recommendations to facilitate the disclosure of Climate Change information.[98] Others disclosure metrics and initiatives include: The Climate Registry (TCR); World Resources Institute (WRI); World Business Council for Sustainable Development (WBCSD); and Investor Network on Climate Risk INCR coordinated by CERES.

reports with one using GRI standards[99] and another using SASB standards.[100] In 1997, the Global Reporting Initiative ("GRI")[101] created a single set of sustainability reporting guidelines for all businesses regardless of their size, sector or location.[102] In contrast, in 2011, the Sustainability Accounting Standards Board ("SASB")[103] identified sustainability issues that are likely to affect the financial condition or operating performance of companies within a specific industry[104] and is U.S. based.[105] Additionally, The GRI metrics focus on providing information to stakeholders,[106] while the SASB metrics focus on providing information to investors. Because neither GRI nor SASB is mandated by law, both metrics are used by publicly traded companies—making it difficult to compare reports in which one report uses GRI standards and another uses SASB standards. Protecting investors through reporting requirements will allow for the comparability aspect of reports, which is something voluntary reporting lacks.

Integrating sustainable data into financial reports is another approach to sustainability reporting that further complicates the comparability aspect of reporting, which I will display by comparing two (2) different integrated approaches. For example, in 2007, the Climate Disclosure Standards Board ("CDSB") narrowed sustainability reporting to environmental information through an integrated reporting scheme that aligned disclosure of environmental information into general corporate financial reports; it has an international scope.[107] Using a similar but slightly different approach, the International Integrated Reporting Council ("IIRC"), in 2010, created an integrated reporting metric that "embodies the shared, common interest of a global coalition of parties in the adoption of Integrated Reporting on an international basis as a means to improve communication about value creation, advance the evolution of corporate reporting, and make a

[99] GRI, *The global standards for sustainability reporting*, https://www.globalreporting.org/standards/ (explaining on its website that GRI is a reporting standard that creates a common language for organizations – large or small, private or public – to report on their sustainability impacts in a consistent and credible way, enhancing global comparability and enables organizations to be transparent and accountable; the standards help organizations understand and disclose their impacts in a way that meets the needs of multiple stakeholders).

[100] SASB, *SASB connects business and investors on the financial impacts of sustainability*, https://www.sasb.org/about/ (explaining that SASB sets standards to guide disclosure of financially material sustainability information of companies to their investors; it identifies the subset of ESG issues most relevant to financial performance in 77 industries).

[101] GRI, *About GRI, https://www.globalreporting.org/about-gri/* (identifying *GRI* as an independent, international organization that helps businesses and other organizations take responsibility for their impacts, by providing them with a global common language to communicate impacts).

[102] Global Reporting Initiative *G4 Sustainability Reporting Guidelines* (Dec. 13, 2019), https://www.globalreporting.org/resourcelibrary/grig4-part1-reporting-principles-and-standard-disclosures.pdf.

[103] SASB, *SASB connects business and investors on the financial impacts of sustainability*, https://www.sasb.org/about/ (explaining SASB is an independent nonprofit organization).

[104] For example, on SASB's materiality map, under the Extract & Minerals Processing Industry SASB identifies as material environmental issues to include GHG emissions, Air Quality, energy management, water and wastewater management, waste and hazardous materials management, and ecological impacts. Whereas, for the healthcare industry, the material environmental issues include GHG emissions, energy management, waste and hazardous materials management. https://materiality.sasb.org/.

[105] SASB uses a materiality map to identify issues that are likely going to be material to an industry; and therefore, necessary to report on. SASB identifies 26 sustainability-related business issues, or General Issue Categories, which encompass a range of Disclosure Topics and their associated Accounting Metrics that vary by industry. *See* https://materiality.sasb.org/.

[106] GRI, *About GRI* (Dec. 13, 2019), *https://www.globalreporting.org/Information/about-gri/Pages/default.aspx*.

[107] CDSB, *About the Climate Disclosure Standards Board* (Dec. 13, 2019), https://www.cdsb.net/our-story.

lasting contribution to financial stability and sustainable development."[108] CDSB is limited to environmental information, while IIRC includes sustainable development more generally. While integrating financial and sustainable reports helps investors see how sustainability and finance go hand in hand, if not every company uses an integrated type of reporting scheme, it makes it difficult to compare reports using a different approach. I go through all these different metrics, not to argue that one is necessarily better or worse than the other, but rather to show the need for a set sustainability accounting and reporting standard that is enforced by the SEC.

Even the sustainability accounting and reporting standard setting organizations are realizing the need for better guidance and are paving the path for the SEC to mandate sustainability accounting and reporting standards. In September 2020, the five (5) leading sustainability accounting and reporting standard setting organizations announced[109] a "shared vision for a comprehensive corporate reporting system that includes both financial accounting and sustainability disclosures, connected via integrated reporting."[110] On December 20, 2020, these five (5) leading organizations published a prototype climate-related financial disclosure standard that illustrates how the concepts can be applied to climate disclosure and consolidates content and metrics into one practical guide.[111] Their cumulative efforts have been a useful first step. Now is the time for the SEC to step in using all the accumulated experience, research, and public input out there to mandate a sustainable accounting and reporting standard to be used by reporting companies.

iii. Investors Need Assurance Sustainability Reports are Accurate and True

Once sustainability reporting is mandated, auditing of sustainability reporting ought to be required and regulated under section 404 of the Sarbanes Oxley Act, because it will provide an extra layer of assurance to investors that the information in which they are receiving is accurate. In practice, the audit of a sustainability reports has come to be known as an assurance statements or assurance letter.

Because sustainability reporting and assurance letters are unregulated and not uniform, investors can be misled about the information disclosed and even left with minimal information

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[108] Integrated Reporting <IR>, *Structure of the IIRC* (Dec. 13, 2019), https://integratedreporting.org/the-iirc-2/structure-of-the-iirc/.

[109] Statement of Intent to Work Together Towards Comprehensive Corporate Reporting, *Summary of alignment discussions among leading sustainability and integrated reporting organisations CDP, CDSB, GRI, IIRC and SASB* (September 2020), https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf.

[110] SASB, *SASB and other organizations*, https://www.sasb.org/about/sasb-and-other-esg-frameworks/ .

[111] Press Release, *Global sustainability and integrated reporting organisations launch prototype climate-related financial disclosure standard* (December 18, 2020), https://www.sasb.org/wp-content/uploads/2020/12/Press-release-prototype-climate-related-financial-disclosure-standard-Dec20-FINAL.pdf (explaining how the five leading organisations (CDP, CDSB, GRI, IIRC, and SASB) in sustainability and integrated reporting published a shared vision for a comprehensive corporate reporting system in 2021 and have taken the next step together by publishing a paper that addresses standards for reporting on enterprise value, brought to life with a prototype climate-related financial disclosure standard).

about the information disclosed.[112] This problem is exemplified in Volkswagen's assurance letter from 2018. First, Volkswagen's assurance letter does not give any detailed disclosures of the nature of the inquiries that were made or the disclosures that were selected for analytical evaluation and comparison.[113] Second, Volkswagen's assurance statement had a disclaimer stating that the audit report "is not intended for any third parties to base any (financial) decision thereon. Our responsibility lies only with the Company. We do not assume any responsibility towards third parties."[114] The independent assurer's letter is not designed for Volkswagen investors, it's an assurance letter for Volkswagen itself to relieve it of liability.[115] This defeats the whole purpose of having a third party audit the sustainability report, if the readers of the report can't rely on the information provided in the assurance letter. This evidences that voluntary sustainability reporting and auditing/assurance efforts are not sufficient—investors and shareholders need sustainability reporting, including the auditing/assurance aspect, to be mandated and regulated by the SEC so that they can rely on accurate and reliable information to make investment decisions.

Another issue is raised when trying to compare assurance reports confirming sustainability reports of different companies. For example, when comparing the Volkswagen's assurance report from 2018 to the Fiat Chrysler Automobiles independent assurance report from 2018. Because these two (2) assurance letters detail and confirm different information, it makes it difficult for investors and stakeholders to compare reports sufficiently.[116] This in turn strains the ability of investors and shareholders to make comparisons of companies before investing, highlighting the need for the SEC to mandate and regulated sustainability accounting and standards used for reporting and auditing.

iv. The SEC's Limited Guidance on Sustainability Reporting Does Not Protect Investors

Since the 1960s, stakeholders, including investors, have been trying to use securities law to increase corporate sustainability disclosure.[117] In the past the SEC has been resistant to the idea of regulating sustainable disclosures. This is evidenced by the 1977 report of the Advisory Committee on Corporate Disclosure, led by former SEC Commissioner Sommer ("The Sommer Report").[118] The Sommer Report concluded that the SEC "should not try to use its powers to compel disclosure concerning, for instance, social or environmental matters, hiring practices, and the like, unless it could be shown that such matters were material to investors."[119]

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[112] Po-Chang Chen, et. Al., *Sustainability assurance's link to reporting quality* (October 10, 2019), https://www.journalofaccountancy.com/news/2019/oct/sustainability-assurance-link-to-reporting-quality-201919354.html (summarizing that sustainability assurance is typically limited in scope and is performed in accordance with different assurance standards).
[113] Michael Kraten, *Sustainability Reports and the Limitations of 'Limited' Assurance*, The CPA Journal (Jul. 2019), https://www.cpajournal.com/2019/07/26/sustainability-reports-and-the-limitations-of-limited-assurance/.
[114] *Id.*
[115] *Id.*
[116] *Id*
[117] Making Sustainability Disclosure Sustainable (explaining that efforts by various social and political groups to use the securities laws to obtain greater corporate sustainability disclosure began in the 1960s, partly in response to concerns about corporate power and related societal implications).
[118] Making Sustainability Disclosure Sustainable Paper.
[119] Advisory Comm. On Corp. Disclosure, 95th Cong., Rep. To The Securities And Exchange Commission 391-99 (Comm. Print 1977).

Probably to Sommer's surprise, investors have been pushing the SEC to issue guidance regarding the information contained in a sustainability report, which evidences that investors are already indicating that they think some of sustainability reporting is "material." In 2007, institutional investors petitioned the SEC to issue guidance on Climate Change disclosures.[120] The petition explained that "the risks and opportunities many corporations face in connection with Climate Change fall within the category of material information that is required to be analyzed and disclosed in many corporate filings."

In 2010, in response to the institutional investors,[121] the SEC issued guidance on Climate Change disclosures.[122] In the 2010 guidance, the SEC advised issuers that they could include climate risks and were required to disclose material information about their exposure to risks resulting from Climate Change.[123] The SEC said this requirement to disclose material information regarding Climate Change stemmed from provisions of Regulation S-K[124]—including disclosures in the MD&A, disclosure about legal proceedings, or disclosures about risk factors.[125] The 2010 guidance fell short because the SEC did not implement or enforce an adequate and consistent set of requirements.[126] Since sustainability reporting was not mandated, the disclosure qualities have been criticized.[127]

SEC enforcement of this guidance has been limited.[128] There are perhaps a few reasons for this. One being that agency's staff guidance is "nonbinding" and without "enforceable legal rights or obligations."[129] However, the guidance does not purport any new information; rather, reiterates already existing law about reporting on material information. To this latter point, the SEC may be resisting enforcement as a way to prevent disclosure overload, due to its lack of resources to enforce, or to stay out of the political division about Climate Change.[130] The lack of standardized reporting frameworks also makes it difficult to enforce because there is no standard to go off of.

In 2016, the SEC issued a Concept Release[131] where it received thousands of comments about the importance of sustainability disclosures for shareholder investment and voting decisions.[132] In response, investors are indicating the materiality of sustainability disclosures by requesting that

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[120] Making Sustainability Disclosure Sustainable Paper.
[121] *Id*.
[122] SEC, *Commission Guidance Regarding Disclosure Related to Climate Change*, Release No. 82 (Feb. 2, 2010).
[123] Making Sustainability Disclosure Sustainable Paper.
[124] 17 C.F.R. § 229.10 (prescribing that regulation S-K lists the reporting requirements for SEC filings by pubic companies, including requirements applicable to the content of the non-financial statement portions).
[125] SEC, *Commission Guidance Regarding Disclosure Related to Climate Change*, Release No. 82 (Feb. 2, 2010).
[126] Robyn Bishop, *Investing in the Future: Why the Sec Should Require A Uniform Climate Change Disclosure Framework to Protect Investors and Mitigate U.S. Financial Instability*, 48 Envtl. L. 491, 495 (2018).
[127] Making Sustainability Disclosure Sustainable Paper.
[128] Robert Repetto, *It's Time the SEC Enforced its Climate Disclosure Rules*, INT'L INST. FOR SUSTAINABLE DEV. (Mar. 23, 2016), https://www.iisd.org/blog/it-s-time-sec-enforced-its-climate-disclosure-rules [https://perma.cc/EG68-2BKD].
[129] Thomson Reuters Tax and Accounting, *Clayton Statement Downplays Significance of Staff Guidance* WGL-ACCTALERT VOL 12 NO 179.
[130] Robert Repetto, *It's Time the SEC Enforced its Climate Disclosure Rules*, Int'l Inst. For Sustainable Dev. (Mar. 23, 2016), https://www.iisd.org/articles/its-time-sec-enforced-its-climate-disclosure-rules
[131] SEC, *SEC Concept Releases*, https://www.sec.gov/rules/concept.shtml (defining concept releases: The Commission occasionally publishes "concept" releases to solicit public views on securities issues to better evaluate the need for future rulemaking).
[132] Making Sustainability Disclosure Sustainable Paper.

the SEC "require annual, uniform sustainability reporting from public companies as part of the overhaul of the agency's disclosure regime.[133] The SEC has not acted on the request yet.[134] Just a few months ago, on March 15, 2021, in light of demand for Climate Change information and questions about whether current disclosures adequately inform investors, Acting Chair Allison Herren Lee is requesting public input from investors, registrants, and other market participants on Climate Change disclosure. The deadline to submit comments is June 2021, which is after the completion of this paper.

It's time for the SEC to make its next move in ensuring that investors have access to material information: that is through mandating and regulating sustainability reporting.

C. Summary

The SEC's function is to protect investors. However, the minimal SEC guidance is not enough to push voluntary sustainability reporting where it needs to be to protect investors by providing them with adequate and reliable sustainable disclosures. The SEC mandate and regulation of sustainability reporting will fill in the gaps. This next step makes sense especially due to the fact that the SEC directive of sustainability reporting fits under the existing securities law. Using its authority under securities law the SEC can impose uniform sustainability accounting and reporting standards, require auditing obligations, and bring enforcement actions against violators. Additionally, the SEC should mandate sustainability reporting because sustainability reporting concerns, issues, and risks fall under the definition of "material" information—as evidenced by the fact that investors are requesting this information from the SEC itself. In part II of this paper, I discuss other ways that investors and shareholders have been indicating that sustainable disclosures are material to them.

II. Shareholders are Demanding Accurate and Reliable Sustainability Reporting

Shareholders and investors have not only been turning to the SEC to ensure they receive reliable and accurate sustainable disclosures, but they have also been pushing for this information at the judicial and corporate levels. Because investors are attempting to access sustainable disclosures through shareholder litigation and shareholder proposals, this section reveals that this information is in fact material to investors. Therefore, SEC mandate and regulation of sustainability reporting would support its mission of maintaining fair orderly and efficient markets[135] because litigation and proposals can be costly, take up a lot of time, and take up a lot of a company's resources.

In section A below, I analyze two (2) shareholder securities fraud cases regarding climate disclosures—brought by shareholders against two (2) of the largest companies in the energy industry, Exxon Mobil and PG&E. Shareholders may bring a securities fraud lawsuit if they have suffered financial losses resulting from purchasing shares in a company during a period of time when fraud or securities law violations inflated the value of the stock.[136] This is known as a 10-

[133] *Id.*
[134] Release No. 10064, *Bus. & Fin. Disclosure Required by Regulation S-K* (Apr. 13, 2016).
[135] *See supra* note 41 and accompanying text.
[136] 17 C.F.R. § 240.10b-5 states that:

(b)(5) claim.[137] The Private Securities Litigation Reform Act ("PSLRA") made the pleading requirements more difficult for a plaintiff to bring a securities fraud claim due to plaintiffs bringing claims in hopes of revealing securities fraud, without necessarily having a suspicion that there was any securities fraud in the first place.[138] Despite the increased difficulty, these types of lawsuits are still being brought.

In section B below I discuss shareholder proposals requesting a company's sustainable disclosures. Shareholders that meet a statutory requirement are able to bring shareholder proposals.[139] Because a shareholder proposal is nonbinding, its force comes from the facts that it is included in the issuer's proxy statement,[140] which can put pressure on a company to take certain action. A proxy statement is a public document[141] required by the SEC to be delivered to shareholders of publicly held corporations that alerts shareholders of meetings, discloses issues that will be discussed, and discloses all important facts about the issues on which shareholders are asked to vote.[142] Shareholders have been using shareholder proposals as a way to access and make public sustainable information, including which directors have environmental experience, a company's energy uses, how companies are dealing with environmental risks, and the effects of

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> The law regarding securities fraud lawsuits states that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

[137] *Id.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008) (explaining that the following elements need to be met in order to bring a 10-(b)(5) claim: 1) a material misrepresentation (or omission); 2) scienter, i.e., a wrongful state of mind; 3) a connection with the purchase or sale of a security; 4) reliance; 5) economic loss; and 6) loss causation).

[138] 15 U.S.C. § 78u-4(b)(1) (prescribing that a plaintiff must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed").

[139] 17 C.F.R. § 240.14a-8 (prescribing that a shareholder must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date they submit the proposal and must continue to hold those securities through the date of the meeting in order to be eligible to submit a proposal).

[140] U.S. Securities and Exchange Commission, *Proxy Statement* (Sept. 8, 2011), https://www.sec.gov/answers/proxy.htm. (stating that the SEC requires that shareholders of a public company receive a proxy statement prior to a shareholder meeting and the information contained in the statement must be filed with the SEC before soliciting a shareholder vote on the election of directors and the approval of other corporate action; solicitations must disclose all important facts about the issues on which shareholders will vote).

[141] 17 C.F.R. § 240.14a–8; *see also* SEC, *Proxy statements: How to Find https://www.investor.gov/introduction-investing/investing-basics/glossary/proxy-statements-how-find* (explaining that companies are required to file their proxy statements using the SEC's public database, known as EDGAR).

[142] US Legal, *Proxy statement law and legal definition*, https://definitions.uslegal.com/p/proxy-statement/.

Climate Change on capital, because they find this information material to their investment decisions.[143]

Shareholder litigation and shareholder proposals can be tools to incentivize companies to present accurate information about and to improve their sustainable practices. For example, the costs and the effects on a company's reputation from shareholder securities fraud lawsuits can negatively affect a company's stock value. In order to avoid these high risks, companies are incentivized to be transparent and have good sustainable practices from the start. Shareholder proposals can have a dramatic influence on a company's sustainable practices even if they do not pass because sometimes companies will agree to take action in exchange for withdrawal of proposals that they don't want to be public.[144] However, mandating sustainability reporting would be a more efficient and way to ensure transparency and a productive market that protects investors. To be in line with its mission statement, the SEC should mandate, regulate, and enforce penalties for violations of sustainability reporting.

A. Shareholder Litigation

Shareholder litigation can be an extremely expensive and time-consuming way for shareholders to protect themselves from misleading and fraudulent information. The securities fraud claims brought against Exxon regarding fraudulent climate disclosures has cost Exxon Mobil's shareholders between $476 million and $1.6 billion.[145] The securities fraud claims brought against PG&E regarding false and misleading statements about compliance with safety regulations regarding electricity transmissions, state laws, and potential to cause wildfires in California has cost PG&E billions of dollars causing PG&E to file bankruptcy.[146] For the shareholders, this means that they could keep losing out on dividends[147] and create a volatile price of the stock.[148] Mandating

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[143] Cristina Banahan, *Doubling Down on Two-Degrees: The Rise in Support for Climate Risk Proposals*, ISS Corporate Solutions (Jan. 23, 2018), https://corpgov.law.harvard.edu/2018/01/23/doubling-down-on-two-degrees-the-rise-in-support-for-climate-risk-proposals/#more-104394.

[144] Maya Mueller, *The Shareholder Proposal Rule: Cracker Barrel, Institutional Investors, and the 1998 Amendments*, 28 Stetson L. Rev. 451, 458–59 (1998) FN 58 (explaining that sometimes management will concede to shareholders in return for the withdrawal of a proposal).

[145]John Schwartz, *Fossil Fuels on Trial: New York's Lawsuit Against Exxon Begins* (Oct. 24, 2019), https://www.nytimes.com/2019/10/22/climate/new-york-lawsuit-exxon.html.

[146] Sammy Roth, *Meet the new PG&E. It looks a lot like the old PG&E* (June 17, 2020), https://www.latimes.com/environment/story/2020-06-17/pge-bankruptcy-new-pge-looks-like-old-pge#:~:text=PG%26E%20filed%20for%20bankruptcy%20protection,it%20still%20faces%20huge%20risks (explaining that PG&E filed for bankruptcy protection in January 2019 to shield itself from tens of billions of dollars in potential fire liabilities).

[147] Sammy Roth, *Meet the new PG&E. It looks a lot like the old PG&E* (June 17, 2020), https://www.latimes.com/environment/story/2020-06-17/pge-bankruptcy-new-pge-looks-like-old-pge#:~:text=PG%26E%20filed%20for%20bankruptcy%20protection,it%20still%20faces%20huge%20risks (looking to the 2001 bankruptcy, in which investors lost out on approximately $1.7 billion in dividends).

[148] Sammy Roth, *Meet the new PG&E. It looks a lot like the old PG&E* (June 17, 2020), https://www.latimes.com/environment/story/2020-06-17/pge-bankruptcy-new-pge-looks-like-old-pge#:~:text=PG%26E%20filed%20for%20bankruptcy%20protection,it%20still%20faces%20huge%20risks (summarizing that the price PG&E's stock went up more than 2 percent the day the filing was announced; then the stock price plummeted to a little more than $5 in early January; and then it traded at more than $47 in November, before details emerged about the utility's potential role in the latest wildfires).

and regulating sustainability reporting would be a more efficient way to protect investors being defrauded by misleading sustainable disclosures.

i. Exxon Shareholder Litigation

On November 11, 2016, an Exxon investor filed a securities class action against Exxon for failure to disclose climate risks. The plaintiffs in this lawsuit alleged that Exxon deliberately misled investors regarding the impact of Climate Change on the company's operations and valuation.[149] The initial complaint alleged that Exxon made materially false and misleading public statements because it did not disclose that Exxon's internally generated reports concerning Climate Change recognized the environmental risks associated with Climate Change—specifically that Exxon would not be able to extract the hydrocarbon reserves it asserted to have.[150] Additionally, the complaint alleged that Exxon had been employing an inaccurate price of carbon to calculate the value of certain future oil and gas prospects.[151] As a result of statements Exxon made during the plaintiff's class period,[152] the common stock price was artificially inflated, and Exxon's release of its third quarter financial results on October 28, 2016, in which it disclosed it might have to write down 20% of its oil and gas assets, resulted in the stock price falling by more than $2 per share.[153]

Additionally, in July 2017 a consolidated complaint was filed as a class action, which included similar claims but by additional shareholders who traded stock between March 31, 2014 and January 30, 2017.[154] On August 14, 2018, the court ruled that investors had adequately pleaded the claims that Exxon and Exxon officials made material misstatements concerning the company's use of proxy costs for carbon in business and investment decisions.[155] This litigation is still on going as of October 20, 2020.[156]

This Exxon shareholder litigation about Exxon's failure to report accurate climate disclosures evidences that investors find climate disclosures material because it affects the value of their stock. Manipulation of stock prices is what the Exchange Act aims to prevent.[157] SEC regulation of sustainability reporting, which includes the climate disclosures at issue in this Exxon shareholder litigation, would be in line with securities law because it would help ensure investors have material information and prevent manipulation of stock prices. While only speculative, had sustainability reporting been mandated and regulated, perhaps Exxon would have publicly disclosed what it had discovered in its internal reports because environmental risks associated with Climate Change—specifically that Exxon would not be able to extract hydrocarbon reserves it asserted to have—is the type of material information that a sustainability report would include.

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[149] Complaint at 1, *Ramirez v. Exxon Mobil Corp.,* 334 F. Supp. 3d 832 (N.D. Tex. 2018) (No. 3:16-cv-3111).
[150] Complaint at 2, *Ramirez v. Exxon Mobil Corp.,* 334 F. Supp. 3d 832 (N.D. Tex. 2018) (No. 3:16-cv-3111).
[151] Complaint at 8, *Ramirez v. Exxon Mobil Corp.,* 334 F. Supp. 3d 832 (N.D. Tex. 2018) (No. 3:16-cv-3111).
[152] Joel C. Haims, Ruti Smithline, *Keeping Current: Securities*, 16 Bus. L. Today 53 (2007) (exemplifying through a lawsuit analysis that the class period is the time when the fraud inflated the value of the stock).
[153] Complaint at 3, *Ramirez v. Exxon Mobil Corp.,* 334 F. Supp. 3d 832 (N.D. Tex. 2018) (No. 3:16-cv-3111).
[154] *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832, 859 (N.D. Tex. 2018) (3:16-cv-03111-K).
[155] *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832, 859 (N.D. Tex. 2018).
[156] Ramirez v. Exxon Mobil Corp. case update can be found at: http://climatecasechart.com/case/ramirez-v-exxon-mobil-corp/?mc_cid=4f18cdab05&mc_eid=[054c56d010].
[157] *See supra* note 40 and accompanying text.

ii. PG&E Shareholder Litigation

The 2018 and 2019 shareholder litigation cases against PG&E provide another example of investors finding sustainable disclosures material because it affects their investments. In these shareholder litigation cases against PG&E, the plaintiffs requested compensatory damages for the damages they have endured as a result of PG&E's wrongdoing to be determined at a jury trial.[158]

In June 2018, the plaintiff shareholders in *Weston v. PG&E Corp*. file suit against PG&E.[159] This is a federal securities class action on behalf of all investors who purchased or otherwise acquired PG&E common stock between the Class Period.[160] In the complaint, the shareholders asserted that:

> Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (i) PG&E had failed to maintain electricity transmission and distribution networks in compliance with safety requirements and regulations promulgated under state law; (ii) consequently, PG&E was in violation of state law regulation; (iii) PG&E's electricity networks would cause numerous wildfires in California; and (iv) as a result of the foregoing, Defendants' statements about the Company's business and operations were materially false and misleading at all relevant times.[161]

Due to the commencement of the Bankruptcy, PG&E Corporation and the Utility filed a notice on February 1, 2019, reflecting that the proceedings are automatically stayed pursuant to Section 362(a) of the Bankruptcy Code.[162]

Another case was filed against PG&E on February 22, 2019.[163] At the time this new suit was filed, PG&E had declared bankruptcy twenty some days earlier from a batch of criminal proceedings, regulatory investigations, and civil lawsuits—which cost PG&E an estimated $30 billion.[164] Because of the bankruptcy, the new case was brought against PG&Es officers and directors by the underwriters of the notes offerings, PG&E, and bond investors.[165] Their complaint stated that PG&E had lax wildfire safety practices, and from June 2014 through December 2017, PG&E equipment was found to have caused over 1,500 fires across almost the entirety of the Company's service area.[166]

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[158] Complaint at 21, *Weston v. PG&E*, 2018 WL 2948088 (N.D.Cal.); Complaint at 46, *York County v. Rambo*, WL 917281 (N.D.Cal. 2019) (No. 3:19-cv-00994-RS).

[159] PG&E, *2019 Proxy Statement* page 104 (June 21, 2019), https://s1.q4cdn.com/880135780/files/doc_financials/2019/05/2019-Proxy-Statement-final-web-ready.pdf (summarizing the wildfire-related securities class action litigation against the company, including another case *Jon Paul Moretti v. PG&E Corporation, et al.* in which similar claims as the *Weston* case were raised).

[160] Complaint at 1, *Weston v. PG&E*, 2018 WL 2948088 (N.D.Cal.).

[161] Complaint at 6, *Weston v. PG&E Corp.,* 2018 WL 2948088 (N.D.Cal. 2018) (No. 3:18-cv-03509).

[162] PG&E, *2019 Proxy Statement*, page 104 (June 21, 2019), https://s1.q4cdn.com/880135780/files/doc_financials/2019/05/2019-Proxy-Statement-final-web-ready.pdf.

[163] PG&E, *Joint Annual Report to Shareholders* (2020), https://s1.q4cdn.com/880135780/files/doc_financials/2020/ar/PCG012AR_2020_AR_Web.pdf.

[164] Complaint at 10, *York County v. Rambo*, WL 917281 (N.D.Cal. 2019) (No. 3:19-cv-00994-RS).

[165] Complaint at 3, *York County v. Rambo*, WL 917281 (N.D.Cal. 2019) (No. 3:19-cv-00994-RS).

[166] Complaint at 41, *York County v. Rambo*, WL 917281 (N.D.Cal. 2019) (No. 3:19-cv-00994-RS).

PG&E continues to face more shareholder lawsuits asserting that PG&E made false and misleading statements about its safety practices, including active concealment of numerous and widespread violations of California safety regulations.[167] On May 7, 2019, the District Court granted a consolidation of the *York County Action* with *In re PG&E Corporation Securities Litigation*.[168] These consolidated cases are still on going as of October 4, 2019, when the officer, director, and underwriter defendants filed motions to dismiss.[169] The motion to dismiss is still under submission with the Court.[170] The securities actions are to be resolved by the Bankruptcy Court as part of the claims reconciliation process in the Chapter 11 Cases.[171]

In all, the numerous cases against PG&E reflect the importance of having accurate and reliable sustainable disclosures. Shareholder litigation is an inefficient way to obtain climate information because it is so costly and time consuming. ESG performance disclosures reported on in a sustainability report include compliance with safety requirements and regulations under state law as well as environmental risks like wildfires. Therefore, I asset that mandating and regulating sustainability reporting could potentially prevent or at least minimize this type of shareholder litigation because companies would be required to disclose this information already.

B. Shareholder Proposals

Another example of shareholder action to get the material information about sustainable disclosures that they need to make informed investment decisions is through shareholder proposals. The examples of shareholder proposals in section show that investors are interested in a company's sustainable disclosures—the environmental risks and the connection between a companies' long term shareholder value and Climate Change. In this section I will summarize shareholder proposals regarding sustainability.

i. Shareholder Proposal About Sustainable Disclosures

Climate-related proposals fall into two categories: calls for the company to disclose climate-related risks (including the risks associated with a rapid global transition to clean energy sources) or calls to reduce its greenhouse gas emissions.[172] Shareholders proposals typically concentrate on seeking sustainability disclosure and oversight, rather than attempting to cause the company to adopt specific sustainability policies.[173]

The shareholders of Caterpillar, Conoco Phillips, Cummins, Gillette, Nexen, Occidental Petro-Canada, Reebok, and Staples asserted in a proposal that the board of directors and managers had a fiduciary duty to become informed, and to inform shareholders, about potential Climate

167 Labaton Sucharow, *In re G&E Corporation Securities Litigation* (April 22, 2020), https://www.labaton.com/cases/in-re-pge-corporation-securities-litigation#:~:text=On%20January%2029%2C%202019%2C%20the,%2C%20directors%2C%20and%20underwriters).
168 PGE, *Joint Notice of 2019 Annual Meetings Joint Proxy Statement*, Page 104, (June 21, 2019), https://www.sec.gov/Archives/edgar/data/75488/000130817919000210/lpcg_def-14a.htm.
169 *Id.*
170 *Id.*
171 *Id.*
172 Jonathan M. Gilligan, *Carrots and Sticks in Private Climate Governance*, 6 Tex. A&M L. Rev. 179, 192 (2018).
173 Making Sustainability Disclosure Sustainable Paper.

Change risks and opportunities.[174] Other types of Climate Change proposals include: requests for review of proxy guidelines; nomination of directors with environmental experience; increase of return on capital in light Climate Change risks; GHG Emission Goals; Renewable Energy goals; and Methane emission goals.[175]

The shareholders from PPL Corporation, Exxon, and Occidental Petroleum requested a "2-degree scenario analysis" in a proposal, which refers to the goal of the Paris Climate Accord of limiting global temperature increases to 2 degrees Celsius (3.6 degrees Fahrenheit).[176] These proposals won with at least a majority support. The shareholder proposal for Occidental petroleum was approved with a 2/3 vote, the PPL proposal was approved with a 57% vote for, and the ExxonMobil proposal passed with 62% for. This means that the requested information will need to be disclosed. However, in April 2019 the SEC held in favor of Exxon's request to strike down the shareholder proposal, concluding that it agreed with Exxon's claim that the proposal constituted "micromanagement" of the company in violation of Rule 14(a)(8).[177]

The sustainability accounting and reporting standards developed by industry professionals, includes the type of information being requested in these shareholder proposals. Therefore, mandating and regulating sustainability accounting and reporting standards would more efficiently protect investors because it would provide them with the accurate and reliable information that they are attempting to obtain through the shareholder proposals.

C. Summary

Shareholder litigation and proposals reveal that investors find sustainability disclosures material and clearly evidences that they are not gaining access to accurate and reliable sustainable disclosures through voluntary sustainability reporting. This further supports that sustainability reporting should be mandated and regulated by the SEC. The SEC can look to shareholder proposals about sustainable disclosures as a guide to what exactly investors think is material.

III. Public Policy Argument for Mandating Sustainability Reporting

Because sustainability reporting has only recently been widely adopted across the globe, there is limited research on how effective it is in contributing to Climate Change mitigation.[178] A recent study of the literature on climate accounting concluded that "a greater concentration should

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174 Perry E. Wallace, *Climate Change, Fiduciary Duty, and Corporate Disclosure: Are Things Heating Up in the Boardroom?,* 26 Va. Envtl. L.J. 293, 322 (2008).

175 Cristina Banahan, *Doubling Down on Two-Degrees: The Rise in Support for Climate Risk Proposals*, ISS Corporate Solutions (Jan. 23, 2018), https://corpgov.law.harvard.edu/2018/01/23/doubling-down-on-two-degrees-the-rise-in-support-for-climate-risk-proposals/#more-104394.

176 *IPCC*, *Climate Change 2014 Synthesis Report* (2014); *see also* Cydney Posner, Cooley LLP, *Are Shareholder Proposals on Climate Change Becoming a Thing?,* Harvard Law School Forum on Corporate Governance and Financial Regulation (Jun. 21, 2017), https://corpgov.law.harvard.edu/2017/06/21/are-shareholder-proposals-on-climate-change-becoming-a-thing/.

177 Alyson Clabaugh, *SEC Backs Exxon on Climate Change* Proposal Intelligize a LexisNexis company (Apr. 5, 2019), https://www.intelligize.com/sec-backs-exxon-on-climate-change-proposal/.

178 Carmela Gulluscio, et. al., *Climate Change Accounting and Reporting: A Systematic Literature Review* 12 Sustainability 20 (July 2020) [hereinafter, Climate Change Accounting and Reporting: A Systematic Literature Review] (explaining that Climate Change accounting-related literature is not very widespread).

be invested on the concrete effects produced by Climate Change related practices on the sustainability performances of [accounting] firms."[179]

I purport that government mandate and regulation of sustainability reporting could incentivize companies to be more sustainable and climate conscious since they would be required to disclose sustainable information—the good, the bad, and the ugly. Because companies would not want to report sustainable disclosures that damage their reputation, mandating sustainability reporting could have the effect of making companies more sustainable. This in turn can have the effect of contributing to Climate Change mitigation.

What is clear, is the connection between Climate Change and sustainable development.[180] The U.S. shift to clean energy is happening. Corporations will be forced to adapt and transition to more sustainable practices. I can only hope that the United Nations definition of sustainability will come to fruition, that the "needs of the present [will be met] without compromising the ability of future generations to meet their own needs."[181]

IV. Conclusion

In the wake of numerous financial disasters, securities laws have been developed and amended to ensure investors have access to accurate, reliable, and trustworthy information about publicly traded companies to facilitate their sound investment decisions. Mandating and regulating sustainability reporting is in line with this paradigm of securities law and fits into the existing legal regime.

Industry professionals, reporting companies, and investors have all done their part to take sustainability reporting as far as it can go. Industry professionals have come together to create sustainability accounting and reporting standards. Reporting companies have been engaging in voluntary sustainability reporting of some sort since the 1980s. Investors have shown that they find sustainability disclosure material, by way of petitioning the SEC, shareholder litigation, and shareholder proposals. The missing piece to the puzzle is SEC mandate and regulation.[182]

[179] Climate Change Accounting and Reporting: A Systematic Literature Review.
[180] Climate Change Accounting and Reporting: A Systematic Literature Review.
[181] *See supra* note 17 and accompanying text.
[182] Drops mic.