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Non-Financial Reporting & Corporate Governance: Explaining American Divergence & Its Implications for Disclosure Reform

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Abstract: Non-financial reporting reforms have moved ahead around the world as governments work to advance sustainable development and improve environmental, social, and governance (“ESG”) risk management by firms and investors. In the United States, however, non-financial reporting reforms face resistance and have lagged behind. This article offers an overview of the state of non-financial reporting in the U.S. and explains why the U.S. approach still diverges so visibly from the reform path adopted by other governments around the world. It then suggests potential directions for non-financial disclosure reform that take account of the U.S. institutional context. The article concludes by considering the implications of the United States’ market-driven approach for non-financial reporting reform and for the future of sustainable finance more broadly.

Keywords: securities law, corporate governance, disclosure, ESG, non-financial, reporting, path dependency, private ordering, shareholder primacy, shareholder wealth maximization

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1 Introduction

This volume’s theme reflects significant efforts by governments around the world to promote non-financial reporting reform in order to advance sustainable development goals and enable environmental, social, and governance (“ESG”) considerations to be integrated across financial markets.¹ Leading efforts include

¹ The term “ESG” is sometimes used to refer to “sustainability” or non-financial information, even though it is broader than the former and narrower than the latter. On the relationship among these concepts, see Barker and Eccles (2018).

the European Commission's Non-financial Reporting Directive and its 2018 Action Plan on Financing Sustainable Growth (EU, 2014; EC, 2018).

In the United States, demand for better ESG disclosure is also rising among investors and other corporate stakeholders, and sustainability issues are gaining visibility among corporate boards. In 2018, institutional investors representing USD \$5 trillion in assets under management teamed up with leading securities and corporate law scholars to urge the U.S. Securities and Exchange Commission (SEC) to undertake new rulemaking on ESG disclosure (Williams & Fisch, 2018), and a climate risk disclosure bill was introduced in the Senate.² In 2019, new proposals on ESG disclosure were introduced in the House of Representatives, and the SEC opened the door to expanded disclosure on human capital.³ However, significant barriers to the adoption of non-financial reporting reforms remain.

This article offers an overview of the state of non-financial reporting reform in the U.S. and explains why the U.S. approach to ESG disclosure, which relies largely on private ordering, still diverges so visibly from the reform paths adopted elsewhere. Key reasons for this divide are the deep roots of shareholder primacy in U.S. business practice, and a greater skepticism toward regulation in some quarters of the U.S. polity. In addition, corporate issuers' fears of over-aggressive shareholder enforcement, legal obstacles to new disclosure regulation, and the nature of the current disclosure regime constrain the prospects for federal disclosure reform and will define the contours of any future non-financial disclosure rules.

Given these institutional starting points, non-financial disclosure in the United States will continue to depend heavily on private ordering, and absent Congressional support, any regulatory change must be justified on traditional economic grounds rather than on stakeholder concerns or on an intent to change corporate practice. This article suggests possible paths for non-financial

² Climate Risk Disclosure Act of 2018, 115 S. 3481, 2018 S. 3481.

³ ESG Disclosure Simplification Act of 2019, H.R. ___, 116th Cong. (discussion draft); Shareholder Protection Act of 2019, H.R. ___, 116th Cong. (discussion draft); Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019, H.R. ___, 116th Cong. (discussion draft); To require issuers required to file an annual or quarterly report under the Securities Exchange Act of 1934 to disclose the total amount of corporate tax such issuer paid in the period covered by the report, and for other purposes, H.R. ___, 16th Cong. (discussion draft); Climate Risk Disclosure Act of 2019, H.R. 3623, 116th Cong. (discussion draft). All available at: <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=109770>. In August 2019, the SEC partially responded to several rulemaking petitions by including human capital disclosure in proposed amendments to risk disclosures under Item 101(c) of Regulation S-K (SEC, 2019).

reporting that take account of this institutional context, although a full treatment of how the barriers to ESG disclosure reform might be addressed is beyond its scope. One such path would be for future ESG disclosure reforms to draw more heavily on the comply-or-explain approaches that are more common outside the United States. As a form of private ordering, these approaches may be more welcomed by reporting companies, while at the same time encouraging more comparable and reliable ESG disclosure. The article concludes by considering the implications of the United States' market-driven approach for non-financial reporting reform and for the future of sustainable finance more broadly.

2 The evolving U.S. regulatory context of non-financial reporting

Although the current rules that apply to mandatory reporting under the federal securities laws already require companies to disclose certain environmental and social information, non-financial reporting in the United States is largely market-driven. Some non-financial information does reach investors, regulators, and corporate stakeholders through corporate annual reports, proxy statements, and other public filings, but the largest public corporations provide non-financial disclosures primarily in free-standing sustainability reports, in corporate surveys, and in response to direct engagement between investors and corporate management (Lukomnik, Kwon, & Welsh, 2018). Indeed, in recent years, shareholder activism has become one of the primary catalysts of rising corporate board attention to non-financial or ESG issues in the United States (Harper Ho, 2018: 420–423; Huennekens & Smith, 2018). In the absence of new regulatory guidance, a wide range of private actors drive the proliferation of reporting standards and frameworks for voluntary non-financial disclosure; many of these, including the Global Reporting Initiative (GRI), the Task Force on Climate-related Financial Disclosure (TCFD), and the Extractive Industries Transparency Initiative, are the same sources that inform non-financial reporting practice for European companies. U.S. companies also participate in voluntary regimes, such as the Global Compact and various environmental or social certification programs, that also encourage sustainable business practice and disclosure.

2.1 The current state of non-financial reporting

Although private actors dominate the landscape of non-financial reporting in the U.S., many of the reporting requirements under the federal disclosure laws already potentially require non-financial disclosure, as the SEC noted in its 2010 Guidance on Climate-Related Risk (SEC, 2010). These include rules requiring disclosure of material changes to the business, disclosure of certain environmental compliance costs, and disclosure of material legal proceedings.⁴ In addition, companies must discuss ESG risks if they are among the material risk factors for the company,⁵ and Management's Discussion and Analysis must also provide a narrative discussion of "any known future trends or uncertainties" that could materially affect the firm's financial performance.⁶ All of these encompass material environmental and social risks, even though the SEC has not yet adopted any specific disclosure rules on ESG risks, nor do any of the current rules specifically mention environmental or social risk factors. In addition, the federal proxy rules governing the information that companies must provide in advance of a shareholder vote include elements that may relate to firms' ESG risk management function. For example, Item 402(s) of the Sarbanes-Oxley Act of 2002 (SOX) requires disclosures on how the company's risk management practices relate to executive compensation if those practices are "reasonably likely to have a materially adverse effect on the company," and Item 407 requires a description of board diversity policies.⁷ Beyond specifically required disclosure, companies must also report any other information, including non-financial information, that is "necessary to make the required statement, in light of the circumstances ... not misleading."⁸

In addition to these general disclosure rules, the SEC has adopted certain "specialized disclosure" rules under the 2010 Dodd Frank Act that pertain to social or human rights concerns. Specifically, these rules mandated disclosure of mine safety and government payments by extractive sector firms, the use of conflict minerals, and business activities in Iran.⁹ Specialized disclosure have

4 17 C.F.R. § 229.101(a)(1) (2018); 17 C.F.R. § 229.101(c)(1)(xii) (2018); 17 C.F.R. § 229.103 (2011).

5 17 C.F.R. § 229.105 (2019).

6 17 C.F.R. § 229.303(a)(3)(ii) (2019).

7 17 C.F.R. §§ 229.402(s), 229.407(c), (h) (2019).

8 Securities Act Rule 408, 17 C.F.R. § 230.408 (2001); Exchange Act Rule 12b-2017 C.F.R. § 240.12b-20 (2013); 15 U.S.C. §§ 78a–78qq (2012).

9 Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111–203, §§ 1502–1504, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78 m (2018)); 17 C.F.R. § 229.104 (mine safety); *see also* Conflict Minerals, 77 Fed. Reg. 56,274 (September 12, 2012); Mine Safety Disclosure, 76 Fed. Reg. 81,762 (December 28, 2011). Iran Threat Reduction and Syria Human

faced stiff resistance from the business community, and some of these rules have been invalidated following legal challenge.¹⁰

Investor responses to the SEC's 2016 Concept Release on disclosure reform (SEC, 2016), discussed below, and surveys of mainstream institutional investors since then confirm rising investor demand for ESG information that is not currently being met by the level of disclosure in corporate annual reports (Ernst & Young, 2017; Vasantham & Shammai, 2019). Of course, nearly all of the largest publicly traded companies produce free-standing sustainability reports, most based on the same reporting framework – the GRI Standards (Ceres, 2018; KPMG, 2017; Lukomnik, Kwon, & Welsh, 2018). But even with common frameworks, voluntary reporting does not harmonize or standardize disclosure. This is because voluntary reporting frameworks like the GRI allow companies to adopt stakeholder-oriented definitions of materiality that can be defined by each company and that do not align with the investor-oriented definition of materiality established under U.S. federal securities laws. Sustainability reports are also subject to many well-known limits that make them inadequate as a source of investment-grade information: they are generally not assured, and the flexibility they offer to reporting companies comes at the expense of the comparability, consistency, and reliability that characterizes information contained in public filings (TCFD, 2016; Harper Ho, 2018: 447–52; CII, 2019). In short, public companies face growing demand for material ESG information that is not readily available either in companies' annual reports or through other public sources.

2.2 Non-financial reporting reform

As it happens, disclosure reform has been a focus of the SEC since at least 2012, when the U.S. Congress directed it to begin a review of the effectiveness of the federal disclosure rules under Regulation S-K and to recommend potential changes to modernize and simplify the reporting requirements for smaller issuers. Congress extended the SEC's mandate in 2015 under the Fixing America's Surface Transportation (FAST) Act and directed it to consider how to achieve those goals “while still providing all material information to investors,

Rights Act of 2012, Pub. L. No. 112–158, § 219, 126 Stat. 1214, 1235–36 (2012). The SEC's final rule on Payments to Governments by Resource Extraction Issuers, Exchange Act Release No. 34–78,167 (2016), was repealed February 14, 2017 by Pub. L. No. 115–4, 131 Stat. 9.

¹⁰ *Ibid.*; see also *National Association of Manufacturers v. SEC*, 800 F.3d. 518 (D.C. Cir. 2015) (striking down portions of the Dodd-Frank conflict mineral rules).

and eliminat[ing] duplicative, overlapping, outdated or superseded provisions.”¹¹ As part of this “Disclosure Effectiveness” review, the SEC sought public comment in 2016 on several questions relating to the need for an improved ESG disclosure framework. These questions attracted over 25,000 responses, with over 80 percent of respondents and nearly all investors urging the SEC to take new steps to improve ESG disclosure in SEC filings (SASB, 2016: 4; Harper Ho, 2020: 6, 37).

However, the SEC’s revisions to its disclosure regime since then have largely ignored ESG issues, and at the time of this writing, its first limited proposal to include human capital disclosure, if material, in corporate Form 10-K filings is still pending (SEC, 2019). Neither Congress nor any of the U.S. stock exchanges have adopted any non-financial reporting measures, and they are unlikely to do so in the near future.¹² As discussed below, responses to the 2016 Concept Release and more recent statements from many reporting companies, trade associations, law firms, and industry groups like the U.S. Chamber of Commerce and the Business Roundtable, also reveal that many do not believe non-financial disclosure gaps exist or that new approaches to non-financial disclosure are necessary.

2.3 Private ordering

In the absence of non-financial reporting reform, investors, advocacy organizations, financial regulators outside the U.S., and international organizations continue to draw attention to sustainability issues and non-financial disclosure among investors, in corporate boardrooms, and among corporate and securities law scholars. Private standard setters, such as the Sustainability Accounting Standards Board (SASB) and the Climate Disclosure Standards Board (CDSB), and the work of the Financial Stability Board’s Task Force on Climate-related Financial Disclosure (TCFD) have raised awareness of ESG materiality and provided tools for companies to use when disclosing material

11 Fixing America’s Surface Transportation (FAST) Act, Public Law 114–94, Sec. 72,002, 129 Stat. 1312 (2015).

12 Although there is some interest in Congress in ESG reform – preliminary hearings on ESG disclosure were held in the U.S. House of Representatives in 2019 – none are expected to succeed under the current administration. In 2017, President Trump issued an Executive Order aimed at limiting new regulations of any kind, reflecting the current deregulatory climate. Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9339, January 30, 2017.

non-financial information within their annual reports. The Committee of Sponsoring Organizations of the Treadway Commission (COSO) has also been instrumental in promoting better ESG risk management, and in 2018 developed guidance for how ESG-related risks should be addressed within its enterprise risk management framework (COSO, 2018).

International developments, such as the European Non-financial Reporting Directive, the United Kingdom's Stewardship Code and the European Commission's sustainable finance initiatives are also raising attention to ESG issues among U.S.-based companies and inspiring new private-sector initiatives. For example, voluntary stewardship guidelines for U.S. investors, which were developed by a coalition of institutional investors, were inspired by the U.K. Investor Stewardship Code (ISG, 2018).

Institutional investor pressure is now perhaps the single most important driver of changes in non-financial disclosure practice in the United States and in the level of attention U.S. corporations pay to the strategic and financial implications of environmental and social issues. Investor activism typically makes use of shareholder proposals and the proxy process, as well as investor surveys and direct shareholder communications with management (Bauer, Moers, & Viehs, 2015; Haan, 2016). Recent proxy seasons have seen rising support for environmental and social shareholder proposals, with some winning majority support (Ernst & Young, 2019; Mueller, Ising, & Briggs, 2018). Although shareholder proposals are non-binding in the U.S., they are widely used to promote dialogue between investors and management and to prompt changes in corporate practice and in environmental and social transparency (Bauer et al., 2015). Mainstream investor support for ESG proposals has risen as Blackrock, Vanguard, Fidelity and others have joined state public pension funds and other traditional supporters of ESG initiatives in adopting voting policies that are supportive of certain ESG proposals. Investor voice is further amplified by proxy advisory firms; for example, the 2019 voting policies of leading proxy advisors Glass Lewis and Investor Shareholder Services (ISS) signal support for most common environmental and social proposals, and Glass Lewis' policies condition support for director candidates on the extent to which the board has active oversight of ESG issues (Glass Lewis, 2019; ISS, 2019). At the same time, relying on an *ad hoc* campaign-style approach to corporate reform is costly to activists and to corporations, and is also far less effective at standardizing reporting practices than it may be at raising the visibility of ESG issues among corporate boards and executives. (Harper Ho, 2018: 444–456).

3 Explaining U.S. divergence

As public policies to advance sustainable finance and promote non-financial disclosure have been introduced by stock exchanges and financial regulators outside the U.S., the continued reliance of Congress and the SEC on voluntary regimes, shareholder pressure and other forms of private ordering to define the scope and content of ESG disclosure is increasingly an outlier. Key explanations for this divergence come from deep literatures in comparative law and policy, as well as institutional theory, which observe that the institutional starting points of a given legal system directly affect the potential range of future regulatory reforms and whether they are ultimately effective. (Brummer, 2010; Gilson, 2001; Roe & Gordon, 2004).¹³ These institutional starting points include dominant social norms and pre-existing legal rules, which are often self-reinforcing (Ingram, Schneider, & Deleon, 2007: 96–97; Scott, 2008: 128–32).

In general, the institutional foundations of emerging non-financial reporting and sustainability-oriented policies outside the U.S. include an emphasis on stakeholder interests, a comfort with the government's guiding role in the economy, and a far greater reliance on flexible principles-based disclosure approaches and on regulatory enforcement rather than on prescriptive rules and enforcement through shareholder litigation. However, all of these stand in stark contrast to the norms and practices that shape the perspectives of U.S. regulators, legislators, and reporting companies themselves, and which constrain the scope and pace of non-financial reporting reform in the U.S.

3.1 Shareholder primacy

As Sjøfjell, Johnston, Anker-Sørensen, and Millon (2015) have noted, the strong influence of shareholder primacy on U.S. business culture is perhaps the primary reason why regulators, financial institutions, and corporate boards alike hesitate to urge companies to disclose more non-financial information and to pay attention to the social welfare effects of corporate activity on stakeholders. To be sure, state corporate governance rules in the United States emphasize director's autonomy in decision-making and give directors discretion to sacrifice profit, so long as they are acting in the best interests of the corporation and its

¹³ Christopher Brummer has noted that institutional differences among jurisdictions, the real costs of adjusting to new standards, and competition among capital markets all contribute to divergence in securities regulation even in an era of cross-border regulatory networks and transnational organizations (Brummer, 2010: 349–355).

shareholders and the company is not “on the auction block” (Bainbridge, 2003; Elhauge, 2005; Stout, 2012: 27–44). There are also emerging indications of greater openness to stakeholder-oriented corporate governance reform in the U.S. For example, the Business Roundtable, which represents some of the largest public companies and has been most stridently opposed to non-financial reporting reform, released in August 2019 a statement of the purpose of the corporation that affirmed the importance of stakeholder constituencies (Business Roundtable, 2019). Even the state of Delaware, whose corporate code governs most Fortune 500 companies in the United States, has gotten on the sustainability bandwagon – in 2018, it passed legislation allowing companies to obtain a “sustainability certification” from the state if they voluntarily adopt sustainability reporting standards and assessment measures.¹⁴

But it is far from clear that these developments signal a fundamental reorientation of U.S. business culture and practice. The view that corporations are creatures of private contract whose primary purpose is to maximize shareholder wealth has a long history among U.S. corporations and among business lawyers and academics (Friedman, 1970; Roe, 2001: 2065, 2073; Fisch, 2006: 654–55). From a normative perspective, shareholder primacy also rests on widely accepted economic rationales that still loom large for both corporate managers and regulators. Chief among them are that agency costs will rise as corporate managers are charged with following the marching orders of “two masters” – shareholders and other stakeholders – and that public welfare is best served when corporate managers work to maximize the value of the corporation rather than catering to the interests of competing stakeholder constituencies (Easterbrook & Fischel, 1991:38). Chief Justice of the Delaware Supreme Court Leo Strine has also made clear his view that under Delaware law, “within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare” (Strine, 2015: 771).

This notion that corporate directors’ and officers’ consideration of stakeholders is permissible solely to advance shareholder interests essentially requires corporate directors and officers to identify a business case for focusing on stakeholder impacts. In contrast, the “enlightened shareholder value” perspective of the U.K. 2006 Company Act defines fiduciary duties to corporate shareholders to *include* consideration of stakeholder interests (Keay, 2013). This endorsement of the importance of stakeholder interests may explain the greater willingness of U.K. regulators to promote non-financial reporting, even though,

¹⁴ Delaware Certification of Adoption of Transparency and Sustainability Standards Act, prom. June 27, 2018, eff. October 1, 2018.

as a matter of corporate governance, the United Kingdom gives shareholders even greater power in corporate governance than they hold under most U.S. state corporate statutes (Bruner, 2010; Keay, 2015: 120).

Under the securities laws as well, the U.S. Supreme Court has defined materiality in terms of the significance of that information to investors, not other stakeholders.¹⁵ In contrast, materiality under the E.U.'s non-financial reporting directive is designed to aid all users of the disclosure in understanding the "impact of the [company's] activity" (EC, 2017: 5). For most U.S. public companies, stakeholder impacts, such as human rights violations, must raise a real threat of significant economic impact or regulatory risk to the company itself before they could be considered financially material. For some of the largest firms, their sheer size means that even extremely large transactions or risk events may not be financially material and will not be disclosed (Georgiev, 2017).

Similarly, the fiduciary duty standards for employee pension funds, which also inform the standards that govern public pension funds and other U.S. institutional investors, only permit them to engage in ESG integration and activism to the extent such efforts are cost-efficient and reflect a prudent determination that they are reasonably likely to enhance economic value (DOL, 2015; DOL, 2018). This rule reflects the core economic emphasis of pension fund fiduciary duties and is a more modest approach to ESG issues than the requirements under the European Commission's Occupational Retirement Provision Directive, or the laws of Sweden, Norway, and Germany, which mandate some combination of ESG integration into risk management processes or investment decisions (UNPRI & MSCI, 2016: 14–15).

Comments to the SEC's 2016 Concept Release from companies, trade associations, and other business organizations affirm the strength of shareholder primacy in the U.S. Even though the vast majority of investor responses stressed that ESG information is material to shareholders' investment, voting, and engagement decisions, many corporate respondents questioned the notion that *any* ESG issues could be material for purposes of the U.S. federal securities laws (Harper Ho, 2020: 39–40). These responses often included strong statements about the "political" or "special interest" nature of ESG information and urged

¹⁵ The U.S. Supreme Court's standard established in *TSC Industries*, defines information as material if there "is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" or "that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information" available to the investor in reaching a voting or investment decision. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988), *quoting* *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

the SEC to reject any efforts to let itself be hijacked in service of these goals. For example, a coalition of 43 state attorneys general echoed the common view that existing materiality standards should already elicit non-financial disclosure and expressed concerns that climate change disclosure mandates are promoting a political agenda where shareholder activists use their power to advance the “social cause du jour” Pruitt & attorneys general, 2016¹⁶ Such arguments resonate with some current SEC Commissioners; in 2018, SEC Commissioner Peirce cautioned that any attempt to identify material ESG factors that might be the subject of disclosure reform would open a Pandora’s box of potentially burdensome regulatory mandates, necessitating choices among stakeholders that “introduce uncertainty and political influence into corporate operations” (Peirce, 2018). Clearly, many companies, as well as regulators at both the state and federal levels, still stand to be convinced that non-financial information is material to investors. But unless they are, reforms of the U.S. federal disclosure rules will continue to face an uphill battle.

3.2 Regulatory skepticism

Another obstacle to non-financial reporting reform has to do with a broader skepticism among many Americans toward the benefits of government intervention and a greater faith in market forces to produce social benefit (Hoffman, 2012; Luers, 2013; Romano, 1993), in contrast to much of Europe, East Asia, and elsewhere where the regulatory state plays a larger role in the institutional context (Dignam & Galantis, 2009: 225–262; Gelter, 2009; Ohnesorge, 2016). In the U.S., this skepticism extends to disclosure reform, since disclosure is widely recognized as a soft form of regulation, incentivizing changes in corporate behavior where direct regulation may be difficult to achieve or enforce (Steurer, 2013; Keay, 2015: 215–19). An example that reflects this strong preference for private ordering over regulatory solutions is the effort of the U.S. Chamber of Commerce, which opposes ESG disclosure reform, to respond to rising demand for ESG information by promoting private standards and issuing guidance for voluntary ESG reporting,

¹⁶ The view that ESG issues simply reflect particular social or even political agendas is perpetuated to some extent by the securities laws (Harper Ho, 2019). Under the federal proxy rules, shareholder proposals that pertain to the “ordinary business” of the corporation can only proceed to a shareholder vote if they raise a “significant policy issue.” SEC Staff Legal Bulletin (SLB) (2017), No. 14I (CF), November 1, 2017, <https://www.sec.gov/interps/legal/cfs1b14i.htm> (explaining 17 C.F.R. § 240.14a-8(i)(vii)).

while continuing to express its opposition to ESG disclosure reform (U.S. Chamber & CCMC, 2018:33, U.S. Chamber & CCMC, 2019).

Of course, the United Nation's Roadmap for a Sustainable Financial System, the European Commission's Action Plan on Sustainable Finance, China's Guidance on Establishing a Green Financial System, and the TCFD's recommendations on climate-related financial disclosure all emphasize the importance of government efforts to stimulate and support a market-driven sustainable finance transition in which disclosure plays a key role (Maimbo & Zadek, 2017: 48–64; EC, 2018; PBOC, MOF, NDRC, MEP, CBRC, CSRC, & CIRC, 2016; TCFD, 2017a). In the U.S., however, similar reforms face strong opposition from some legislators and their constituents. This distrust of government rests in part on constitutional grounds,¹⁷ but is most common among conservative voters and policymakers who fear that new environmental policies could lead to a broader regulatory expansion (Luers, 2013). Opposition to new reforms also draws strength from the deregulatory policies of the Trump administration. As a result, the business community tends to resist not only proposals for direct environmental and social regulation, but also any disclosure reform that appears designed to motivate sustainable business practice.¹⁸

3.3 Disclosure regime path dependencies

The institutional literature predicts that efforts to strengthen non-financial reporting within corporate annual reports will be bounded by existing legal rules, in addition to the obstacles outlined above (Ingram et al., 2007; Scott, 2008). In this case, aspects of the federal disclosure framework that are likely to most directly constrain future reforms include the strength of securities fraud litigation in the U.S., the scope of the SEC's statutory authority, and the standards that have been set by the federal courts for new agency rulemaking. Given

¹⁷ The U.S. federal system reserves to state governments all powers not expressly conferred on the federal government U.S. Constitution, Art. X. (2013).

¹⁸ Robert Kagan observes that the adversarial nature of the U.S. legal system, coupled with a generally more stringent, less flexible approach to regulation than other jurisdictions, engenders resistance and even hostility from regulated entities (Kagan, 2019: 210, 235–38). Even U.S. companies that produce voluntary sustainability disclosures often aggressively oppose any effort to incorporate similar reporting standards into federal disclosure rules. ExxonMobil is one such example. See David S. Rosenthal, Comment on Business and Financial Disclosure Required by Regulation S-K, File Number S7-06-16, August 9, 2016, <https://www.sec.gov/comments/s7-06-16/s70616-355.pdf> (expressing strong concerns about ESG over-disclosure and its opposition to ESG reporting reforms).

these factors, non-financial reporting reform will be most likely to succeed if it is justified on economic rather than public policy grounds and if it is backed by special Congressional authorization.

By way of clarification, the following discussion focuses on reforms that could be introduced by Congress or the SEC rather than by stock exchanges, even though ESG disclosure rules have been adopted by many stock exchanges worldwide. This is because U.S. stock exchanges have historically been hesitant to toughen their listing rules or expand their regulatory role unless the SEC has already done so.¹⁹ An additional institutional factor is that the U.S. has not adopted International Financial Reporting Standards (IFRS) and relies instead on generally accepted accounting principles (GAAP) as interpreted by the Financial Accounting Standards Board (FASB); therefore, U.S. reporting practice will not be directly affected by the International Accounting Standards Board (IASB) standards or policies on ESG disclosure.

3.3.1 Non-financial reporting & liability risk

An initial reason why the SEC has been hesitant to introduce non-financial reporting reforms is that companies are exposed under the federal securities laws to private enforcement through shareholder litigation, as well as agency enforcement, for allegedly fraudulent or misleading statements or material omissions. In many other jurisdictions, principles-based disclosure is the norm, and corporate governance and disclosure rules have been adopted on a comply-or-explain basis that allows companies to deviate from a recommended best practice if they provide an explanation for the deviation (FRC, 2012). Research on the effectiveness of comply-or-explain approaches finds that shareholder litigation over inadequate or missing explanations is relatively rare (EC, 2011: 191; Keay, 2014). While this may leave reporting obligations more weakly enforced under such a regime than they would be in the U.S. system, it also reduces the perceived legal risk companies face if reporting obligations are expanded. However, U.S. companies and trade associations have strongly resisted any expansion of mandatory disclosure in Regulation S-K, not only because of the potential costs of new reporting obligations, but also because

¹⁹ This view was expressed by a stock exchange representative I interviewed in 2017. One possible explanation is that such a move may weaken an exchange's competitiveness in attracting listings (UNCTAD 2014: 5–6), at least *vis a vis* other U.S. exchanges, even if competitors abroad have already adopted ESG listing rules.

new mandatory disclosures increase the risk of shareholder litigation for alleged securities fraud (Harper Ho, 2020: 33–34).²⁰

These concerns are heightened because the U.S. reporting framework is more prescriptive than in many other jurisdictions. To be sure, U.S. regulations on periodic reporting are perhaps more accurately described as a mixed system of prescriptive and principles-based disclosure, and even many of the line-item reporting rules in Regulation S-K contain “materiality qualifiers” that give companies discretion not to disclose information they deem immaterial to investors. Narrative reporting, regulatory safe harbors for forward-looking information, and other principles-based elements of the reporting framework add additional flexibility to the system. The SEC has also stated its commitment to preserving this mix of prescriptive and principles-based disclosure rules as it considers future disclosure reforms, recognizing that principles-based approaches reduce the burdens of successive layers of “static requirements.” (SEC, 2013: 98, 2016: 23921–26, 2019: 44359–60). However, many U.S. public companies have opposed any adoption of specific ESG reporting rules because their liability exposure for material omissions may be higher if there is a specific affirmative disclosure obligation in the reporting rules than if the decision of whether or not to disclose is left to the issuer’s materiality determination.²¹ This presents a clear challenge to disclosure reform, since prescriptive rules are better for addressing the lack of “completeness and comparability” that plague non-financial reporting (SEC, 2013: 98, 2016).

3.3.2 The SEC’s statutory authority

Another limiting feature of the U.S. regulatory landscape is that the SEC has continued to interpret the scope of its statutory authority to preclude the use of disclosure “solely for the purposes of changing corporate behavior,” a position that dates back to 1975 when it first considered the materiality of

20 Companies who produce sustainability reports are already exposed to some degree of litigation risk since the “antifraud provisions of the securities laws apply equally to information companies provide to investors via third parties, on their website, or in other sources outside their periodic reporting.” Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,869–70 (August 7, 2008), (referencing the “2000 Electronics Release”, Use of Electronic Media, SEC Release No. 33–7856 (April 28, 2000)).

21 The U.S. federal securities laws do not require companies to disclose *all* material information. As the U.S. Supreme Court has held, “[s]ilence, absent a duty to disclose, is not misleading” and therefore cannot ground shareholder claims for securities fraud. *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n. 17 (1988).

environmental and social matters to investors.²² Yet voluntary frameworks, such as the United Nations' Global Compact, nearly universally use disclosure commitments to motivate changes in corporate behavior. In these regimes, disclosure facilitates peer comparisons and outside scrutiny from NGOs, consumers, and other stakeholders (Potoski & Prakash, 2009). Similarly, the European Union's 2014 Non-financial Disclosure Directive was adopted with the stated goal of not only meeting the needs of investors, but also of advancing social justice and environmental protection and providing information to stakeholders about the impacts of corporate activity (EC, 2014). Indeed, the Symposium from which this volume proceeds was organized to identify how non-financial reporting and corporate governance can promote more sustainable business practices.

On occasion, Congress has directed the SEC to adopt new disclosure rules that are clearly intended to achieve broader regulatory goals. In these cases, the authorizing legislation may establish separate corporate governance or regulatory objectives for SEC rulemaking. The most obvious examples are the specialized disclosure rules the SEC adopted under the Dodd-Frank Act. In addition, Section 953(b) of the Dodd-Frank Act required the SEC to adopt disclosure rules on the pay ratio between the compensation of the CEO and the median employee in order to ultimately reduce that gap.²³ Similarly, Section 406 of the Sarbanes-Oxley Act of 2002 has led public companies to adopt codes of ethics for senior financial officers even though the rule permits the firm not to do so long as it explains why it has not (Rodrigues & Stegemoller, 2010).²⁴ One possible path toward non-financial reform, then, would be for Congress to direct the SEC to undertake rulemaking to promote consistent and comparable ESG reporting. It could then articulate the goals of such legislation in terms of investor and market objectives, sustainable development and stakeholder impacts, or both.

Without specific Congressional authorization, however, the SEC views the scope of its authority under the Securities Act of 1933 and the Securities and Exchange Act of 1934 in narrowly economic terms even though both statutes "authorize the Commission to promulgate rules for registrant disclosure as necessary or appropriate in the public interest or for the protection of investors" (SEC,

²² Commission Conclusions and Rule Making Proposals, Securities Act Release No. 5627, Exchange Act Release No. 11,773, [1965–1976 Transfer Binder] Fed. Sec. L. Rep (CCH) ¶ 80, 820 at 85,719–720 (October 14, 1975).

²³ Dodd-Frank Act of 2010 § 953(b), 124 Stat. at 1904; SEC Pay Ratio Disclosure, 80 Fed. Reg. 50,104, August 18, 2015.

²⁴ Sarbanes-Oxley Act of 2002 § 406(a)–(b), 15 U.S.C. § 7264 (2012). This is one of the relatively limited examples of a U.S. regulation that has been adopted on a comply-or-explain basis.

2016: 23921–22). Academic commentators who urge the SEC to take a broader view of its authority note that these same provisions also empower the SEC to regulate in the public interest (Langevoort & Thompson, 2013: 375–382; Sale, 2013: 1017–1031). The SEC itself has recognized that disclosure may indirectly promote corporate accountability by giving investors greater information about how the company is managed and may therefore motivate changes in corporate conduct (SEC, 1975: 85,713).

Still, the SEC has taken the position that any determination of whether action is “necessary or appropriate in the public interest” requires it to not only “consider ... the protection of investors [and] whether the action will promote efficiency, competition, and capital formation,” but to engage in rule-making only to advance these goals.²⁵ Until it adopts a more expansive view, any new ESG disclosure rulemaking must be based on the materiality of the disclosures to investors rather than on public policy grounds or a desire to change corporate behavior or benefit stakeholders.

3.3.3 Economic cost-benefit analysis & administrative law

A further challenge related to the institutional context of disclosure reform is that even when Congress has specifically authorized new rulemaking to address non-financial disclosure, appellate courts in the District of Columbia, which hear cases challenging agency action, have required the SEC to defend those rules on the basis of an economic cost-benefit analysis (Coates, 2015). For example, the SEC’s conflict minerals disclosure rules were challenged on both constitutional and administrative law grounds, even though the new rulemaking was specifically authorized by Congress; the court’s resolution of both issues turned in part

²⁵ Section 2(b) of the Securities Act of 1933 and Section 3(f) of the Securities and Exchange Act of 1934 state that: “Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation” *codified at* Securities Exchange Act of 1934, 15 U.S.C 78c(f) (2012); Securities Act of 1933, 15 U.S.C. 77b (2012). The current environmental disclosures in Regulation S-K were adopted only under a direct mandate to federal agencies in environmental legislation because the SEC had concluded that these matters were “social goals unrelated to the objectives of the federal securities laws” that would be beyond the SEC’s regulatory authority but for separate Congressional authorization. 1975 Environmental and Social Disclosure Release, Rel. No.33–5627, 40 Fed. Reg. 51,656 (November 6, 1975).

on the SEC's inability to quantify the benefits the rules would produce.²⁶ When considering challenges to rulemaking the SEC undertakes on its own initiative, the courts have also interpreted the SEC's statutory authority under the federal securities laws to require the SEC to "adequately assess" the economic effects of the proposed rule to demonstrate that it will protect investors and promote "efficiency, competition, and capital formation."²⁷

Determining which costs and benefits matter and how to quantify them presents clear challenges to any attempts by the SEC to standardize non-financial reporting. First, cost-benefit analysis tends to focus on the reporting costs to companies and to ignore the equally significant costs to market efficiency from disclosure gaps and the costs investors incur searching for, comparing, and analyzing non-financial data outside companies' public reports. In addition, the diffuse benefits to investors of any one piece of information or of a mandatory non-financial reporting regime generally are difficult to quantify, as are benefits that may be due to future policy effects. Finally, ESG disclosure reform could require companies to assume the additional costs of assuring non-financial information so that it meets federal securities' laws standards of accuracy and reliability. Since few firms currently assure voluntary reports (KPMG, 2017), these added costs could be significant, even though the fact that companies already produce sustainability reports should lower their cost of reporting non-financial information to the SEC. If the courts continue to require this type of cost-benefit analysis, non-financial reporting reforms will have to clear a high bar, even if they are adopted at Congress' behest.

4 The way forward

Although corporate self-regulation, shareholder activism, and private standard-setters have all helped push companies to produce sustainability reports and

²⁶ In *National Association of Manufacturers v. SEC (NAM II)*, 800 F.3d 518, 527 (D.C. Cir. 2015), the Court of Appeals stated that the SEC must quantify the expected benefits of the disclosure and "demonstrate[e] that the measure it adopted would 'in fact alleviate' the [identified] harms 'to a material degree'." In *National Association of Manufacturers v. SEC (NAM I)*, 748 F.3d 359, 364, 369 (D.C. Cir. 2014), the court had found that the SEC had presented evidence of the anticipated costs. See also *Chamber of Commerce v. SEC*, 412 F.3d 133, 143–144 (DC Cir. 2005) (holding that the SEC has a "statutory obligation to determine as best it can the economic implications of the [proposed] rule").

²⁷ *Business Roundtable v. Sec. & Exch. Comm'n*, 647 F.3d 1144, 1148, 1152 (D.C. Cir. 2011) (invalidating the SEC's proxy access rule because of its failure "to estimate and quantify the costs it expected companies to incur").

have raised the visibility of ESG issues as a corporate governance concern, private ordering alone is simply not suited to streamlining and standardizing the content and form of disclosure in the way that disclosure mandates can (Harper Ho, 2018). As a result, there is now growing demand among mainstream investors for the SEC to require non-financial reporting within corporate annual reports. This Part presents possible paths toward non-financial reporting reform in the U.S. that fall within the bounds of the current institutional context, as well as others that could go further if some of the constraints discussed in Part 3 were relaxed.

4.1 Reforming non-financial reporting without regulation

The SEC already has at its disposal several possible steps short of rulemaking that could encourage better disclosure of material ESG information in corporate annual reports. First, the SEC could issue new guidance building on its 2010 Climate Guidance to further standardize disclosure of material climate-related risks, perhaps endorsing the TCFD framework and the use of sector-specific indicators. The SEC could also go further by encouraging the use of other private frameworks that base their ESG risk indicators on the securities laws' definition of materiality, such as the SASB standards or the CDSB reporting framework. Other alternatives include using its practice of case-by-case disclosure review and comment letters to focus issuers' attention on non-financial reporting gaps.²⁸ While these efforts should encourage more companies to identify ESG information as material and to include it in their public filings, none of these possibilities can promote the kind of consistency and comparability that investors demand from ESG disclosure.

4.2 Pathways to non-financial rulemaking

Ensuring that investors and regulators have access to standardized and comparable ESG information will therefore ultimately require either Congressional action or new rulemaking by the SEC. Given the SEC's statutory mission to take account of investor interests and promote market efficiency, rising investor demand may help overcome some of the policy barriers to SEC action that are

²⁸ The SEC's Division of Corporation Finance has indicated it is focusing these reviews on inconsistencies between climate-related disclosure in public filings and in corporate voluntary reports (Hinman, 2019).

outlined above. However, as discussed earlier, Congressional authorization may be necessary in order for the SEC to adopt any new disclosure rules, especially if they are intended to promote sustainable finance, corporate governance reform, or greater corporate attention to stakeholder risks.

Some scholars have suggested that the SEC do so by mandating a narrative “Sustainability Discussion & Analysis” from corporate management, along the lines of the current Management Discussion & Analysis (MD&A) and Compensation Discussion & Analysis (CD&A) rules (Fisch, 2018), the management report required under the E.U. accounting directives, or the U.K.’s strategic report. However, such an approach unnecessarily duplicates elements of the MD&A, such as forward-looking assessments of significant risks and trends that should already incorporate material ESG risk disclosure. And like the MD&A and CD&A, any narrative discussion is also of less value in promoting comparability than prescriptive indicators.

Instead, non-financial reporting reform should adopt a tiered approach that balances prescriptive and principles-based reporting. A tiered approach would include a limited set of mandatory common indicators or principles-based disclosures that would apply across all sectors. Cynthia Williams and Jill Fisch, for example, have proposed to the SEC, in line with the TCFD’s recommendations, that disclosures relating to ESG risk management and governance should apply broadly to all issuers and go beyond existing governance disclosures (Williams & Fisch, 2018: 13; TCFD, 2018). Other disclosures beyond this “first tier” could be subject to materiality judgments or might be required only for certain issuers or sectors. The TCFD’s climate-related disclosures and the Singapore and Hong Kong stock exchanges’ ESG reporting frameworks offer useful models of this kind of tiered approach. For instance, the Hong Kong stock exchange’s disclosure rules require some disclosures, such as greenhouse gas emissions reporting, from all public companies, but encourage companies to voluntarily disclose other indicators; the Hong Kong model currently allows even mandatory indicators to be reported on a comply-or-explain basis (HKEx, 2019). In the U.S., any such reforms would supplement or amend current environmental, governance, and risk factor disclosures, which do not specifically mention climate-related risks, ESG-related indicators, or ESG risk management.

Where greater comparability and consistency is required, for example, with respect to specific indicators or climate-related risks, line-item rules will be more effective. However, one of the biggest practical barriers to more precise line-item disclosure, even for widely accepted issues like greenhouse gas emissions or climate-related risk management, is the question of which ESG indicators are material. This challenge is heightened by the fact that ESG materiality is often sector-specific and likely to evolve over time (Barker & Eccles, 2018), raising the

specter of ever-expanding disclosure burdens. One solution is to defer to issuers' own materiality determinations, but this perpetuates under-reporting of ESG information. Alternatively, the specific content of such disclosures could be drawn from existing reporting frameworks, such as the SASB materiality standards, or could incorporate such frameworks by reference, leaving to certain private standard setters the task of identifying material indicators over time. Under this more flexible approach, standardization could still be achieved if the SEC endorsed or identified the specific private standards that could serve as the basis for disclosure, or engaged in a kind of "meta-regulation" of private standards by specifying features a standard must have for it to be relied upon in a company's public filings (Parker, 2002). These could include, for example, requirements that the standard be internationally recognized, aligned with the Supreme Court's definition of materiality, and informed by ongoing industry and stakeholder engagement.²⁹

In light of the challenges of cost-benefit analysis and issuer concerns about the burdens of new reporting mandates, any prescriptive rules the SEC develops as part of these reforms should apply to issuers on a more flexible comply-or-explain basis. For example, the SEC could require companies to disclose whether they had adopted policies and procedures to assess climate risk or to explain why they did not; similarly, the SEC could mandate reporting of greenhouse gas emissions, but allow companies to omit such a disclosure if they explained why such disclosures were not material. Comply-or-explain provisions are not the norm in the U.S, but they have, in fact, already been introduced to a limited extent by Congress over the past decade. For example, as noted earlier, Section 406 of the Sarbanes-Oxley Act did not directly require firms to adopt a code of ethics for senior executives, but instead required companies to disclose whether they had done so or not.³⁰

Because comply-or-explain approaches are also a form of private ordering and rely on shareholder enforcement to police the sufficiency of companies' responses, they might find a more welcome reception in a U.S. context that heavily favors private ordering, flexibility, and shareholder monitoring. At the same time, adopting new rules on a comply-or-explain basis also allows

²⁹ For example, the SEC has already endorsed compliance with voluntary frameworks and foreign regulations as a kind of safe harbor in its Order Recognizing the Resource Extraction Payment Disclosure Requirements of the European Union, Canada, and the U.S. Extractive Industries Transparency Initiative as Substantially Similar to the Requirements of Rule 13q-1 Under the Securities Exchange Act of 1934, 81 Federal Register 49,163, July 27, 2016. Other examples include its endorsement of the COSO internal control framework (SEC, 2003).

³⁰ Sarbanes-Oxley Act of 2002 § 406(a)–(b), 15 U.S.C. § 7264 (2012).

regulators to identify baseline disclosures or practices that should generally be followed by reporting companies. Although comply-or-explain regimes are often weakly enforced (Keay, 2014; Moore & Petrin, 2017: 63), the implementation of Sarbanes Oxley's few comply-or-explain provisions by U.S. companies (Rodrigues & Stegemoller, 2010: 7), as well as evidence from other jurisdictions, suggests that enforcement is likely to be more robust in markets like the U.S. where shareholder litigation and active shareholder engagement is common (Harper Ho, 2017; Klettner, 2017). This suggests that allowing firms to report on a comply-or-explain basis could improve comparability and corporate practice by setting a basic standard for firm conduct or disclosure content, while allowing flexibility for companies who cannot provide such disclosures or for whom the baseline standard is not efficient.

4.3 Regulatory goals and rationales

Given the SEC's current position that its authority to regulate in the public interest must be exercised only in the interest of investor protection (SEC, 2016: 23921–22) and the courts' insistence upon a rigorous economic cost-benefit analysis of proposed rules, any of the above changes would need to be justified on economic and investor-oriented grounds, not solely on the basis of stakeholder or public policy concerns like sustainable development. Even if the SEC were to interpret its authority to engage in rulemaking in the public interest more broadly, it could act more decisively to promote sustainable finance or sustainable development only if Congress directed it to do so or if it could establish that the rules' potential economic benefits outweighed their potential costs.

Maintaining financial stability is another potential justification for the SEC to consider non-financial reporting reforms. The 2018 Report of the European Commission's High-Level Expert Group on Sustainable Finance observes that in addition to promoting long-term growth and sustainable development, one of the primary goals of sustainable finance is to "strength[en] financial stability by incorporating environmental, social and governance (ESG) factors into investment decision-making" (EC, 2018:1). Similarly, the TCFD's 2016 report points to the lack of information on the financial impact of environmental and social risks as a source of systemic risk to global economies (TCFD, 2016: 9–10, 18).

In the U.S., managing systemic risk has historically been the focus of the Federal Reserve Board, not the SEC (Paredes, 2006: 999; Coffee & Sale, 2009; Hu, 2014). The Federal Reserve Board has established a risk disclosure regime for financial institutions that it could amend to incorporate new requirements on

the management and disclosure of climate-related risk and other material ESG risks, perhaps along the lines suggested by the TCFD (TCFD, 2017b). The Federal Reserve could also go further, following the lead of the European Union's 2018 Sustainable Finance Action Plan, and introduce new prudential rules for banks and insurance companies. Such rules would incentivize ESG risk management by raising the cost of capital for investments with a negative climate impact or that otherwise contribute to systemic risk.³¹ These reforms could be much more effective than disclosure alone in reducing climate impacts and directly confronting climate-related sources of systemic risk.

Nonetheless, the International Organization of Securities Commissioners (IOSCO) also considers risk assessment, disclosure, and governance-related measures to be part of the role of securities regulators in “mitigating systemic risk” and “promoting financial stability” (IOSCO, 2011: 32, 39–43). Disclosure alone may be less effective than direct financial regulation to reduce systemic risks (Schwarcz, 2008), but the SEC's current mandate to maintain *orderly* markets can be read to confer this authority to promote financial stability and address systemic risk (Allen, 2018). Other commentators have also argued that investor protection itself justifies SEC action to reduce systemic risk (Paredes, 2006: 990–1004), an argument that extends equally to systemic risk that is linked to ESG disclosure gaps. In order to address emerging systemic risks such as climate change with the necessary speed and focus, disclosure reform should be viewed as a complement to more targeted measures, like the prudential rules mentioned above.

4.4 States as innovators

Even in the absence of any of these federal reforms, another potential avenue lies with state governments, some of whom have already introduced non-financial disclosure and stakeholder-oriented reforms. Since corporate governance in the United States is established primarily by state law, stakeholder-oriented corporate governance reforms are in fact more likely to advance at the state level. For example, in 2018, California became the first state in the nation to introduce gender quotas for the corporate boards of publicly held corporations headquartered within the state.³² California has also taken the lead in introducing disclosure reforms on

³¹ For example, Cullen (2018) has advocated regulatory incentives for financial institutions as a necessary preemptive response to restrict financing to projects that, in the aggregate, contribute to systemic risk.

³² California SB-826, September 30, 2018 (adding Sections 301.3 and 2115.5 to the California Corporations Code).

supply chain transparency, as well as climate-related financial risk disclosure requirements for insurers.³³ At a time when deregulation is the order of the day at the federal level, state authorities are free to move forward on non-financial reporting and related corporate governance reforms that may serve as test cases for future reforms at the state or national levels.

5 Conclusion

The current U.S. reporting framework under the federal securities laws offers a good foundation on which to develop more robust and more uniform standards for non-financial reporting. The SEC also has the regulatory authority to undertake such reforms, even if it relies solely on its core mission to protect investors, facilitate capital formation, and promote fair, orderly, and efficient markets.

However, the institutional barriers to bold rulemaking initiatives mean that non-financial disclosure by U.S. companies within their annual reports will continue to expand largely in response to shareholder voting and direct engagement. While some forms of private ordering, such as the use of comply-or-explain codes or disclosure rules, may promote disclosure comparability, this kind of private ordering – relying on shareholder voice alone – is wholly incapable of standardizing and harmonizing the form and content of non-financial reporting, or of driving companies to treat other forms of sustainability reporting with the same rigor that applies to periodic disclosures.

Global demand for decision-useful non-financial information and the imperatives of sustainable development and climate change responses continue to grow. As Congress and the SEC begin to consider non-financial reporting reform, public policies from the European Union and national governments to promote non-financial reporting and sustainable finance may encourage further shifts in perspective in the U.S. among mainstream investors, corporate leaders, and other market participants.

³³ California Transparency in Supply Chains Act, S.B. 657, effective January 1, 2012, *codified at* California Civil Code Section 1714.43. California's Climate Risk Carbon Initiative requires California insurance companies to provide public disclosures regarding climate-related financial risks following the TCFD climate risk disclosure framework. 2018 Press Release, September 26, 2018, <http://www.insurance.ca.gov/0400-news/0100-press-releases/2018/release120-18.cfm>. The National Association of Insurance Commissioners has developed a Climate Risk Disclosure Survey in 2010, modeled after the CDP questionnaire, which is mandatory for large insurers. https://www.naic.org/cipr_topics/topic_climate_risk_disclosure.htm.

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