ESG HYPOCRISY AND VOLUNTARY DISCLOSURE

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This Article argues that we must remain vigilant about policing environmental, social and governance ("ESG") hypocrisy in voluntary ESG disclosures. ESG hypocrisy refers to circumstances whereby organizations convey ESG information or commitments inconsistent from their own observed behaviors regarding employees, climate, diversity, and other ESG initiatives. On the one hand, the rise of ESG has sparked considerable backlash, suggesting that any focus on ESG is no longer warranted. However, available evidence indicates that most companies continue to publish ESG disclosure and seek to live up to their ESG commitments, including companies that have shied away from more visible ESG statements. On the other hand, anecdotal and empirical research reveals serious concerns surrounding the accuracy and reliability of voluntary ESG disclosure—suggesting that the existing voluntary disclosure landscape is rife with ESG hypocrisy. These hypocrisy concerns not only have prompted a push for mandatory ESG disclosure, but also have shifted attention away from addressing the accuracy and hypocrisy issues associated with voluntary ESG disclosure. This Article insists that this shift is inappropriate and, given the likelihood that ESG will continue to be a business priority, this Article emphasizes the need to remain attentive to ESG hypocrisy in voluntary disclosures for at least three reasons. First, voluntary ESG disclosures provides important benefits that cannot be replicated by mandatory disclosure but also cannot be harnessed if accuracy problems persist. Second, because corporations have increasingly used voluntary ESG disclosure to enhance their reputation, hypocrisy in voluntary ESG disclosure can generate significant damage to corporate reputation and expose corporations to the financial harms associated with that reputational damage. Third, the connected nature of all public disclosure means that hypocrisy in voluntary ESG disclosure can impact the accuracy and reliability of mandatory ESG disclosures. As a result, even if mandatory disclosure emerges, we must stay the course with respect to reducing ESG hypocrisy in voluntary disclosure. The Article then advances three reforms aimed at ameliorating ESG hypocrisy in voluntary ESG disclosure.

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Introduction

Environmental, social, and governance ("ESG")[1] has become one of the most significant corporate governance phenomena in recent history.[2] ESG has come to dominate corporate governance discourse, propelled not only by non-investor stakeholders such as employees, Congress, and the general public, but also by some of the nation's most influential executives, investors, and asset managers.[3]

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1. For a more robust definition of ESG, *see infra* Part I.A.

2. *See* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L.J. 923, 932 (2019); Jill E. Fisch, Keith L. Johnson & Cynthia A. Williams, Why Corporate Sustainability Disclosure Has Become a Mainstream Demand (unpublished manuscript) (on file with New York University School of Law), https://www.law.nyu.edu/sites/default/files/Corporate%20Sustainability%20Disclosure%20by%20Fisch%20Johnson%20Williams%209.18.pdf; *All Stakeholders Not Just Shareholders*, Indus. Wk., Aug. 20, 2019, https://www.industryweek.com/leadership/article/22028107/corporations-new-purpose-to-serve-all-stakeholders-not-just-shareholders [https://perma.cc/W8UC-QS6Y] (noting that "it seems the corporate world is all in"); Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, Harv. Bus. Rev., May–June 2019, at 106–16, https://hbr.org/2019/05/the-investor-revolution [https://perma.cc/H66X-DRVP] (noting that ESG issues were "almost universally" at the top of the minds of executives); Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 Yale J. on Reg. 625, 633–34 (2019).

3. *See* Evie Liu, *Fund Companies Are Paying More Attention to ESG Matters, Survey Shows*, Barron's (July 22, 2021, 5:15 AM), https://www.barrons.com/articles/fund-companies-are-paying-more-attention-to-esg-matters-survey-shows-51626914577 [https://perma.cc/AB3G-YXL6]; Sara Bernow, Robin Nuttal & Sean Brown, *Why ESG Is Here to Stay*, McKinsey & Co. (May 26, 2020), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/why-esg-is-here-to-stay [https://

On the one hand, the rise in ESG has sparked considerable debate about the appropriateness of corporate focus on ESG, prompting some companies to retreat from their public embrace of ESG.

The rise in ESG also has corresponded with a rise in concerns around accountability and corporate posturing. How can we make corporations accountable for ESG and thus ensure that corporate commitment to ESG isn't merely rhetorical, or worse, a form of "greenwashing"?[4] More bluntly, how can we ensure that corporations are not engaging in ESG hypocrisy?

Corporate hypocrisy refers to circumstances whereby organizations, like people, convey information or commitments inconsistent from their own observed behaviors.[5] When corporations make statements or commitments related to ESG that are perceived to be inconsistent with their historical or current behavior related to employees, diversity, climate, and the broader host of issues embedded in ESG, ESG hypocrisy emerges.[6] For example, a company can make public statements in support of essential workers' rights to a living wage while donating to legislators that refuse to support increases in the minimum

perma.cc/WH4D-TKGE]. ESG is linked to a corporate and investor push to embrace a corporate purpose that focuses on social and environmental issues. *See* Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/VD9N-NQCB] [hereinafter Fink, *2018 Letter to CEOs*]; Larry Fink, *Larry Fink's 2019 Letter to CEOs: Purpose and Profit*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter [https://perma.cc/7H62-HFMR] (writing that corporations must operate with a view towards benefitting all stakeholders); *Business Roundtable Redefines the Purpose of a Corporation to Promote 'an Economy that Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/X2PL-FMTM] [hereinafter *Business Roundtable Statement*] (redefining corporate purpose to promote "an economy that serves all Americans"); Ira T. Kay et al., *The Stakeholder Model and ESG*, PAY GOVERNANCE (Sept. 1, 2020), https://www.paygovernance.com/viewpoints/the-stakeholder-model-and-esg [https://perma.cc/H3TY-PY59] (citing Fortune survey demonstrating that sixty-three percent of CEOs agreed with Business Roundtable Statement).

4. While the SEC notes there is no universally accepted definition of greenwashing, greenwashing is a term generally used to describe actions that falsely convey alignment with ESG issues. *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21,334, 21,429 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf.

5. Tillmann Wagner, Richard J. Lutz & Barton A. Weitz, *Corporate Hypocrisy: Overcoming the Threat of Inconsistent Corporate Social Responsibility Perceptions*, 73 J. MKTG. 77, 79 (2009).

6. *See id.*

wage, or a company can make a public statement condemning discrimination while being accused of discriminatory hiring and promotion practices.

This article assumes that ESG will remain a feature of the corporate landscape notwithstanding the current backlash against it. Indeed, even as some companies shy away from more visible ESG commitments around such matters as climate change or diversity matters, they continue to publish disclosure around ESG and seek to live up to their ESG commitments.[7] For example, Vanguard withdrew from the Net Zero Asset Managers Initiative, which is an international group of asset managers committed to the goal of achieving net zero greenhouse gas emissions by 2050 or sooner. However, Vanguard made clear that its withdrawal did not impact its commitment to disclosure or its commitment to addressing climate risks.[8] Moreover, a 2023 survey of 500 U.S. C-suite executives found that as many as 82% of their companies continue to pursue environmental goals and initiatives, while as many as 69% plan to hire a chief sustainability officer within the next six to twelve months.[9] These actions should come as no surprise given the extent that ESG practices and disclosure have become embedded into the corporate ecosystem. This includes board oversight of ESG, the proliferation of ESG officers, and extensive ESG disclosure in both mandatory and voluntary reports. Importantly, ESG practices have become embedded in the corporate ecosystem because of the strong belief within the corporate community that ESG issues impact corporations' long-term financial health and sustainability. For example, a 2020 U.S. Government Accountability Office ("GAO") report revealed that most shareholders believe that ESG issues could have a substantial impact on a company's long-term financial performance and that focusing on ESG is necessary in order to monitor and evaluate the risks and opportunities

7. *See, e.g.*, *Corporate Statement: An Update on Vanguard's Engagement With Net Zero Asset Managers Initiative*, VANGUARD (Dec. 7, 2022), https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/update-on-nzam-engagement.html [https://perma.cc/8CPQ-9HF9] [hereinafter Vanguard Corporate Statement]; *see also* Dan Byrne, *Understanding "Green Hushing" and Its Risks*, COMPLIANCE WK. (Nov. 12, 2022, 10:00 AM), https://www.complianceweek.com/esg/social-responsibility/understanding-green-hushing-and-its-risks/32343.article [https://perma.cc/U58Z-78G8] (noting that companies have climate goals but have decided not to publicize them); *ESG Disclosure Trends in SEC Filings*, WHITE & CASE LLP, at 2–3 (June 2022), https://www.whitecase.com/sites/default/files/2022-06/esg-disclosure-trends-in-sec-filings-2022-annual-survey-web.pdf (noting sizeable increases in disclosure).

8. *See* Vanguard Corporate Statement, *supra* note 7.

9. *See C-Suite Insights: Sustainability and ESG Trends Index*, ERNST & YOUNG, at 3, 12 (2023), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/sustainability/ey-c-suite-insights-sustainability-and-esg-trends-index.pdf.

that could impact a company's financial wellbeing.[10] A 2023 survey found that despite the anti-ESG sentiment, the majority of CEOs and investors have increased their commitment of balancing ESG issues with their core business practices because ESG helps manage material risks and improve long-term value creation.[11] Thus, even if corporations refrain from using the ESG term because of political and legal backlash, their continued reliance on ESG factors is likely to persist.[12]

In light of the likelihood of continued focus on ESG, this Article argues that we need to remain vigilant and attentive to ESG issues, which includes being attentive to ESG hypocrisy. ESG critics insist that we cannot ameliorate ESG hypocrisy.[13] Those critics express severe skepticism about the ability to generate effective accountability mechanisms for ensuring that corporations will adhere to their ESG commitments or otherwise be held accountable for their failure to comply with their ESG commitments.[14] As a result, ESG critics characterize the current embrace of ESG as rhetorical at best and false and misleading at worse.[15] That is, ESG critics suggest that ESG commitments may simply reflect ESG hypocrisy. ESG supporters are more optimistic and thus are willing to believe that corporations are sincere in their desire

10. *See Public Companies Disclosure of Environmental, Social and Governance Factors and Options to Enhance Them*, U.S. GOV'T ACCOUNTABILITY OFF., at 5, 9 (July 2020), https://www.gao.gov/assets/710/707967.pdf [hereinafter GAO Report].

11. *See* Kensey Biggs, *Too Legit: ESG Won't Quit—U.S. ESG Trends for 2023*, TENEO (Jan. 31, 2023), https://www.teneo.com/too-legit-esg-wont-quit/ [https://perma.cc/Z72C-BPQL].

12. *See id.* (noting that the focus on ESG topics in the corporate world is "here to stay" even if we "may not call it ESG ten years from now"); *see also* Carolyn Crist, *ESG Is Here to Stay, Seyfarth Report Concludes*, HR DIVE (Mar. 2, 2023), https://www.hrdive.com/news/esg-isnt-going-away/644001/ [https://perma.cc/AH44-K82R]; *Go Green or Go Home*, KATTEN (June 22, 2023), https://katten.com/go-green-or-go-home-esgs-increasing-impact-on-ma-in-the-uk-and-europe [https://perma.cc/BJS7-M7J7].

13. *See* Jonathan Karpoff, *On Stakeholder Model of Corporate Governance*, 50 FIN. MAN. 321, 321 (2021); Lucian A. Bebchuk & Roberto Tallarita, *'Stakeholder' Talk Proves Empty Again*, WALL ST. J. (Apr. 18, 2021, 6:20 PM), https://www.wsj.com/articles/stakeholder-capitalism-esg-business-roundtable-diversity-and-inclusion-green-washing-11629313759 [https://perma.cc/YMC2-7Q88] [hereinafter Bebchuk & Tallarita, *'Stakeholder' Talk*]; *see also* Dorothy Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1619–20 (2021) (pinpointing the inconsistency of companies who signed the Business Roundtable statement).

14. *See* Fin. Econ. Roundtable, *Statement on SEC Regulation of ESG Issues*, at 3–4 (Oct. 2021), https://static1.squarespace.com/static/61a4492358cbd07dda5dd80f/t/61e8d6dd8c22c04330637bc9/1642649310539/2021.pdf [hereinafter FER Statement].

15. *See* Karpoff, *supra* note 13, at 321; Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 124–28 (2020) [hereinafter Bebchuk & Tallarita, *The Illusory Promise*]; Bebchuk & Tallarita, *'Stakeholder Talk'*, *supra* note 13; *see also* Lund, *supra* note 13, at 1619 (highlighting the lack of genuine change due to the ESG effort).

to advance ESG issues. However, even ESG advocates have made clear that corporate commitment to ESG will only be meaningful and impactful when we generate measures for ensuring that corporations adhere to their ESG commitments and remain focused on ESG in the medium and long term.[16] In other words, advocates recognize the importance of accountability for any effort to advance ESG and protect against hypocrisy.

While many different potential measures exist for holding companies accountable for their ESG commitments and thereby reducing ESG hypocrisy,[17] one that has garnered significant attention has been disclosure. Disclosure is the bedrock of our federal securities laws.[18] Those laws are rooted in the notion that disclosure is invaluable to investors, providing them with the essential information they need to make prudent investment decisions and oversee their investments.[19] Consistent with this regulatory focus on disclosure, the corporate and securities community view disclosure as an invaluable accountability tool because it provides relevant stakeholders with information needed to monitor corporate behavior and pressure corporations to alter behavior deemed to have fallen short of important goals.[20] It is therefore no surprise that the ESG accountability conversation has centered on disclosure.

The demand for disclosure has triggered a virtual avalanche of voluntary ESG disclosure.[21] Unfortunately, anecdotal and empirical research reveals serious concerns surrounding the accuracy and reliability

16. *See* Colin Mayer, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction: A Comment on "The Illusory Promise of Stakeholder Governance," by Lucian Bebchuk and Roberto Tallarita*, 106 CORNELL L. REV. 1859, 1873 (2021) (observing that investor pushback to ESG expenditure might stem from an "information problems" that inhere in short term expenditures that have long-term effects); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1419 (1993).

17. Those measures include shareholder and stakeholder activism, private litigation, and board oversight.

18. *See* Santa Fe Indus. v. Green, 430 U.S. 462, 478 (1977) (noting that federal securities laws rest on a "philosophy of full disclosure"); LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 103–04 (1914).

19. *See* Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 278 n.25, 304–06 (2022) [hereinafter Fairfax, *Dynamic Disclosure*].

20. *See* BRANDEIS, *supra* note 18, at 104; ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 239 (1932) (noting that disclosure enhances corporate accountability to shareholders and the public); Donald C. Langevoort, *Seeking Sunlight in Santa Fe's Shadow: The SEC's Pursuit of Managerial Accountability*, 79 WASH. UNIV. L.Q. 449, 453 (2001) (stating that securities disclosure promotes accountability); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1211–12 (1999).

21. *See* Fairfax, *Dynamic Disclosure*, *supra* note 19, at 291–92.

of voluntary ESG disclosure, suggesting that the existing voluntary disclosure landscape is rife with ESG hypocrisy.[22] In this regard, voluntary ESG disclosure has become both a cure and symptom of ESG hypocrisy.

The accuracy and hypocrisy concerns associated with voluntary ESG disclosure have prompted a push for mandatory ESG disclosure. Proponents of mandatory disclosure contend that the legal and extra-legal apparatus associated with mandatory disclosure dramatically increases the likelihood that mandatory disclosure will produce accurate information and thus alleviate ESG hypocrisy. The accuracy, reliability, and hypocrisy concerns associated with voluntary ESG disclosure appear to confirm the benefits of mandatory disclosure, prompting ESG advocates to strenuously press for mandatory ESG disclosure.[23] These efforts have garnered results. Most recently, the Securities and Exchange Commission (SEC) proposed first-ever rules mandating disclosure related to climate change.[24]

The push for mandatory ESG disclosure shifts attention away from addressing the accuracy and hypocrisy issues associated with voluntary ESG disclosure.[25] Indeed, the push for mandatory ESG disclosure stems from clear skepticism about the value of voluntary ESG disclosure; one can argue that this concern is rooted in worries about ESG hypocrisy.[26] More importantly, in a disclosure debate that pits mandatory disclosure against voluntary disclosure, proponents of mandatory disclosure often characterize it as the cure for the accuracy and hypocrisy defects associated with voluntary disclosure. Viewed from this perspective, so long as mandatory ESG disclosure is a viable solution, resolving accuracy issues associated with voluntary ESG disclosure seems redundant, unnecessary, and a potential waste of valuable time and resources. In other words, why engage in the effort to address accuracy and hypocrisy issues associated with voluntary ESG disclosures when the effort to ensure mandatory ESG disclosure is much more likely to solve those accuracy and hypocrisy issues?

This Article argues that we need to remain attentive to ESG disclosure, and, in order to do so, we must remain vigilant to the inaccuracy

22. *See id.* at 295–97.
23. *See id.*
24. *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21,334, 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf.
25. *See id.* at 21,335.
26. *See* Rick A. Fleming & Alexandra M. Ledbetter, *Making Mandatory Sustainability Disclosure a Reality*, 50 ENV'T L. REP. 10647, 10649 (2020).

concerns of voluntary ESG disclosure. Shifting attention away from policing ESG hypocrisy in voluntary ESG disclosures is a mistake; any robust ESG accountability effort requires ameliorating the inaccuracy and hypocrisy problems associated with voluntary ESG disclosure. The Article makes three important claims as to why inaccuracy in voluntary ESG disclosure matters to the overall effort to reduce ESG hypocrisy—even if some form of mandatory disclosure materializes.

First, voluntary ESG disclosures provide important benefits that cannot be replicated by mandatory disclosures. Indeed, voluntary ESG disclosure represents a rich and significant source of information around corporate ESG activities. Ameliorating accuracy and hypocrisy concerns increases the extent to which investors and other stakeholders can rely on that information.

Second, because corporations have increasingly used voluntary ESG disclosure to enhance their reputation, voluntary disclosure inaccuracy—and even perceptions of corporate hypocrisy—can damage corporate reputation and expose corporations to the resulting financial harms.

Third, inaccuracy and hypocrisy in *voluntary* ESG disclosure can impact the accuracy and reliability of *mandatory* disclosure because the disclosure landscape is connected. Indeed, dismissing the relevance of voluntary ESG disclosure ignores the fact that disclosure is dynamic.[27] The concept of dynamic disclosure is a recognition that all public disclosure is linked, and thus the potential for, or existence of, mandatory ESG disclosure does not render voluntary disclosure accuracy concerns insignificant because mandatory ESG disclosure does not render voluntary disclosure insignificant.[28]

On the one hand, dynamic disclosure means that accuracy and hypocrisy issues in voluntary ESG disclosure could have a negative impact on the perceived reliability of the overall ESG disclosure regime, including mandatory ESG disclosure.[29] On the other, to the extent that inaccuracies in voluntary disclosure could be viewed as materially misleading or otherwise may reflect material omissions in mandated disclosure, inaccuracies and hypocrisy in voluntary ESG disclosure may reflect violations of the securities laws, both with respect to voluntary and mandatory disclosures.[30] This Article builds on my previous scholarship which highlights the existence of dynamic disclosure and the

27. *See* Lisa M. Fairfax, *Dynamic Disclosure*, *supra* note 19, at 279.
28. *See id.* at 279.
29. *See id.* at 332.
30. *See id.* at 332–33 (suggesting that voluntary disclosures impact SEC assessment of the accuracy of mandated disclosure).

ways in which mandatory and voluntary disclosure work together to inform our understanding of the corporate disclosure landscape.

In these ways, this Article insists that accuracy in voluntary ESG disclosures matters. By focusing attention on accuracy and hypocrisy in voluntary ESG disclosure, this Article emphasizes the indelible and thus enduring role voluntary ESG disclosure plays in the overall ESG disclosure landscape and the effort to hold corporations accountable for their ESG activities. Because of this long-term role, even with mandatory disclosure, we must remain vigilant with respect to reducing ESG hypocrisy in voluntary disclosure.

This Article advances three reforms aimed at ameliorating the accuracy and hypocrisy concerns associated with voluntary ESG disclosure: (1) SEC oversight, (2) board oversight, and (3) third party audits. Commentors on this Article have emphasized the need to zero in on one of these three available reforms, even if imperfect. While acknowledging this desire to prioritize, this Article nonetheless shies away from emphasis on only one reform. Instead, this Article insists that those interested in reducing ESG hypocrisy should seek to advance all three reforms for two reasons. First, costs and benefits associated with each reform strongly suggest focusing on any one reform would be unwise and thus neglect other possibilities for shoring up voluntary ESG disclosures. Second, embracing all three reforms more closely mirrors the accountability apparatus associated with traditional financial disclosure. Indeed, financial disclosures are subject to a combination of SEC oversight, particularly in the form of SEC enforcement through violations of federal securities fraud law, rigorous board oversight and internal control procedures, and independent third-party auditor review.

From this perspective, embracing all three of these accountability mechanisms for voluntary ESG disclosure is not only more likely to put ESG disclosure on the same footing as traditional financing disclosure, but also more likely to ensure the most robust level of ESG accountability thereby ameliorating ESG hypocrisy concerns. Thus, this Article asserts that ESG proponents should advocate for all three reforms.

This Article proceeds in three Parts. Part I examines the most recent rise in ESG, concerns around accountability and ESG hypocrisy, and the resulting pressure for increased ESG disclosure. Part I also highlights the accuracy and hypocrisy concerns associated with voluntary ESG disclosure that have led to growing pressure to jettison voluntary ESG disclosure in favor of mandatory disclosure. Part II makes the affirmative case for the importance of voluntary ESG disclosure to ensuring accountability and preventing hypocrisy. In so doing, Part II highlights why we need to take seriously the accuracy and hypocrisy concerns associated with voluntary ESG reporting. Part II also refutes arguments suggesting that accuracy and hypocrisy issues do not merit our attention, especially arguments suggesting that anticipated mandated ESG disclosure will jettison the need for, or reliance on, voluntary ESG disclosure. Importantly, Part II extends the vital scholarship around dynamic disclosure, highlighting the fact that mandatory and voluntary disclosure coexist; thus, inaccuracies in voluntary disclosure impact mandatory disclosure and the overall integrity of the disclosure regime. Part III recommends three strategies for addressing accuracy and ESG hypocrisy concerns and evaluates the benefits and drawbacks of each of those strategies. A conclusion briefly summarizes how the different methods will address ESG hypocrisy.

I.
The Emerging ESG Fervor

A. The ABCs of ESG

The term "ESG" is a moniker that covers a broad range of different issues impacting the corporation.[31] As has been pinpointed elsewhere,[32] the term ESG has three distinct strands: (1) "E" for environmental, which includes issues ranging from climate change to water usage, recycling, and greenhouse gas emissions; (2) "S" for social, which includes workplace culture, workplace health and safety, employee demographics and diversity, employee retention, promotion, and turnover, other human capital management issues, racial equity, and diversity, equity and inclusion ("DEI") efforts, political spending, pay equity, human rights, child labor, vendor relations, and supply chain concerns; and (3) "G" for governance, which includes board diversity and composition, majority voting, proxy access, dual class shares, special meetings procedures, board declassification, elimination of supermajority provisions, independent board chair, shareholder engagement and participation, and executive compensation.[33] On the one hand, the term ESG is

31. There is some disagreement around the appropriate label, with some focusing on "EESG" based on the notion that issues concerning employees should be grouped with other social issues, and others focusing only on "ES" based on the notion that governance issues are not commiserate with environmental and social issues.

32. *See* Fairfax, *Dynamic Disclosure*, *supra* note 19, at 281.

33. *See Environmental, Social, and Governance Disclosure in Proxy Statements: Benchmarking the Fortune 50*, Sidley Austin LLP, at 2 (Aug. 31, 2021), https://www.sidley.com/en/insights/newsupdates/2021/08/environmental-social-and-governance-disclosures-in-proxy [https://perma.cc/THA3-6P94] [hereinafter *Sidley Report*]; *2021 Proxy Season Review: Part I, Rule 14a-8 Shareholder Proposals*, Sullivan & Cromwell LLP, at 1, https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-2021-Proxy-Season-Review-Part-1-Rule14a-8.pdf [hereinafter *SC 2021 Proxy Report*].

used to emphasize the importance of a corporate focus on both groups beyond shareholders—including employees, customers, consumers, vendors, the community and broader society—and on issues beyond strict profit-maximization.[34] The term ESG is also designed to capture the notion that these groups and issues fundamentally impact the corporation, its shareholders, and its financial performance.[35]

Although ESG focuses on issues that may not be viewed as financial, ESG is explicitly linked to economic and financial performance.[36] Most of today's investors believe that ESG information impacts corporate financial performance.[37] As a result, investors use ESG information to monitor a company's expected financial performance and assess how ESG factors may impact financial value.[38] Importantly, investors use ESG information to monitor, assess, and manage corporate risks and opportunities.[39] Investors insist that ESG information is useful not only to evaluate potential risks that could negatively influence a company's financial performance, but also to understand potential opportunities that can enhance financial value.[40] On the one hand, some doubt the connection between ESG and financial performance,[41] while others have argued that focusing on ESG issues has the potential to

34. *See Business Roundtable Statement*, *supra* note 3; Fairfax, *Dynamic Disclosure*, *supra* note 19, at 281.

35. *See* Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Non-Financial Risk*, 41 J. CORP. L. 647, 651 (2016) [hereinafter Ho, *Risk-Related Activism*] (noting that ESG is now being used to encompass all nonfinancial fundamentals that can impact financial performance).

36. *See* Virginia Harper Ho, *Comply or Explain and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 322 (2017) [hereinafter Ho, *Comply or Explain*].

37. *See* GAO Report, *supra* note 10, at 5, 9.

38. *See id.*; Eccles & Klimenko, *supra* note 2.

39. *See* Fairfax, *Dynamic Disclosure*, *supra* note 19, at 286–88; *see also* Andrew Winden, *Jumpstarting Sustainability Disclosures*, 76 BUS. LAW. 1215, 1228 (2021).

40. Ho, *Comply or Explain*, *supra* note 36, at 322; Barnali Choudhury, *Social Disclosure*, 13 BERKELEY BUS. L.J. 183, 196 (2016) (noting social disclosure facilitates the identification and management of risk); Ho, *Risk-Related Activism*, *supra* note 35, at 664.

41. *See* Paul Brest et al., *How Investors Can (and Can't) Create Social Value*, 44 J. CORP. L. 205, 209 (2018); Lund, *supra* note 13, at 1618; Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 36; BRONAGH WARD ET AL., KKS ADVISORS & TEST OF CORP. PURPOSE, COVID-19 AND INEQUALITY: A TEST OF CORPORATE PURPOSE 15 (Sept. 2020), https://c6a26163-5098-4e74-89da-9f6c9cc2e20c.filesusr.com/ugd/f64551_a55c15bb348f444982bfd28a030feb3c.pdf ("[T]he interest of stockholders and other stakeholders will not always align"); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 527 (2020).

negatively impact financial performance.[42] However, there is considerable research supporting the connection between financial performance and ESG issues.[43] A wide variety of ESG issues impact financial performance—from climate change to human capital management and DEI.[44] For example, that research shows that a connection between improved financial performance and enhanced customer satisfaction, as well as a correlation between improved financial performance and appropriate management of DEI issues and improved strategies related to employee recruitment, retention, and promotion.[45] This research supports the underlying premise of ESG—a consensus that corporate focus on ESG stems from a concern about *shareholder value* rather than *stakeholder values*.

B. The ESG Buzz

ESG has become one of the most significant corporate governance issues of this decade.[46] The nation's largest institutional investors and asset managers have begun to routinely issue statements detailing their

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42. *See*, *e.g.*, Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?* 2 (Eur. Corp. Governance Inst., L. Working Paper No. 579, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812642 [https://perma.cc/66DD-QGHL]; Wayne Winegarden, *ESG Disclosure Requirements Will Harm Economic Vibrancy*, FORBES (Sept. 20, 2021), https://www.forbes.com/sites/waynewinegarden/2021/09/20/esg-disclosure-requirements-will-harm-economic-vibrancy/?sh=52faec6a393f [https://perma.cc/P6HH-2WV6]; Robert Armstrong, *The ESG Investing Industry Is Dangerous*, FIN. TIMES (Aug. 24, 2021), https://www.ft.com/content/ec02fd5d-e8bd-45bd-b015-a5799ae820cf [https://perma.cc/N6XP-7B8F]; JEAN-PIERRE AUBRY ET AL., CTR. FOR RET. RSCH. AT B.C., ESG INVESTING AND PUBLIC PENSION PLANS: AN UPDATE 2 (Oct. 2020), https://crr.bc.edu/wp-content/uploads/2020/10/SLP74.pdf (indicating that social investing has the potential to reduce returns).

43. *See* Ho, *Comply or Explain*, *supra* note 36, at 322; Ho, *Risk-Related Activism*, *supra* note 35, at 665–68; Sundiatu Dixon-Fyle et al., *Diversity Wins: How Inclusion Matters*, MCKINSEY & CO. (May 19, 2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters [https://perma.cc/A25D-ACCH]; WARD ET AL., *supra* note 41, at 85; George Serafeim & Aaron Yoon, *Which Corporate ESG News Does the Market React to?* 3–4 (Harvard Bus. Sch. Acct. & Mgmt. Unit Working Paper, Paper No. 21-115, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832698 [https://perma.cc/8BEQ-5E32]; Lily Lieberman, *Why Your Company Should be Paying Attention to ESG*, C2FO (Apr. 1, 2021), https://legacy-site.c2fo.com/en-in/resources/why-your-company-should-be-paying-attention-to-esg/ [https://perma.cc/CQD2-72BG] (citing studies).

44. *See* GAO Report, *supra* note 10, at 5; Bernow et al., *supra* note 3; Lieberman, *supra* note 43.

45. *See supra* note 44.

46. *See* Fisch, *supra* note 2, at 932; Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective*, 41 U. PA. J. INT'L L. 249, 260 (2019); Fleming & Ledbetter, *supra* note 26, at 10648 (noting a "critical mass" of investors view ESG information as important to investment and voting decisions).

ESG expectations for corporations and their boards.[47] Proxy reports reflect a steady rise in shareholder proposals focused on ESG matters and pressuring corporations to make specific commitments around those matters.[48] Thus, in 2021, for the first time in history, ESG proposals accounted for the majority of proposals submitted from shareholders, representing 56% of all submissions.[49] In 2022, ESG proposals surged to a record 63% of submitted proposals.[50] Those reports also reflect a steady rise in institutional shareholder support for such proposals.[51] The nation's most influential business executives also have expressed their support for ESG-related issues.[52]

A 2023 survey of five hundred U.S. C-suite leaders found that "every single respondent indicated sustainability and ESG issues are important to their organization, with 87% believing [ESG and sustainability] initiatives are very to extremely important to their businesses and long-term success."[53] An increasing number of corporations have begun making ESG commitments and seeking to incorporate ESG goals, policies, and metrics into their business plans.[54] Thus, 82% of C-suite executives indicate that their companies have carbon emissions reductions initiatives in place and goals to reach net zero by a given year.[55] In the 2022 proxy season, more than 90% of *Fortune* 100 companies disclosed initiatives or commitments related to climate and workforce diversity.[56] A growing number of companies have embraced

47. *See* Fink, *2018 Letter to CEOs*, *supra* note 3; *See* State St., 2016 Corporate Responsibility Report 4 (2016), https://www.responsibilityreports.com/HostedData/ResponsibilityReportArchive/s/NYSE_STT_2016.pdf; Sara Gutterman, *Transforming Our Future: The ESG Imperative*, Green Builder Media (June 8, 2023, 12:33 PM), https://www.greenbuildermedia.com/blog/transforming-our-future-the-esg-imperative [https://perma.cc/W8J8-4LP9]; *see also* Ho & Park, *supra* note 46, at 261 (noting that the nation's largest and most influential investors and asset managers are pressuring companies to pay closer attention to ESG matters).

48. *See Sidley Report*, *supra* note 33, at 6–7; *SC 2021 Proxy Report*, *supra* note 33, at 10. Indeed, while there remain a small group of shareholders submitting ESG proposals, the investor support for such proposals encompasses a wide range of investors. *See SC 2021 Proxy Report*, *supra* note 33, at 2 (listing the variety of proposals supported).

49. *See SC 2021 Proxy Report*, *supra* note 33, at 1–2.

50. *See* Melissa Sawyer & June M. Hu, *2022 Proxy Season ESG Lookback*, Retail Indus. Leaders Ass'n (Nov. 21, 2022), https://www.rila.org/blog/2022/11/2022-proxy-season-esg-lookback [https://perma.cc/XVT9-ZH6F].

51. *See SC 2021 Proxy Report*, *supra* note 33, at 7, 22–23.

52. *See Business Roundtable Statement*, *supra* note 3.

53. *See C-Suite Insights: Sustainability and ESG Trends Index*, *supra* note 9, at 2.

54. *See Sidley Report*, *supra* note 33, at 1; *SC 2021 Proxy Report*, *supra* note 33, at 21.

55. *See C-Suite Insights: Sustainability and ESG Trends Index*, *supra* note 9, at 4.

56. *See* Jamie Smith, *Four Key Takeaways from the 2022 Proxy Season*, Ernst & Young (Jul. 27, 2022), at 8, https://www.ey.com/en_us/board-matters/four-key-takeaways-from-the-2022-proxy-season [https://perma.cc/39U3-BD97].

board oversight of ESG; now, almost 90% of large corporations have such board oversight.[57]

Increasingly, business courses and jobs are focusing on ESG issues.[58] For example, in 2021, the University of Pennsylvania Wharton School of Business offered more than fifty undergraduate and graduate courses related to social impact.[59] Investment companies have made considerable effort to incorporate ESG matters into their investment criteria.[60] All of this activity highlights the increased attention on ESG within corporate America.

C. ESG Backlash

The rise of ESG has been met with considerable pushback, especially from those that insist that ESG reflects a desire to push an ideological agenda over profit.[61] To date more than forty states have proposed or enacted so-called "anti-ESG" legislation.[62] Moreover, Republicans have launched a comprehensive campaign seeking to dismantle the focus on ESG.[63] This campaign has prompted some companies to pull back from their public statements around ESG or otherwise discontinue

57. *See* Lisa Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 371, 375 (2022) [hereinafter Fairfax, *Board Committee Charters*].

58. *See* Jenny Gross, *Business Schools Respond to a Flood of Interest in ESG*, N.Y. TIMES (Nov. 13, 2021), https://www.nytimes.com/2021/11/13/business/dealbook/business-schools-esg.html [https://perma.cc/FD76-PZXG].

59. *See id.*

60. *See* Eccles & Klimenko, *supra* note 2; *see also* Liu, *supra* note 3. The 2021 survey noted that asset managers' previous voting records did not reflect how much they claimed to care about ESG issues, but 2021 voting records revealed much stronger commitment to ESG matters. *See* Liu, *supra* note 3.

61. Kevin Schmidt, *Profits Over Politics: The Case for Anti-ESG ETFs*, CNBC (Oct. 5, 2022, 6:00 PM), https://www.cnbc.com/2022/10/05/profits-over-politics-the-case-for-anti-esg-etfs.html [https://perma.cc/C65E-336V]; Press Release, Staff of Governor Ron DeSantis, Governor Ron DeSantis Further Prohibits Woke ESG Considerations From State Investments (Jan. 17, 2023), https://www.flgov.com/2023/01/17/governor-ron-desantis-further-prohibits-woke-esg-considerations-from-state-investments/ [https://perma.cc/Y46Y-JKL2]; Michael Smith, et al., *Up Next in Ron DeSantis' War Against the 'Woke Agenda': No ESG Criteria in Municipal Bonds*, FORTUNE (Feb. 13, 2023, 4:13 PM), https://fortune.com/2023/02/13/ron-desantis-esg-municipal-bonds-woke-agenda-florida/ [https://perma.cc/G9WD-3SCM].

62. *See ESG Investing Regulations Across 50 States*, MORGAN LEWIS (July 21, 2023), https://www.morganlewis.com/pubs/2023/07/esg-investing-regulations-across-the-50-states [https://perma.cc/7QQL-MYJQ].

63. Saijel Kishan & Danielle Moran, *Republicans Prepare to Ramp Up Their Anti-ESG Campaign in 2023*, BLOOMBERG (Dec. 29, 2022, 6:00 AM), https://news.bloomberglaw.com/environment-and-energy/republicans-prepare-to-ramp-up-their-anti-esg-campaign-in-2023 [https://perma.cc/5TNR-9B4R].

their public engagement with organizations affiliated with ESG stances or issues.[64]

This Article assumes that ESG will remain a feature of the corporate landscape notwithstanding the current backlash against ESG. Indeed, even as some companies shy away from more visible ESG commitments, they continue to publish disclosure around ESG and seek to live up to their ESG commitments.[65] These actions should come as no surprise given the extent to which ESG practices and disclosure have become embedded into the corporate ecosystem. This includes board oversight of ESG, the proliferation of ESG officers, and extensive ESG disclosure in both mandatory and voluntary reports.[66] A 2023 survey of ESG commitments from CEOs and investors around the globe, along with a review of public company ESG programs and practices, makes clear that CEOs and investors are "unwavering" in their commitment to balance corporate performance and ESG despite the significant pushback.[67] The survey therefore succinctly concludes that the focus on ESG in the corporate world is "here to stay."[68]

D. ESG Hypocrisy Concerns

Corporate hypocrisy refers to the notion that organizations, like people, can convey information or commitments inconsistent from their own observed behaviors.[69] When corporations make statements or commitments related to ESG that are perceived to be inconsistent with their behavior related to stakeholders and the broader community and environment, ESG hypocrisy emerges.[70]

Even as the ESG backlash mounts, the intense focus on ESG has sparked considerable concerns from both critics and supporters about ESG hypocrisy. Critics pinpoint the significant difficulties associated with seeking to advance the multiple and often conflicting issues associated with ESG.[71] Indeed, ESG encompasses a range of interests from those impacting employees and the workforce to those impacting climate and the environment, to those impacting broader society. Critics not

64. *See supra* note 7 (discussing Vanguard and green hushing).
65. *See supra* notes 21–22 and accompanying text.
66. *See supra* notes 9–12, 54–57 and accompanying text.
67. *See* Biggs, *supra* note 11.
68. *See id.*
69. *See* Wagner et al., *supra* note 5, at 79.
70. *See id.*
71. *See* FER Statement, *supra* note 14, at 3–4; Karpoff, *supra* note 13, at 321; Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 24–25; *see also* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1435 (1993); Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1284 (2008).

only insist that there is no available mechanism for pinpointing how best to hold corporations accountable to all of these groups and interests, but also assert that crafting such a mechanism is fraught with potentially insurmountable challenges.[72] In particular, critics argue that there are no guidelines for ensuring that corporations make appropriate tradeoffs.[73] This tradeoff concern includes the difficulty of making tradeoffs between various groups as well as the difficulty of making tradeoffs within a particular group.[74] Critics further argue that enabling corporations to focus on ESG will undermine managerial and corporate accountability by enabling corporate officers and directors to advance their own personal agenda while purporting to promote stakeholder concerns.[75] In their view, an obligation to multiple stakeholders and stakeholder interests inevitably means that corporate managers and directors will always be able to characterize their actions as benefitting at least one stakeholder group or interests, even when it harms shareholders and other groups and may only be designed to benefit managers and their interests.[76] As a result, enabling corporations to focus on ESG matters increases the likelihood of conflict, waste, and managerial self-dealing.[77] Then too, some critics insist that pressuring corporations to focus on ESG matters will erode accountability by undermining more robust regulatory efforts or otherwise shifting attention and appropriate resources away from external agencies with the appropriate expertise to police ESG concerns.[78] Collectively, these issues spark concerns that corporate commitments to ESG will be hypocritical—reflecting corporate commitments that diverge sharply from corporate reality.

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72. *See* FER Statement, *supra* note 14, at 3–4; Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 24–25; *see also* Bainbridge, *supra* note 71, at 1436–37.

73. *See* Jill E. Fisch & Steven Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1333–34 (2021); Karpoff, *supra* note 13, at 321; Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 24–25.

74. *See* Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 24–25.

75. *See, e.g.*, FER Statement, *supra* note 14, at 4; *see also* Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations With Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 433 (2002) [hereinafter Fairfax, *Doing Well While Doing Good*]; Bainbridge, *supra* note 71, at 1439; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE Law 38 (1991).

76. *See* Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 24–25; *see also* Fairfax, *Doing Well While Doing Good*, *supra* note 75, at 433; Bainbridge, *supra* note 71 at 1438; EASTERBROOK & FISCHEL, *supra* note 75, at 38.

77. *See* Karpoff, *supra* note 13, at 336.

78. *See* Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 24–25; FER Statement, *supra* note 14, at 2, 3–4 (arguing that the SEC's expertise lies in financial disclosures and thus the SEC does not have the authority or expertise to mandate board ESG disclosure).

Importantly, research suggests that ESG hypocrisy concerns are serious. Anecdotal and empirical evidence suggest that the historical record of many corporations embracing ESG belies their professed commitment to ESG issues.[79] Evidence further suggests that corporations' more recent behaviors also run counter to their ESG rhetoric.[80] Indeed, recent studies reveal that corporations embracing ESG commitments do not improve the social and environmental performance of their investments.[81] In addition, recent research suggests that corporations professing a commitment to ESG have performed no better than other companies in terms of advancing employee, community, environment, and consumer interests.[82] Put bluntly, this research indicates significant ESG hypocrisy.

Supporters acknowledge ESG hypocrisy and the significant accountability challenges with any effort to enhance corporations' responsibility for ESG matters. On the one hand, some evidence suggests that corporations, investors, and investment managers have made progress in altering their activities to better align with ESG commitments.[83] Then too, advocates of ESG insist that tradeoff concerns have been exaggerated.[84] On the other hand, supporters agree that meaningful metrics must be designed to prevent ESG hypocrisy and better assess whether and to what extent corporations are meeting their ESG commitments.[85] However, supporters insist that accountability and hypocrisy concerns are surmountable and thus insist that we can and must do more to craft solutions that ameliorate such concerns.[86] Moreover, supporters contend that the existence of external regulatory agencies and mechanisms for

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79. *See* Fisch & Solomon, *supra* note 73, at 1337–38; Barry Ritholtz, *Stakeholder Capitalism Will Fail If It's Just Talk*, BLOOMBERG (Aug. 21, 2019), https://www.bloomberg.com/opinion/articles/2019-08-21/business-roundtable-shareholder-primacy-shift-judged-by-actions [https://perma.cc/Q8XQ-VH86].

80. *See* Bebchuk & Tallarita, *'Stakeholder Talk'*, *supra* note 13 (finding that signatures of the Business Roundtable Statement failed to change their governance documents or practices in a manner that aligned with promoting stakeholders); *see also* Lund, *supra* note 13, at 1619–20; Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 36; WARD ET AL., *supra* note 41, at 15.

81. *See* Soohun Kim & Aaron S. Yoon, *Analyzing Active Fund Managers' Commitment to ESG: Evidence From the United Nations Principles for Responsible Investment*, 69 MGMT. SCI. 741, 742 (2023).

82. *See* WARD ET AL., *supra* note 41, at 19, 43.

83. *See* Fairfax, *Board Committee Charters*, *supra* note 57, at 371.

84. *See, e.g.*, WARD ET AL., *supra* note 41, at 81–82; Mayer, *supra* note 16, at 1865; Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 325 (1999).

85. *See* Mayer, *supra* note 16, at 1876; Blair & Stout, *supra* note 84, at 325; Lawrence Mitchell, *A Theoretical Framework and Practical Framework for Enforcing Constituency Statues*, 70 TEX. L. REV. 579, 589 (1992); Green, *supra* note 16, at 1419.

86. *See supra* note 85.

addressing ESG issues does not alleviate the need for corporate attention to these concerns. This is particularly true in light of the manner in which corporations have often undermined external regulatory efforts aimed at holding corporations accountable for ESG matters.[87]

Supporters and detractors agree; ESG hypocrisy is real. A 2022 survey of 1,400 global executives found that 72% of North American executives agree that hypocrisy related to ESG goals exists.[88]

E. The Avalanche of Voluntary ESG Disclosure

ESG hypocrisy concerns and the push for greater ESG accountability have inevitably resulted in a push for enhanced ESG disclosure.[89] While consumers, non-profits, and other stakeholder groups have played an important role in the push for greater ESG disclosure, investors have been at the epicenter. The current push for increased ESG disclosure has been buttressed and propelled by investors, particularly the largest and most influential investors.[90] In fact, investors have formed several initiatives aimed at urging companies to provide relevant ESG information.[91]

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87. *See* Ritholtz, *supra* note 79; Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, HARV. BUS. REV. (Aug. 30, 2019), https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric [https://perma.cc/HK2N-L36B]; Terry Nguyen, *Consumers Don't Care About Corporate Solidarity. They Want Donations.*, VOX (June 3, 2020, 1:00 PM), https://www.vox.com/the-goods/2020/6/3/21279292/blackouttuesday-brands-solidarity-donations [https://perma.cc/T68Q-U9P5] (pinpointing corporations that currently profess commitment to racial equity despite having spent hundreds of thousands of dollars lobbying members of Congress to block civil rights laws, prompting an "F" rating of such corporations by civil rights organizations).

88. *See* Isabella O'Malley, *'Green Hypocrisy' Reported Amongst Most Global Businesses, Poll Finds*, WEATHER NETWORK (May 6, 2022), https://www.theweathernetwork.com/en/news/climate/causes/green-hypocrisy-reported-amongst-most-global-businesses-poll-finds [https://perma.cc/7MHK-Z33E]. The same survey found that 59% of all global survey respondents agree that "green hypocrisy" exists. *Id.*

89. *See* Colin J. Diamond et al., *ESG Disclosure Trends in SEC Filings,* WHITE & CASE LLP (Aug. 13, 2020), https://www.whitecase.com/insight-alert/esg-disclosure-trends-sec-filings#takeaways [https://perma.cc/XV36-LY87] (reporting investor pressure for greater ESG disclosure); Choudhury, *supra* note 40, at 189 (noting that the emphasis on disclosure stems from desire for improved transparency and accountability).

90. *See* Frederico Fornasari, *Knowledge and Power in Measuring the Sustainable Corporation: Stock Exchanges as Regulators of ESG Factors Disclosure*, 19 WASH. U. GLOB. STUD. L. REV. 167, 190 (2020) (noting that ESG reporting in the last decade has risen due to investor demand—"more and more corporations report, because of investors' demand").

91. *See, e.g.*, The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21,334, 21,340 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf (discussing investor initiatives related to climate change).

It should come as no surprise that the desire for accountability and ameliorating hypocrisy has translated into a demand for greater ESG disclosure. Our federal securities laws are premised on the link between disclosure and accountability,[92] resting on a "philosophy of full disclosure."[93] While disclosure serves a variety of critical goals including reducing informational asymmetries, improving market efficiency, and supporting compliance with laws,[94] one paramount disclosure goal is accountability. Disclosure provides increased transparency related to a corporation's policies, goals, and activities, which enables investors and other stakeholders to monitor corporations and hold them accountable for their commitments and actions.[95] Our longstanding emphasis on the accountability benefits of disclosure made it almost inevitable that the demand for greater accountability would result in a demand for more robust ESG disclosure.[96] In essence, our disclosure system historically has been viewed as designed to reduce corporate hypocrisy by better ensuring that corporate commitments are consistent with corporate reality.

Investor pressure for ESG disclosure has translated into a virtual deluge of voluntary ESG disclosure.[97] During 2020, an all-time high

92. *See* Choudhury, *supra* note 40, at 187–88; Williams, *supra* note 20, at 1211–12; BRANDEIS, *supra* note 18, at 104; BERLE & MEANS, *supra* note 20, at 239 (noting that disclosure enhances corporate accountability to shareholders and the public); Langevoort, *supra* note 20, at 453 (discussing ways in which securities disclosure promotes accountability); Merritt Fox, *Required Disclosure and Corporate Governance*, 62 L. & CONTEMP. PROB. 113, 114 (2000).

93. *See* Santa Fe Indus. v. Green, 430 U.S. 462, 477–78 (1977); *see also* Lipton, *supra* note 41, at 556 (2020); Colleen Honisberg, Robert J. Jackson Jr. & Yu-Ting Forester Wong, *Mandatory Disclosure and Individual Investors: Evidence From the Jobs Act*, 93 WASH. U. L. REV. 293, 295 (2015); Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81 (2007).

94. *See* Ferrell, *supra* note 93, at 81; Cynthia Estlund, *Just the Facts: The Case for Workload Transparency,* 63 STAN. L. REV. 351, 370 (2011); Ronald J. Gilson & Reineier Kraakman, *The Mechanics of Market Efficiency*, 70 VA. L. REV. 549, 565 (1984); John C. Coffee, *Market Failure and the Economic Case for a Mandatory Disclosure System,* 70 VA. L. REV. 717, 722–23 (1984).

95. *See* Lipton, *supra* note 41, at 511; Choudhury, *supra* note 40, at 189; Winden, *supra* note 39, at 1222; Williams, *supra* note 20, at 1212; BRANDEIS, *supra* note 18, at 62; BERLE & MEANS, *supra* note 20, at 239 (noting that disclosure enhances corporate accountability to shareholders and the public); Langevoort, *supra* note 20, at 453 (discussing ways in which securities disclosure promotes accountability); Fox, *supra* note 92, at 120.

96. *See* Choudhury, *supra* note 40, at 189 (noting the rise in interest in social disclosure stems from desire for improved transparency and accountability).

97. *See* Fisch, *supra* note 2, at 944; Ho, *Comply or Explain*, *supra* note 36, at 326 (noting that the primary source of ESG reporting is voluntary).

of 92% of S&P 500 companies published freestanding ESG reports.[98] This is up from 90% in 2019, 86% in 2018, and just 20% in 2011.[99] Importantly, this means that a decade ago, 80% of S&P 500 companies were not publishing any type of ESG report, while today only 8% of such companies do not publish such reports.[100] Moreover, research indicates that voluntary ESG reports were virtually non-existent prior to 2000.[101] In addition, 70% of Russell 1000 companies published ESG reports in 2020.[102] This reflects an increase from 65% of Russell 1000 companies with such reports in 2019, up from 60% in 2018.[103] In 2018, 92% of S&P 500 companies had some type of ESG information on their websites.[104]

F. Voluntary ESG and the Plague of ESG Hypocrisy

Unfortunately, voluntary ESG appears to be besieged with ESG hypocrisy. A long-standing concern exists around the accuracy and reliability of voluntary ESG disclosure.[105] A comprehensive review of voluntary ESG disclosure between 2016 and 2018 reveals significant dissatisfaction with such disclosure.[106] Survey data indicates that this

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98. *See* GOVERNANCE & ACCOUNTABILITY INST., 2021 S&P 500 AND RUSSELL 1000 SUSTAINABILITY REPORTING IN FOCUS 2 (2021), https://www.ga-institute.com/fileadmin/ga_institute/images/FlashReports/2021/Russell-1000/G&A-Russell-Report-2021-Final.pdf [hereinafter 2021 SUSTAINABILITY REPORTING IN FOCUS]. The reports have a variety of titles ranging from ESG reports to sustainability reports or corporate responsibility reports. For ease of reference, this article refers to such reports as ESG reports.

99. *See id.* at 3; GOVERNANCE & ACCOUNTABILITY INST., 2020 RUSSELL 1000 FLASH REPORT 3 (2020), https://www.ga-institute.com/research/ga-research-directory/sustainability-reporting-trends/2020-russell-1000-flash-report.html [https://perma.cc/8CKH-DU3T] [hereinafter 2020 RUSSELL 1000 FLASH REPORT] (noting 86% in 2020); *see also* Fisch, *supra* note 2, at 944 (noting that in 2016, 82% of S&P 500 companies published sustainability reports).

100. *See* 2021 SUSTAINABILITY REPORTING IN FOCUS, *supra* note 98, at 3.

101. *See* Lisa M. Fairfax, *Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 690–98 (2006).

102. *See* 2021 SUSTAINABILITY REPORTING IN FOCUS, *supra* note 98, at 4.

103. *See id.*; *see also* 2020 RUSSELL 1000 FLASH REPORT, *supra* note 99, at 4.

104. *See* INV. RESP. RSCH. CTR. & SUSTAINABILITY INST., STATE OF INTEGRATED AND SUSTAINABILITY REPORTING 2018, at 27 (2018).

105. *See* Fisch, *supra* note 2, at 950 ("[S]ustainability reporting is not reliable"); Ho & Park, *supra* note 46, at 255 (noting that rising demand for ESG information has been accompanied by growing dissatisfaction with disclosure).

106. *See* Virginia Harper Ho, *Disclosure Overload? Lessons For Risk Disclosure & ESG Reporting Reform From The Regulation S-K Concept Release,* 65 VILL. L. REV. 67, 81–82 (2020) [hereinafter Ho, *Disclosure Overload*]; *see also* Winden, *supra* note 39, at 1237 (noting that as interest in ESG factors has increased, investors have become increasingly vocal about their dissatisfaction with voluntary ESG reports, including their reliability and quality).

dissatisfaction has persisted into 2019 and 2020.[107] That data clearly aligns with investor concerns about the accuracy of data in voluntary ESG disclosures.[108] A 2021 Harvard Business Review article concluded that much of the information disclosed in voluntary ESG reports is misleading.[109] The SEC's climate proposal rule acknowledged the tremendous concerns with the accuracy of voluntary ESG disclosure.[110] The rule proposal identified academic research revealing evidence of companies engaging in "obfuscation and other misleading efforts" to manipulate their voluntarily disclosed ESG information.[111] These efforts, often referred to as greenwashing, reflect the practices of falsely conveying information about ESG activities, and research suggests that they are a prominent feature of voluntary ESG disclosures.[112] Accuracy concerns have caused investors to rely more heavily on the limited ESG information contained in mandated filing rather than the more robust information contained in voluntary ESG reports.[113] Viewed collectively, this research underscores the existence of significant ESG hypocrisy within the current voluntary ESG disclosure environment.

For the most part, critics' concerns around accuracy and hypocrisy are often used as the primary rationale for preferring mandatory

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107. *See* VIRGINIA HARPER HO, DISCLOSURE OVERLOAD? LESSONS FOR RISK DISCLOSURE & ESG REPORTING REFORM FROM THE REGULATION S-K CONCEPT RELEASE 5 n.17 (2020), https://www.conference-board.org/topics/ESG-reporting/disclosure-overload [https://perma.cc/T2N9-Z8EM].

108. *See* Sarah Bernow, et al., *More Than Values: The Value-Based Sustainability Reporting That Investors Want*, MCKINSEY & CO. (July 2019), https://www.mckinsey.com/business-functions/sustainability/our-insights/more-than-values-the-value-based-sustainability-reporting-that-investors-want [https://perma.cc/BTW3-C6V8]; Bernow et al., *supra* note 3; WARD ET AL., *supra* note 41, at 8; Robert G. Eccles et al., *Reputation and Its Risks*, HARV. BUS. REV., Feb. 2007, https://hbr.org/2007/02/reputation-and-its-risks [https://perma.cc/A3MM-89L9].

109. *See* Kenneth P. Pucker, *Overselling Sustainability Reporting*, HARV. BUS. REV., May–June 2021, https://hbr.org/2021/05/overselling-sustainability-reporting [https://perma.cc/SB2K-GXLW].

110. *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21,334, 21,335 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf.

111. *See id.* at 21,429.

112. *See id.*; *see also* Fisch, *supra* note 2, at 948; Choudhury, *supra* note 40, at 209–10 (noting concerns around the possibility of corporations manipulating information to show their ESG activities in a favorable light); David W. Case, *Corporate Environmental Reporting as Environmental Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 394 (2005) (suggesting that the practice we now refer to as greenwashing has been a source of concern for some time).

113. *See* Ho, *Disclosure Overload*, *supra* note 106, at 82.

disclosure.[114] Indeed, the SEC relied on accuracy concerns as one of the primary rationales for its mandated climate-rule proposal.[115] Importantly, despite some evidence that stakeholder trust in voluntary ESG disclosure has risen, less than a majority of the public trust the accuracy and reliability of voluntary ESG reports.[116] Surveys and studies continue to confirm investor and stakeholder suspicion associated with the accuracy of ESG information, and thus continue to reflect serious ESG hypocrisy issues.

II. HYPOCRISY MATTERS

This Part argues that the inaccuracies and hypocrisy in voluntary ESG disclosures matter for purposes of ESG accountability for several reasons. First, inaccuracies and ESG hypocrisy undermine the ability to use the wealth of ESG information contained in voluntary ESG disclosures. Not only are voluntary ESG disclosures more robust and detailed than those contained in required filings, but also this trend is likely to persist even if mandatory disclosure rules materialize. However, inaccuracies and public perception around hypocrisy in voluntary ESG disclosures undermine the ability to comfortably rely upon even the most high-quality ESG information in voluntary ESG disclosures. Second, inaccuracies and hypocrisy significantly undermine the ability to take advantage of the benefits of voluntary ESG disclosure. Voluntary disclosure offers benefits that cannot be replicated by mandatory disclosure. Beyond allowing more robust disclosure, voluntary disclosure allows companies flexibility in the both the content and the timing of their disclosures. However, we clearly cannot take full advantage of those benefits if we cannot be assured of the accuracy associated with voluntary ESG disclosure. Third, inaccuracies and hypocrisy, along with the perception of ESG hypocrisy, have a tremendously negative impact on corporate reputation. Corporations have increasingly used ESG

114. *See* Lipton, *supra* note 41, at 561–62; Alan L. White & Diana M. Zinkl, *Raising Standardization*, ENV. F., Jan.–Feb. 1988, at 28; Winden, *supra* note 39, at 1239 ("In the absence of significant improvement in the quality of voluntary sustainability reports prepared by corporations, academics have proposed structure for mandatory disclosure regimes"); Request for Rulemaking from Cynthia A. Williams & Jill E. Fisch to Brent J. Fields, Sec'y SEC (Oct. 1, 2018), https://www.sec.gov/files/rules/petitions/2018/petn4-730.pdf.

115. *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. at 21,340.

116. *See, e.g.*, Emily Holbrook, *Public Trust in Sustainability Reporting is Rising Sharply*, Oct. 14, 2020, https://www.environmentalleader.com/2020/10/public-trust-in-sustainability-reporting-is-rising-sharply/ [https://perma.cc/W8J6-BGBV].

information to enhance their reputation. However, if that information is inaccurate or otherwise viewed as mere ESG hypocrisy, corporations risk damage to that reputation along with the negative repercussions—financial and otherwise—that flow from that damage.

Such hypocrisy could also possibly lead to legal liability if a plaintiff can prove that ESG hypocrisy is tantamount to misrepresentation of material information. This liability stems both from shareholder suits alleging securities fraud as well as SEC action.[117] Shareholders have brought suits because of the disconnect between voluntary ESG disclosures and corporate behavior.[118] Moreover, the SEC has made clear that the voluntary nature of disclosure does not render it immune from securities fraud violations—and thus securities fraud violations can stem from ESG disclosure within documents voluntarily produced by corporations.[119] Thus, to the extent hypocrisy concerns spill over into concerns associated with misrepresentations of material information, then hypocrisy may pose litigation risk stemming from potential securities fraud.

Finally, a true understanding of the modern public disclosure regime makes clear that public disclosure—whether voluntary or mandatory—is linked, and thus dynamic, which means that those interested in the integrity of the overall disclosure regime must focus on voluntary disclosure.[120] Dynamic disclosure makes clear that inaccuracies and perceived hypocrisy with respect to voluntary disclosure undermine the integrity and reliability of the overall ESG disclosure regime. Rather than viewing mandatory and voluntary disclosure as competing frameworks, dynamic disclosure refers to the notion that voluntary disclosure and mandatory disclosure exist on a complementary continuum, pursuant to which voluntary disclosure serves as a gap-filler and extension of mandatory disclosure. Dynamic disclosure therefore makes clear that inaccuracies and hypocrisy in voluntary disclosure impact the mandatory disclosure regime. Viewed through the prism of dynamic disclosure, accuracy and hypocrisy matter because fraud matters. Failing to police accuracies in voluntary ESG disclosures leaves open the strong

117. *See* Daniel Wiessner, *The Gap Beats Shareholder Lawsuit Over Commitment to Diversity*, REUTERS (June 2, 2023), https://www.reuters.com/legal/government/gap-beats-shareholder-lawsuit-over-commitment-diversity-2023-06-02/ [https://perma.cc/JY7N-XH33] (discussing a lawsuit related to Gap's public statements on their commitment to racial diversity as compared to their progress diversifying their senior leadership).

118. *See id.*

119. *See* Commission Guidance on the Use of Company Web Sites, 73 Fed. Reg. 45,862, 45,869–70 (proposed Aug. 7, 2008) (to be codified at 17 C.F.R. pts. 241, 271).

120. *See* Fairfax, *Dynamic Disclosure*, *supra* note 19, at 280.

possibility that those disclosures will negatively impact the accuracy and reliability of the overall ESG disclosure regime, including mandatory disclosure in required public filings.

A. Hypocrisy and Reliance on the Richness of Voluntary ESG Disclosure

Voluntary ESG disclosure is considerably more robust and detailed than disclosure in required filings. As an initial matter, companies publish significantly more ESG information in their voluntary disclosure than they provide in required filings. Thus, even when companies report information around an ESG topic in their mandatory filings, they tend to report much more extensive information on that topic in their voluntary disclosure.[121] Voluntary ESG disclosures also encompass a wide range of ESG topics and information that do not appear anywhere in a company's mandatory filings.[122] Finally, the ESG information in voluntary disclosures is more detailed and specific than the ESG information contained in mandatory filings.[123]

Importantly, voluntary ESG disclosure is likely to always be more extensive than mandatory ESG disclosure. First, because mandatory reports include a wide variety of corporate information, there is likely a limit to the additional information a company can report on ESG matters. This limit is underscored by the fact that a sizable majority of corporations that published ESG information in their mandatory filings used those filings to highlight the existence of more detailed information contained in their voluntary disclosures.[124] Second, the wide array of ESG topics makes it inevitable that voluntary ESG disclosure will outstrip any mandatory disclosure. The SEC's regulatory behavior stresses this variety; the current ESG-related rule focuses solely on climate.[125] While climate is clearly a topic prioritized by both investors and corporations, it is still only one of a large number of other ESG topics. Third, it requires considerable time, expertise, and resources to propose and approve a mandated disclosure rule, further ensuring that

121. *See* GAO Report, *supra* note 10, at 25–28.

122. *See Sidley Report*, *supra* note 33, at 3 (noting that while most large companies provide voluntary ESG information, only 7% of those same companies provide any ESG information in their proxy or annual reports).

123. *See* GAO Report, *supra* note 10, at 28.

124. *See* Diamond et al., *supra* note 89, at 9 (noting that 84% of companies refer readers to more detailed information in voluntary ESG disclosures).

125. *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21,334, 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf.

mandatory disclosure will lag behind voluntary disclosure. Indeed, the constraints associated with mandatory disclosure mean that voluntary disclosure almost always predates mandatory disclosure. As a result, those constraints almost guarantee that voluntary ESG disclosure will be a richer source of ESG information than mandatory ESG disclosure.

Then too, even if the SEC mandates ESG disclosure on specific topics, the dynamic nature of the disclosure regime suggests that voluntary ESG disclosure will remain a fixture of ESG disclosure and will be significantly more extensive, particularly with respect to topics outside of climate and environmental issues. Elsewhere it has been argued that the disclosure regime is dynamic.[126] This means that voluntary and mandatory disclosure are not competing systems of disclosure, but rather both forms of disclosure coexist on a complementary continuum whereby mandatory disclosure relies on experiences gleaned from the voluntary disclosure regime, and voluntary disclosure serves to reinforce and extend mandatory disclosure.[127] Dynamic disclosure means that voluntary and mandatory disclosure is intertwined, and thus, mandated disclosure will not eliminate or otherwise crowd out voluntary disclosure.[128] Therefore, it is inadvisable to minimize inaccuracies and hypocrisy in voluntary ESG reports based on the notion that mandatory ESG disclosure will render voluntary ESG reports obsolete.

Of course, inaccuracies and hypocrisy undermine the ability to use this robust set of voluntary ESG disclosure as an accountability tool. We clearly cannot take advantage of the richer source of ESG information embedded in voluntary ESG disclosure if that source is not reliable. Thus, the lack of accuracy impedes any ability to use such disclosure as a tool for improving accountability.[129]

Inaccuracies and hypocrisy concerns also pose risks of securities fraud. Both the SEC and courts have held that ESG information can be material for purposes of securities fraud violations.[130] This means that shareholders can bring a securities fraud suit based on hypocrisy—and in fact some already have done so.[131] It also opens the door for SEC suits in these areas. The SEC also has made clear that the securities fraud laws apply to information disclosed outside of mandated filings, and

126. *See* Fairfax, *Dynamic Disclosure*, *supra* note 19, at 279.
127. *See id.*
128. *See id.*
129. *See* Hillary A. Sale, *Disclosure's Purpose*, 107 Geo. L.J. 1045, 1048 (2019).
130. *See In re* BP P.L.C. Sec. Litig., No. 4:12-CV-1256, 2013 WL 6383968, at *21 (S.D. Tex. Dec. 5, 2013) (finding non-financial information potentially material); *In re* Hi-Crush Partners L.P. Sec. Litig., No. 12 Civ. 8557 (CM), 2013 WL 6233561, at *18 (S.D.N.Y. Dec. 2, 2013) (finding the same).
131. *See* Wiessner, *supra* note 117 (discussing Gap).

thus applies to voluntarily disclosed information.[132] Concerns around accuracy make it plausible that at least some voluntary ESG disclosures are misleading and inaccurate. To the extent these hypocrisy concerns reflect concerns around misstatements of material information, those concerns pose securities fraud risks.

Importantly, uncertainty about the reliability of voluntary ESG information leads to discounting even high-quality accurate voluntary ESG information.[133] Indeed, it is entirely possible that many corporations are in fact accurately disclosing ESG information in their voluntary publications. Unfortunately, research strongly suggests that some voluntary ESG disclosures are misleading and inaccurate, which as noted above, clearly raises the possibility of securities fraud.[134] The existence of ESG hypocrisy and inaccurate voluntary ESG disclosure coupled with the inability to meaningfully distinguish between accurate and inaccurate ESG disclosures not only creates potential liability for securities fraud, but also undermines the reliability of all voluntary ESG disclosures. In other words, "[p]ublic skepticism engendered by misleading or inaccurate reporting undercuts incentives for even superior . . . performers to voluntarily report due to concern that even accurate, reliable informative reporting will be viewed as nothing more than greenwashing."[135] Many investors ignore the more extensive pool of data in voluntary ESG disclosure in favor of the much more limited information contained in mandated disclosure.[136] This is likely due to the inaccuracies or perceived inaccuracies associated with voluntary ESG disclosures. In this regard, ESG hypocrisy in voluntary disclosure taints the entire voluntary ESG disclosure landscape. By increasing investor and stakeholder confidence in the reliability of ESG information, ameliorating accuracy and hypocrisy concerns helps to salvage the role voluntary ESG disclosures can play in holding corporations accountable for their ESG activities.

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132. *See* Commission Guidance on the Use of Company Web Sites, 73 Fed. Reg. 45,862, 45,869–70 (proposed Aug. 7, 2008) (to be codified at 17 C.F.R. pts. 241, 271).

133. *See* Bradley Karkkainen, *Information as Environmental Regulation: Tri and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 290–91 (2001); White & Zinkl, *supra* note 114, at 29; Tom Tietenberg & David Wheeler, *Empowering the Community: Information Strategies for Pollution Control* 6, 9 (Frontiers of Env't Econ. Conf., Paper No. 90286, 1998), https://documents1.worldbank.org/curated/en/431471468147870698/pdf/902860WP0Box380WERING0THE0COMMUNITY.pdf.

134. *See supra* notes 129–30 and accompanying text.

135. *See* Case, *supra* note 112, at 395.

136. *See* Ho, *Disclosure Overload*, *supra* note 106, at 82.

B. Hypocrisy and Harnessing the Benefits of Voluntary ESG Disclosure

Voluntary ESG disclosure offers benefits that cannot be replicated with mandated reporting. First, voluntary disclosure offers flexibility with respect to the content of ESG disclosures. Unlike mandatory disclosure, which often demands that corporations disclose particular information, voluntary disclosure allows corporations the flexibility to determine the most appropriate information to disclose. This flexibility is particularly noteworthy with respect to ESG. Many have argued that the materiality of ESG information differs for different companies and different industries.[137] As a result, many resist mandatory ESG disclosure because of its inflexibility around this issue of materiality.[138] One benefit of voluntary ESG disclosure is that it enables corporations to tailor their disclosure to ESG matters they believe to be material to their particular industry or their particular corporation.[139]

Second, voluntary ESG disclosure offers flexibility with respect to the timing of ESG disclosure. Voluntary disclosure also gives corporations the ability to ramp up their disclosure cost-effectively.[140] Disclosure around ESG topics is a relatively new phenomenon. As a result, corporations may not have the internal policies, resources, expertise, or disclosure framework necessary to accurately disclose information on many ESG topics. A voluntary ESG disclosure framework gives corporations the time to implement such policies, practices, and framework and thus work up to high quality disclosure and the underlying oversight of ESG activities.[141]

Third, not only is voluntary ESG disclosure on websites and other public mediums more accessible to investors and stakeholders, but also it can be updated much more frequently.[142] Each of these are benefits

137. S*ee* Fairfax, *Dynamic Disclosure*, *supra* note 19, at 292.

138. *See* Hester M. Peirce, Comm'r, Sec. Exch. Comm'n, Statement: We Are Not the Securities and Environment Commission - At Least Not Yet (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321[https://perma.cc/XM5T-Z3G7].

139. *See* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2368, 2374 (1998); Paul G. Mahoney, *Mandatory Disclosure as Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1092 (1995); *see also* Winden, *supra* note 39, at 1222.

140. *See* FER Statement, *supra* note 14, at 5, 11; Amanda Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1834–35 (2021).

141. *See* Rose, *supra* note 140, at 1835.

142. *See* Diamond et al., *supra* note 89, at 9; Allison Herren Lee & Robert J. Jackson, *Joint Statement on Proposed Changes to Regulation S-K*, SEC. EXCH. COMM'N (Aug. 27, 2019), https://www.sec.gov/news/public-statement/statement-jackson-lee-082719 [https://perma.cc/A7HZ-SEAW].

that cannot be easily replicated with mandatory disclosure. To be sure, mandatory disclosure offers other benefits, including enabling greater comparability across companies and improving accuracy. However, there is no reason why we cannot harness these benefits even as we advocate for the benefits that mandatory ESG offers.

Of course, hypocrisy and inaccuracies in voluntary ESG disclosures undermine the ability to take advantage of the benefits of voluntary ESG disclosure.[143] We certainly cannot confidently rely on companies' own choices around materiality if we do not have sufficient confidence in the accuracy of the information supporting those choices.

C. *Corporate Reputation and ESG Hypocrisy*

ESG hypocrisy poses acute challenges to corporate reputation and thus to a corporation's financial bottom line. Recent research makes clear that corporations spend considerable sums on managing their reputations because reputations have a considerable impact on consumer, employee, and other stakeholder behavior and thus a corporation's bottom line.[144] Research also confirms the growing prominence of corporate commitment to ESG considerations in the evaluation of corporate reputation.[145] Companies use voluntary ESG reports to create or contribute to a positive reputation.[146] These reports represent the corporation's effort to generate positive reputation by positioning itself as actively engaging and supporting ESG activities.[147] Such efforts are being made with the understanding that positive corporate reputation is linked to positive corporate financial performance.[148]

If voluntary ESG reports are perceived as inaccurate, they create perceptions of corporate hypocrisy that could hurt corporate reputation. Research reveals that inconsistent ESG information has a significant

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143. *See* Rose, *supra* note 140, at 1834.
144. *See* Eccles et al., *supra* note 108; Paul Kontonis & Jonas Sickler, *What Does a Bad Business Reputation Cost*, COMMPRO (May 1, 2021), https://www.commpro.biz/news/what-does-a-bad-business-reputation-cost [https://perma.cc/8R7N-MBLN]; Keri Calagna & Matthew Davy, *Managing Reputation Risk*, WALL ST. J. (July 24, 2017, 12:01 AM), https://deloitte.wsj.com/cmo/2017/07/24/managing-reputation-risk/ [https://perma.cc/NNY6-A76S].
145. *See* Wagner, *supra* note 5, at 77 (noting that stakeholders' perceptions of a corporation's commitment to ESG issues influences corporate reputation).
146. *See id.* at 79.
147. *See id.*
148. *See Why Reputation Management Is So Important in a Business*, BUS. MATTERS (Nov. 24, 2019), https://www.bmmagazine.co.uk/in-business/advice/why-reputation-management-is-so-important-in-a-business/ [https://perma.cc/4KRQ-63NY]; Eccles et al., *supra* note 108; Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 920–21, 931 (2018).

and negative impact on perceptions of corporate hypocrisy and corresponding consumer behavior.[149] Indeed, problematic ESG disclosure can lead to considerable backlash and reputational harm.[150] Hypocrisy perceptions are significantly higher when corporations make positive ESG statements and follow them with inconsistent behavior.[151] This makes the hypocrisy concerns associated with the existing voluntary ESG disclosure especially acute. The volume of voluntary ESG disclosure means that there is a robust array of positive ESG statements that may form the basis of claims related to corporate hypocrisy and thus negative perceptions around ESG commitments. Hence, corporate hypocrisy concerns associated with the existing voluntary ESG disclosure landscape pose considerable risks to corporate reputation. From this perspective, reducing inaccuracies and the threat of corporate hypocrisy is critical to protecting corporate reputation and preventing the considerable harms that result from damage to corporate reputation.

D. Dynamic Disclosure, Hypocrisy, and Fraud

Dynamic disclosure means that mandatory and voluntary disclosure are inextricably linked.[152] Indeed, dynamic disclosure recognizes that investors rely upon both voluntary and mandatory disclosure to understand and monitor corporate activities, particularly corporate ESG activities.[153] Dynamic disclosure also highlights the fact that corporations voluntarily provide disclosures in recognition of this investor reliance.[154] This is especially true with respect to ESG information because the voluntary publication of such information is a clear response to investor appetite for that information.[155]

Dynamic disclosure has particular relevance for hypocrisy in voluntary disclosures. Dynamic disclosure means that inaccuracies and hypocrisy in voluntary disclosure will have a spillover effect, negatively impacting the integrity and reliability of the overall ESG disclosure regime, including disclosure in required public filings.

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149. *See* Wagner, *supra* note 5, at 80–81, 83.
150. *See* Richard Welford & Andrew Gouldson, Environmental Management and Business Strategy 150–51 (1993) (explaining that "green marketing" led to widespread consumer backlash, undercutting credibility of disclosure more generally).
151. *See* Wagner, *supra* note 5, at 83.
152. *See* Fairfax, *Dynamic Disclosure*, *supra* note 19, at 279.
153. *See id.* at 331.
154. *See id.* at 336.
155. *See* Fornasari, *supra* note 90, at 190 (noting that corporate ESG reporting has risen due to investor demand); Winden, *supra* note 39, at 1217 (noting that voluntary ESG reports reflect public companies' response to investor pressure).

Importantly, inaccuracies and hypocrisy in voluntary ESG disclosure may reflect securities fraud or other violations of the securities laws (both civil and criminal), which, given the linkage, can undermine the integrity of the overall ESG disclosure landscape. Some may believe that voluntary ESG disclosures have no securities fraud repercussions because ESG information may not be deemed material. However, both the SEC and courts have negated this belief, and instead made clear that ESG information can be viewed as material, particularly when it is more detailed and specific.[156] Some also may believe that voluntary ESG disclosures are outside of the purview of the federal securities laws because the ESG information is voluntary or appears outside of required filings on websites and other public venues. However, here again, the SEC has made clear the fallacy of this belief and has emphasized that the securities fraud laws apply to information provided in sources outside of periodic reporting.[157]

Inaccuracies and hypocrisy in voluntary ESG disclosure also may reflect securities violations associated with mandatory filings because they may reveal problematic omissions. The SEC assesses whether or not information in mandated filings is misleading by comparing them with statements outside of the filings, especially statements voluntarily published on websites and other public arenas.[158] From this perspective, when companies publish ESG information in mandatory filings, they should be especially mindful of the hypocrisy in voluntary ESG disclosures because inaccuracies and hypocrisy in such disclosures make them vulnerable to securities fraud allegations. In this regard, any anticipated mandated ESG disclosure does not negate the need to focus on ameliorating accuracy and hypocrisy concerns in voluntary reports.

III.
Three Pathways for Progress

This Article recommends three reforms aimed at ameliorating hypocrisy and enhancing the reliability and accuracy of voluntary ESG reporting: (1) SEC oversight, (2) board oversight, and (3) third party audits. Commentors on this Article have recommended choosing one of these three available reforms, even if imperfect. While acknowledging

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156. *See In re* BP P.L.C. Sec. Litig., No. 4:12-CV-1256, 2013 WL 6383968, at *21 (S.D. Tex. Dec. 5, 2013) (finding non-financial information potentially material); *In re* Hi-Crush Partners L.P. Sec. Litig., No. 12 Civ. 8557 (CM), 2013 WL 6233561, at *18 (S.D.N.Y. Dec. 2, 2013) (finding the same).

157. *See* Commission Guidance on the Use of Company Web Sites, 73 Fed. Reg. 45,862, 45,869–70 (proposed Aug. 7, 2008) (to be codified at 17 C.F.R. pts. 241, 271).

158. *See* GAO Report, *supra* note 10, at 34–37.

this desire to prioritize, this Article nonetheless maintains that advancing all three reforms is important for at least two reasons. First, the reforms are complementary, each making up for shortcomings of the others. Second, a combination of all three reforms better aligns with the existing accountability apparatus for traditional financial reporting. Indeed, financial disclosures are subject to SEC oversight through mandatory reporting obligations, rigorous board oversight through board certification and independent board committee review, and independent third-party audits that certify the legitimacy of financial disclosures. From this perspective, reliance on all three of these mechanisms for attacking hypocrisy and enhancing accuracy in voluntary ESG disclosure is not only more likely to put ESG disclosure on the same footing as traditional financing disclosure but also more likely to ensure the most robust level of accountability. Thus, this Article asserts that ESG advocates should seek to pursue all three accuracy reforms.

A. Enhanced SEC Oversight

Although, in theory, sustainability reports are public disclosures, it is unclear whether greenwashing or other false disclosures in these reports would subject the issuer to liability for federal securities fraud.[159]

The SEC has an array of tools at its disposal to prevent hypocrisy and enhance the level of accuracy and reliability of voluntary ESG reporting. These range from providing more intentional guidance, increasing examination of voluntary ESG disclosures, increasing examination of the divergence between voluntary disclosures and required disclosures, to enhancing enforcement efforts.[160] Any of these actions are likely to improve accuracy because investors have greater confidence in disclosures when the SEC makes clear that it is providing oversight over those disclosures.[161]

Professor Andrew Winden has proposed increased SEC oversight of voluntary ESG disclosures by requiring corporations to file such voluntary disclosures with the SEC on Form 8-K.[162] According to Winden, such a requirement would mean that voluntary disclosures would be subject to Rule 10b-5 liability, but not Section 11 liability

159. *See* Fisch, *supra* note 2, at 950.
160. *See* Winden, *supra* note 39, at 1220.
161. *See* Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures*, 23 U. Pa. J. Bus. L. 740, 792–95 (2021) (describing SEC guidance related to ESG disclosures); Winden, *supra* note 39, at 1257.
162. *See* Winden, *supra* note 39, at 1220.

because they would not be deemed incorporated by reference to any registration statement.[163]

On the one hand, this proposal may be redundant. Indeed, the SEC's prior guidance makes clear that voluntarily disclosed information is subject to Rule 10b-5 liability.[164] In this regard, Winden's proposal is unnecessary to ensure that federal securities laws cover voluntarily disclosed ESG information. Moreover, the fact that the federal securities laws already apply to voluntary ESG disclosures means that the SEC already has the ability to increase its enforcement efforts in this area.

On the other hand, it is entirely possible that such a requirement may have value. Indeed, the fact that the federal securities laws already apply to voluntary disclosures and that those disclosures tend to have more inaccuracies than mandated disclosures begs an important question about how such discrepancies exist. Such discrepancies suggest that corporations do not impose the same level of rigor on disclosures that do not appear in required filings. In Winden's view, requiring disclosure of voluntary ESG reports on Form 8-K would enhance the quality, accuracy, and reliability of voluntary ESG disclosure not only because it increases the likelihood that the SEC would pay attention to such disclosures, but also because it increases the likelihood that corporations will establish the internal controls and processes necessary to ensure the accuracy of any reported data.[165] In this regard, Winden insists that requiring corporations to furnish ESG disclosures on Form 8-K will better ensure that voluntarily disclosed ESG information is subject to the kind of rigor corporations use when disclosing required financial information to the SEC. Importantly, the SEC appears to agree with this contention. In its climate change rule proposal, the SEC notes that the voluntary nature of disclosure may not provide the necessary incentives or discipline to ensure that disclosure is complete and robust.[166] To this end, the SEC notes that one key benefit of requiring that information is "*filed* with the Commission as opposed to posted on company websites" is that it improves the accuracy and reliability of the disclosure presumably because such a filing improves investor confidence while also providing the needed incentives to ensure greater accuracy.[167] As a result,

163. *See id.* at 1257.
164. *See* Commission Guidance on the Use of Company Web Sites, 73 Fed. Reg. 45,862 (proposed Aug. 7, 2008) (to be codified at 17 C.F.R. pts. 241, 271).
165. *See id.*
166. *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21,334, 21,342 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf.
167. *See id.* at 21,429.

such a proposal may serve to increase SEC and corporate attention on the accuracy of voluntary ESG disclosure.

Even if the SEC does not go as far as adopting Winden's proposal, it can still use other tools to encourage greater accuracy. These range from issuing guidance that may put corporations on notice about the importance of ameliorating accuracy concerns with voluntary ESG disclosures to stepping up enforcement in this area. SEC guidance serves as an important signal that focuses corporate attention on key issues. Indeed, the SEC recently issued guidance making clear that it was comparing information in voluntary disclosures with information in mandated filings.[168] After issuing such guidance, the SEC sent comment letters to several companies highlighting discrepancies between its voluntary and mandatory disclosures.[169] This kind of action sends a message to the entire corporate community that may ensure that corporations pay closer attention to the content and accuracy of their voluntary ESG disclosures. With respect to enforcement, it may only take a few high-profile SEC enforcement actions related to voluntary ESG disclosures to focus corporate attention on the need to police accuracy in their voluntary disclosures.

Reliance on SEC efforts poses several challenges. First is the question of effectiveness. Most of the above-mentioned tools are already available to the SEC for purposes of policing inaccurate ESG disclosures. Indeed, the SEC has issued guidance in the past not only making clear that it reviews public disclosures beyond required filings, but also stating that SEC staff "actively" compares information companies voluntarily provide to information disclosed in SEC filings.[170] Moreover, the SEC's past guidance about the applicability of securities fraud laws beyond mandated disclosure clearly supports the conclusion that inaccuracies in voluntary disclosures outside of required filings reflect a violation of the federal securities laws.[171] The fact that such guidance exists alongside serious concerns around accuracy in voluntary ESG disclosures suggest that guidance may be insufficient to encourage improved corporate behavior or the necessary investor confidence in that behavior. The existence of such historical guidance therefore begs

168. *See id.* at 21,339.

169. *See* Andrew Ramonas, *SEC Boosts Climate Disclosure Scrutiny Before Reporting Mandate*, BLOOMBERG (Jan. 19, 2022, 6:00 AM), https://news.bloomberglaw.com/securities-law/sec-boosts-climate-disclosure-scrutiny-before-reporting-mandate?context=article-related [https://perma.cc/L7HB-WX8B].

170. *See* Diamond et al., *supra* note 89, at 10.

171. *See* GAO Report, *supra* note 10, at 34–37; *see also* Commission Guidance on the Use of Company Web Sites, 73 Fed. Reg. 45,862, 45,870 (proposed Aug. 7, 2008) (to be codified at 17 C.F.R. pts. 241, 271).

the question about the effectiveness of additional guidance in this area. It also begs the question about whether the SEC will in fact use the tools in its arsenal to pay closer attention to divergences between voluntary and mandated disclosures or otherwise take appropriate action in the face of such divergences. At the very least, these observations suggest that the SEC needs to take more specific actions, including issuing more detailed or directed guidance or bringing enforcement action. A single, notable public enforcement action can have an outsized impact on spotlighting and impacting corporate conduct.

The second concern related to reliance on the SEC centers on political and practical feasibility. Indeed, the SEC's willingness to engage on ESG matters—including any engagement related to disclosure—depends on broader political forces. Whether or not the SEC will focus its guidance or enforcement efforts on voluntary ESG disclosures depends on the political agenda and priorities of the SEC. To be sure, the current administration has clearly prioritized climate and ESG issues. However, administrations may change, causing the SEC to change its goals and priorities. This fact underscores the relative uncertainty with relying on the SEC to ensure adherence to ESG matters.

A third concern is SEC resource constraints. It is certainly not clear whether and to what extent the SEC has the necessary resources to devote to enhancing review of voluntary ESG disclosures. Perhaps more importantly, one may legitimately question if the SEC should devote its time and attention to policing voluntary ESG disclosures and detract from the SEC's other activities.[172] This Article insists that this endeavor is a legitimate and appropriate use of resources; it is a modest proposal that only seeks to encourage action based on pre-existing guidance using tools already at the SEC's disposal. Hence, it is a limited—but potentially impactful—use of SEC resources. However, without devoting sufficient resources, seeking to enhance the accuracy of ESG disclosures through SEC oversight likely will have no teeth.[173] The fact that the SEC currently has the tools to police inaccuracies in voluntary reporting but does not appear to have used them underscores the importance of resources. Moreover, the SEC's inaction does not bode well for its willingness to use additional tools such as the one anticipated by Winden's proposal.

172. *See* FER Statement, *supra* note 14, at 4.
173. *See* Winden, *supra* note 39, at 1263 (noting that the success of a proposal focused on SEC review depends upon whether the SEC devotes the necessary resources to that review).

Fourth is potential cost compliance concerns. Any disclosure obligation involves costs.[174] Indeed, in its climate proposal the SEC specifically emphasized that "disclosures are not costless."[175] Disclosure costs include the costs of overseeing the disclosure process as well as the costs of harmonizing differences between disclosure documents.[176] The argument that disclosure is costly proves too much; it applies to any disclosure proposal. The critical question is whether the disclosure costs are justified. This Article insists that they are. Indeed, the cost of disclosure may be minimal because any new disclosure obligation would piggyback off of existing disclosures rather than requiring the production of new disclosures.[177] Given corporations' existing obligation to produce accurate information, the cost is one the system already expects corporations to bear. Finally, the costs are outweighed by the benefits of ensuring reliable disclosures. Indeed, there are real costs associated with the failure to produce accurate ESG disclosure, including waste associated with producing disclosures that have limited utility as well as reputational harm and the potential for fraud.

Fifth, any form of SEC oversight runs the risk of reducing the nature and quality of voluntary ESG disclosure. Voluntary ESG disclosure is significantly more extensive and more detailed than ESG disclosure contained in mandated reporting.[178] As an example, a review of S&P 500 filings of climate risk disclosure found that such companies use "boilerplate language of minimal utility to investors."[179] Companies use vague or generic statements such as "natural disasters such as hurricanes or earthquakes, may impact our operating results," rather than language that is specific to a company's line of business or geographic location.[180] Some have opined that the divergence between the more detailed voluntary disclosure and the more limited mandated disclosure stems from concerns about liability risks associated with mandated disclosure.[181] This concern suggests that greater SEC focus on voluntary ESG disclosure not only may cause corporations to reduce their

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174. *See* FER Statement, *supra* note 14, at 4; Choudhury, *supra* note 40, at 198.

175. *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21,334, 21,426 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf.

176. *See* Rose, *supra* note 140, at 1832.

177. *See* Winden, *supra* note 39, at 1220, 1259–60.

178. *See supra* notes 121–23 and accompanying text.

179. *See* JIM COBURN & JACKIE COOK, COOL RESPONSE: THE SEC & CORPORATE CLIMATE CHANGE REPORTING 5 (2014), https://www.ceres.org/sites/default/files/reports/2017-03/Ceres_SECguidance-append_020414_web.pdf.

180. *See id.* at 13, 35.

181. *See* GAO Report, *supra* note 10, at 27.

disclosure but also may lead to less detail and more boilerplate language in voluntary ESG disclosure.

This concern may be overstated. As an initial matter, it is entirely possible that the less robust ESG information in required filings is a result of the practical reality that required filings are already very long and cover a broad range of topics, necessitating that corporations limit any additional disclosures. If this is accurate, then it undercuts the argument that SEC focus on *voluntary* ESG disclosure will necessarily result in reduced ESG information. Then too, it may be unrealistic to assume that corporations will have the ability to significantly reduce the specificity of their voluntary ESG disclosure.[182] ESG reports and other voluntarily produced ESG information are the direct result of shareholder and stakeholder demand; that demand has translated into longer and more detailed ESG reports and information. It is hard to imagine that, in the face of growing demand and sustained pressure, corporations will feel free to cut back on their ESG disclosures. Finally, less disclosure is not necessarily a bad outcome because more disclosure is not always good.[183] Therefore, such an outcome may reflect an appropriate tradeoff if it results in higher quality disclosure.

Sixth is the problem of information overload. There is a considerable amount of existing disclosure.[184] While we can debate the extent to which there exists information overload with respect to ESG matters,[185] this proposal does not seek more information. It instead aims to enhance the quality of the information already being presented.

Then too, there are the costs related to the potential of increased shareholder suits. Any increased focus and attention around fraud and enforcement brings with it the potential for increased shareholder suits, including shareholder strike suits. Even if without merit, such suits can be distracting and costly. Of course, ways to minimize this concern exist, and thus we could consider developing strategies to blunt the impact of such suits such as limiting enforcement actions to the SEC or capping damages.[186] Additionally, this is not a new cost; the current securities regime already exposes corporations to liability for

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182. *See* Winden, *supra* note 39, at 1259 (noting that the proposition that SEC oversight would lead to a decline in ESG reports is "probably overblown").

183. *See* Lipton, *supra* note 41, at 569; Paula Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1127–28 (2007); Steven Davidoff & Claire Hill, *The Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 624 (2013).

184. *See* Choudhury, *supra* note 40, at 198.

185. *See* Ho, *Disclosure Overload*, *supra* note 106, at 74–78.

186. *See* Hazen, *supra* note 161, at 791 (suggesting the need for an ESG disclosure safe harbor to mitigate litigation risks).

inaccuracies. Shareholder suits are also not always undesirable; these suits represent an important avenue to police corporate misbehavior (including fraudulent misbehavior), especially when the SEC does not have the resources or bandwidth to engage in such efforts. Thus, we should not shy away from SEC oversight merely because they may trigger increased shareholder suits.

Ultimately, while relying on the SEC involves costs, it does offer tremendous benefits and hence should be part of the solution to ESG hypocrisy and inaccuracy. Importantly, SEC oversight of voluntary ESG disclosure may be less costly than anticipated if it is incorporated into a plan to mandate ESG disclosure. Moreover, SEC oversight of voluntary ESG disclosures may be more efficient because it may align with the SEC's broader oversight efforts. Because the SEC has already made the decision to devote resources towards overseeing ESG disclosure, SEC oversight may be more appropriate and less burdensome.

B. Board Oversight of Hypocrisy

Corporate board oversight is another important tool for addressing ESG hypocrisy and ensuring accuracy and reliability of voluntary ESG disclosure. Board oversight can take many forms ranging from increased review of voluntary ESG disclosure to board certification of ESG reports. One of the primary reasons investors view voluntary disclosure skeptically is that the absence of board review means that such disclosure is not subject to the more rigorous process associated with mandated disclosure.[187] Historically, a corporation's marketing department oversaw much of the disclosure on corporate websites without even the board's awareness, much less input.[188] Even if these practices have shifted, investors and the public do not appear to have a clear awareness of the shift, leading them to discount ESG information in the public sphere. Thus, efforts to ramp up board review, especially if coupled with public disclosure of those efforts, may help alleviate accuracy and reliability concerns. Importantly, it may be that corporations are already engaging in enhanced efforts at board oversight of these voluntary disclosures.[189] Public disclosure of their efforts is aimed at

187. *See* Winden, *supra* note 39, at 1257.

188. *See* Eccles et al., *supra* note 108; Winden, *supra* note 39, 1257 (citing a 2016 letter noting that production of ESG reports were "loosely-controlled" and subject to "disjointed processing").

189. Most recent proxy report data reflects an increased level of disclosure around board oversight of ESG matters. *See Sidley Report, supra* note 33, at 3; *SC 2021 Proxy Report*, *supra* note 33, at 20–22; *see also* Diamond et al., *supra* note 89, at 5.

giving shareholders and stakeholders added assurance associated with board oversight.

Board oversight could also take the form of board certification of voluntary ESG reports. Not only do boards have experience with certifying important public information, but also some scholars have recommended certification in the context of ESG reports as a mechanism for enhancing board accountability and investor confidence with respect to ESG information.[190]

Recent trends in fiduciary duty law emphasize the importance of board oversight over ESG matters. Indeed, courts have insisted that boards must establish information and reporting systems reasonably designed to provide them with information about the corporation's activities and compliance with laws.[191] Delaware's decision in *Caremark* makes clear directors' obligation to monitor corporate conduct.[192] This duty extends to ensuring that information and reporting systems are in place as well as actively monitoring the adequacy of the information and reporting process.[193] More importantly, recent cases indicate Delaware courts' willingness to hold directors responsible for appropriately monitoring ESG-related activities.[194] These cases underscore the importance of board-level monitoring ESG issues, at least to the extent they can be described as mission critical.[195] One recent opinion is replete with concerns about the corporation's inattention to ESG matters and the fact that their cost-cutting, profits-first business model exposed the corporation to risks.[196] Delaware courts also have indicated that boards do not comply with their responsibilities by simply focusing on general risk; instead boards need to focus on specific ESG risk in order to comply with their oversight duties.[197] As one set of researchers notes,

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190. *See* Fisch, *supra* note 2, at 958.

191. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 969–70 (Del. Ch. 1996); Stone v. Ritter, 911 A.2d 362 (Del. 2006) (affirming *Caremark* standard for directors' obligations).

192. *See In re Caremark*, 698 A.2d at 969–70.

193. *See id.* at 970; Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019); *In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934, at *26–27 (Del. Ch. Sept. 7, 2021); *In re* Citigroup Inc. Shareholder Derivative Litig., 964 A.2d 106, 123 (Del. Ch. 2009) (citing *Stone*).

194. *See Marchand*, 212 A.3d at 823–24; *In re Boeing*, 2021 WL 4059934, at *5; *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188, at *13–15 (Del. Ch. Oct. 1, 2019).

195. *See Marchand*, 212 A.3d at 822–24; *In re Boeing*, 2021 WL 4059934, at *6–7; *In re Clovis*, 2019 WL 4850188, at *13.

196. *See In re Boeing*, 2021 WL 4059934, at *5–6; *see also Marchand*, 212 A.3d at 823.

197. *See In re Boeing*, 2021 WL 4059934, at *5–6; *see also Marchand*, 212 A.3d at 823 (compliance with outside regulations related to ESG matters is not sufficient to reflect board compliance with its duties).

"recent legal opinions and regulatory guidelines make it clear that it is a violation of fiduciary duty not to consider [ESG] factors."[198] It is not entirely clear whether and to what extent these recent decisions reflect a significant embrace of board oversight of ESG activities, given the emphasis in those cases on mission-critical ESG activities or activities that impact a corporation that has a monoline business.[199] However, such cases underscore courts' willingness to hold boards accountable for ESG even if in only a limited fashion. Thus, this Article's recommendation of board-level oversight of voluntary ESG disclosure is compatible with the current direction of fiduciary duty law.

Board oversight of ESG also aligns with changing investor demands and emerging corporate governance best practices.[200] Proxy advisors guidance and shareholder engagement reports indicate an increased expectation of board-level ESG oversight.[201] A 2020 survey revealed that 88% of the largest companies reported board oversight of ESG issues and 44% of such companies increased disclosure related to board oversight of ESG issues in their 2020 proxy statements.[202] Most boards locate this oversight function in their nomination and governance committee, while others have begun to create stand-alone ESG committees.[203] Hence, a reliance of board oversight on ESG aligns with both investor expectations and ways corporate governance practices are evolving.

To be sure, board oversight of voluntary ESG disclosures presents several challenges. First, boards have a significant amount of oversight obligations; adding more oversight responsibilities to their plate may be impractical and infeasible.[204] We need to be mindful of the board's capacity to effectively monitor the broad range of corporate activities they have been increasingly expected to manage.[205] However, boards already are being tasked with oversight of ESG activities; holding

198. *See* Eccles & Klimenko, *supra* note 2.

199. *See Marchand*, 212 A.3d at 822–23; *In re Boeing*, 2021 WL 4059934, at *6; *In re Clovis*, 2019 WL 4850188, at *13.

200. *See* Martin Lipton et al., *Some Thoughts for Boards of Directors in 2021*, WACHTELL, LIPTON, ROSEN & KATZ 3–4 (Dec. 7, 2020), https://www.wlrk.com/docs/Some_Thoughts_for_Boards_of_Directors_in_2021.pdf (noting an expectation for "ESG competent" boards).

201. *See* Diamond et al., *supra* note 89, at 5, 9.

202. *See id.*

203. *See* Lipton et al., *supra* note 200, at 4 (noting that it may be appropriate to adjust oversight of the ESG function either by creating a new board committee or by refining the mandate of specific committees).

204. *See* Lisa M. Fairfax, *Managing Expectations: Does the Directors' Duty to Monitor Promise More Than It Can Deliver?*, 10 U. ST. THOMAS L.J. 416, 418, 441 (2012).

205. *See id.*

them responsible for disclosure related to those activities thus may not impose a significant additional burden. This observation certainly aligns with recent proxy disclosures revealing increased board oversight in this area.[206]

Second, board oversight promises to be costly, especially if it includes a certification requirement. When boards are asked to pay closer attention to specific actions, that ask has a price tag. It requires greater internal controls and the implementation of a more rigorous review process. However, such costs may be a necessary result of ensuring greater accuracy, and thus may be outweighed by the benefits of that accuracy.

Third, given the vast array of ESG matters, board oversight of voluntary ESG disclosures may expose the board to significantly more liability risks. This may be underscored by recent findings of liability in board oversight cases related to ESG matters.[207] However, succeeding in an oversight claim is very rare and difficult.[208] Moreover, encouraging board oversight of voluntary ESG disclosures may actually minimize boards' liability risk. Courts have made it clear that liability risk is greatest when boards do not engage in active oversight of ESG matters, and when boards do not have specific processes in place to monitor and discover issues related to ESG.[209] To the extent board oversight of voluntary ESG disclosures encourages boards to create policies and procedures for understanding ESG matters, those actions will likely protect them from liability.

Fourth, one may question if the board has the needed expertise to engage in oversight of ESG issues. Those critical of corporate involvement in ESG consistently point out that boards may not have the expertise to resolve stakeholder tradeoffs or nonfinancial issues.[210] Supporters disagree and insist that the realities of the business world suggest that boards are already heavily engaged in oversight and discussion around ESG matters and issues impacting non-shareholder stakeholders.[211] Perhaps more importantly, this expertise concern is solvable. For decades scholars have argued that board diversity is linked to improved

206. *See generally Sidley Report*, *supra* note 33.
207. *See* Marchand v. Barnhill, 212 A.3d 805, 822 (Del. 2019).
208. *See id.*
209. *See id.* at 813; Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006); *In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934, at *5–7 (Del. Ch. Sept. 7, 2021); *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188, at *12 (Del. Ch. Oct. 1, 2019).
210. *See* Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 24–25; Bainbridge, *supra* note 71, at 1435–36; Green, *supra* note 16, at 1421.
211. *See* Mayer, *supra* note 16, at 1863.

corporate performance precisely because it better ensures that boards include the range of perspectives necessary to understand and assess the array of stakeholder-related issues they are being asked to oversee.[212] From this perspective, the need for board-level oversight of ESG, including voluntary ESG disclosure, aligns with growing investor calls for board diversity and the need to actively recruit board candidates with diverse backgrounds and perspectives in order to meet the evolving responsibilities of today's corporate board.[213]

Board oversight of ESG hypocrisy is only as valuable as shareholder and stakeholder belief in the integrity of that oversight. This may depend on both the nature and public disclosure of oversight; it also may depend on public perceptions around board independence and reliability. Nonetheless, board oversight is a critical aspect of any

212. *See* AARON DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 58–59 (Cambridge University Press 2015); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 382–83 (2014); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 795, 810–11 (2005); David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 34 (2003); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306–08 (2003) (noting that "diversity may enhance board effectiveness"); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837, 840–41 (2003); Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1391–96, 1403 (2002); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 75–76 (2000); Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 494 (1999).

213. *See generally* Alexander Osipovich, *Nasdaq's Board-Diversity Proposal Wins SEC Approval*, WALL ST. J. (Aug. 6, 2021, 3:48 PM), https://www.wsj.com/articles/nasdaqs-board-diversity-proposal-faces-sec-decision-11628242202 [https://perma.cc/R7Z9-5DC5]; Cydney Posner, *BlackRock Advocates That at Least Two Women Be on Each Company Board*, COOLEY PUBCO (Feb. 6, 2018), https://cooleypubco.com/2018/02/06/blackrock-advocates-that-at-least-two-women-be-on-each-company-board/ [https://perma.cc/9RVB-2ZM8]; GOVERNANCE INSIGHTS CENTER, PWC'S 2018 ANNUAL CORPORATE DIRECTORS SURVEY 18 (2018), https://www.pwc.com/us/en/governance-insights-center/annual-corporate-directors-survey/assets/pwc-annual-corporate-directors-survey-2018.pdf; DELOITTE & SOCIETY FOR CORPORATE GOVERNANCE, BOARD PRACTICES REPORT: COMMON THREADS ACROSS BOARDROOMS 6 (2018), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/2018-board-practices-report.pdf; Richard Vernon Smith, *California Mandates Female Representation on Public Company Boards*, FORBES (Oct. 1, 2018, 12:04 PM), https://www.forbes.com/sites/allbusiness/2018/10/01/california-mandates-female-representation-public-company-boards/#6fb4e2f81775; Brad W. Pacheco & Wayne Davis, *CalPERS Expands Engagement for Greater Diversity to More Than 500 U.S. Companies*, CALPERS (Aug. 22, 2017), https://www.calpers.ca.gov/page/newsroom/calpers-news/2017/engagement-corporate-board-diversity [https://perma.cc/4JWN-UB2M].

accountability regime. Hence, attention must be given to the best way to ensure appropriate and effective board monitoring in this area.

C. Third-Party Audits

Board oversight still relies on corporate actors self-policing; several commentators have emphasized the need for third-party auditing or validation of voluntary ESG reports. Accuracy and hypocrisy concerns often stem from a presumption that voluntary ESG reports have not been subjected to a rigorous process of creation and review and are instead generated by marketing professionals. In contrast, required filings undergo rigorous internal review and approval. Several commentators have emphasized the need for third-party auditors to close this gap. Professor Virginia Harper Ho has noted that the reliability of voluntary reporting depends on private auditing third-party assurance systems that attest to the integrity of the disclosures.[214] Further, in the absence of an independent, third-party audit, the accuracy of any voluntary data simply cannot be assured.[215] Research from McKinsey insists that investors cannot be fully comfortable with any voluntary reporting because there is no validation or auditing of the reported data.[216] Researchers from the Governance & Accountability Institute similarly have opined that some form of external auditing "provides increased recognition, transparency, and credibility of a company's ESG disclosures while reducing risk."[217]

Importantly, experts have maintained that third-party auditing is linked to strong internal controls. "Seeking external assurance often indicates strong internal reporting and management systems."[218] This observation strengthens this Article's thesis about the importance of all three reforms for ensuring robust ESG accountability.

However, there is not yet robust or well-developed third-party auditing of ESG reports. A growing number of companies are seeking some form of external audit. A 2021 study revealed that 35% of Russell 1000 companies relied on third-party auditors in 2020, which represents a 46% increase from 2019.[219] However, digging deeper into these figures reveals variations that suggest that ESG auditing is neither robust nor very well-developed. First, more large companies than smaller

214. *See* Ho, *Comply or Explain*, *supra* note 36, at 327.
215. *See* Ward et al., *supra* note 41, at 8; Eccles & Klimenko, *supra* note 2 (noting the lack of "rigorous audit by third party").
216. *See* Bernow et al., *supra* note 3.
217. *See* 2021 Sustainability Reporting in Focus, *supra* note 98, at 18.
218. *See id.*
219. *See id.*

companies are seeking some form of audit: 44% of S&P 500 companies obtain some type of audit for their ESG report, while only 18% of companies in the smallest half of the Russell 1000 relied on audits.[220] This means that the sizeable majority of ESG reports do not have any third-party external audit.[221] Second, it is rare for any company to audit their entire ESG report. Only 3% of companies that provided an audit did so for the entire report.[222] Companies limited the audit to specified sections of the ESG report, with the most commonly audited section being the one focused on greenhouse gas emissions.[223] Third, research suggests that the level of external assurance varies, with only 7% of audits providing reasonable or high assurance, while some 90% of audits provide only a limited or moderate level of assurance.[224] Finally, the provider for these assurances varies, with only 14% of assurances being done by accountants, 31% being conducted by small consultancy/boutique firms, and 55% being done by engineering firms.[225]

There is not yet a set of best practices around auditing for ESG information. Indeed, the variation in assurance providers underscores the fact that there are as yet no uniform standards for ESG assurance providers.[226] There is also disagreement about what kind of third-party entity is best positioned to ensure data accuracy for voluntary ESG reports.[227] Such disagreement suggests that the market for third-party auditing is still evolving. While a proposal based solely on third-party auditors may not be feasible, at least in the near term, one would expect the market—and corresponding best practices related to that market—to develop and meet the growing demand in this space.

Reliance on third-party auditors is not without its drawbacks. First, this reliance raises its own accuracy and credibility concerns.[228] Indeed, relying on third-party assurers may create additional concerns around data integrity because third parties must rely on data provided to them by issuers.[229] Additionally, third-party auditors' use of proprietary methodologies and information may make it difficult to understand how they evaluate companies.[230] Second, reliance on third-party auditors

220. *See id.*
221. *See* Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307, 339–40 (2023).
222. *See* 2021 SUSTAINABILITY REPORTING IN FOCUS, *supra* note 98, at 18.
223. *See id.*
224. *See id.*
225. *See id.*
226. *See* Ho, *Comply or Explain*, *supra* note 36, at 327.
227. *See id.*
228. *See* Fisch, *supra* note 2, at 927–28.
229. *See id.*
230. *See id.*

imposes an additional cost on companies. Finally, such reliance raises questions of whether and to what extent we will need to provide oversight over the auditors.[231]

Given the infancy of the third-party auditor market in this area, it may be some time before we can credibly rely on auditors as a source of accountability. However, it would be a mistake to ignore the need for independent auditors. Indeed, no one would find it appropriate to jettison third-party audits of financial reports. Instead, such audits are viewed as an indispensable measure for ensuring the integrity of financial information disclosed to the public. The fact that researchers link third-party auditing to the strength of internal oversight underscores the interconnected nature of these audits to ensuring the overall integrity of ESG reporting.[232] Thus, it seems inadvisable to completely dismiss the need for an independent audit of ESG information, particularly because such information is increasingly quantitative in nature.

Conclusion

This Article argues that we must remain vigilant with respect to corporate hypocrisy in ESG disclosures. ESG hypocrisy is real and negatively impacts the corporation, its reputation, and our ability to trust the growing deluge of ESG commitments being made by corporations. ESG disclosure appears to be a cure for ESG hypocrisy. ESG disclosure is aimed at combatting ESG hypocrisy and ensuring that corporations can be held accountable for their ESG commitments and activities by providing shareholders and stakeholders with the information they need to understand and monitor corporate behavior as it relates to ESG. To this end, investor and stakeholder demand has translated into a significant amount of voluntary ESG disclosure. While that disclosure varies, it has increasingly become more detailed and more voluminous, particularly when compared to ESG disclosure currently found in required public filings.

Complaints about ESG hypocrisy and disclosure accuracy too often mean that investors and stakeholders choose to ignore voluntary ESG disclosure in favor of less voluminous ESG disclosure in mandated filings. Those complaints are often "Exhibit A" for those demanding greater mandated ESG disclosure. It appears that the SEC will finally respond to those demands. However, this Article insists that mandated ESG disclosure should not result in the failure to focus on ameliorating ESG hypocrisy associated with voluntary ESG disclosure.

231. *See id.*
232. *See* 2021 Sustainability Reporting in Focus, *supra* note 98, at 18.

We must remain attentive to voluntary disclosures. Voluntary ESG disclosure is important. So too is curbing ESG hypocrisy by enhancing the accuracy and reliability of such disclosure. While this Article does not refute the benefits of mandated ESG disclosure, this Article does insist that voluntary ESG disclosure has tremendous benefits that we should take the opportunity to harness. Voluntary disclosure can contain a broader and more detailed set of information. Companies can benefit from the content and timing flexibility associated with voluntary disclosure. Importantly, mandatory and voluntary disclosure are linked. As a result, the potential for mandatory disclosure does not negate the continued value of voluntary disclosure. Instead, the benefits of voluntary ESG disclosure will remain even if the SEC manages to mandate some form of ESG disclosure, especially given the likelihood that any mandate will cover some, but not all, of the array of ESG topics. Dynamic disclosure also means that hypocrisy and inaccuracies in voluntary ESG disclosure may negatively impact the entire ESG disclosure regime.

In this regard, ameliorating hypocrisy and accuracy concerns in voluntary ESG disclosure represents a critical goal in our quest to ensure that we can credibly rely on corporate ESG commitments. This Article advances three pathways for responding to hypocrisy and accuracy concerns in voluntary ESG disclosure: increased SEC oversight of voluntary disclosure, corporate board oversight of voluntary disclosure, and a reliance on third-party auditing. While each of those pathways may have drawbacks, all of them merit our attention. All three hold the promise of enabling investors and stakeholders to more appropriately use voluntary ESG disclosures to gain a better understanding of corporate ESG activities and hold corporations accountable for those activities. Though each has drawbacks, each provides a layer of protection against ESG hypocrisy that will alleviate investor and stakeholder concerns.