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Adopting Components of European Union ESG Securities Regulations into United States Securities Regulation

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ADOPTING COMPONENTS OF EUROPEAN UNION ESG SECURITIES REGULATIONS INTO UNITED STATES SECURITIES REGULATION

By Chris Wright *

TABLE OF CONTENTS

I. INTRODUCTION 327
II. BACKGROUND 329
  A. ESG Generally........ 329
  B. Disclosure Mandates and Standards in the U.S........ 335
  C. Materiality & the Reasonable Investor in U.S. Securities Law 340
  D. Materiality and ESG Disclosure in E.U. Securities Law 346
    1. Sustainable Finance Disclosure Regulation........ 348
    2. The Corporate Sustainability Reporting Directive and E.U. Taxonomy 350
III. ANALYSIS........ 352
  A. Adjusting the Reasonable Investor Standard........ 352
  B. Adopting Double Materiality 356
  C. Adopting Definitions for a Comprehensive ESG Disclosure Framework 357
IV. CONCLUSION 359

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I. INTRODUCTION

Does a company have a responsibility to do good? This is a question that law students grapple with in corporations classes, legal scholars write about in articles, and investors consider when deciding which companies to back. Everyone may have a different answer, but regardless, companies influence the environment and peoples' financial health.

Investors are people and people have values. In an ideal world, someone would invest in a company that shares his values, but this is not always true. The primary motivation of a for-profit company is to provide value to its shareholders. A company can take its shareholders' values into account but acting on those values might decrease the bottom line or the shareholders' value. For example, environmental conservation might conflict with the purpose of an oil drilling company. In cases where there is a mismatch between shareholders' values and expectations and a company's actions, it may be easier for officers of the company to stretch the truth about the company's activities. For example, an energy company might notify its shareholders of the great steps it is taking toward creating a sustainable biofuel but omit that it has only spent a fraction of a percentage on research and development. Some shareholders might find this unacceptable.

In the 1970s and 1980s, those who believed that one of the purposes of for-profit companies is to benefit society termed this idea corporate social responsibility ("CSR"). Organizations soon developed Environmental, Social, and Governance ("ESG") metrics to try to quantify corporate practices and assess their social impact. These metrics reduced corporate practices, such as human rights, supply chain management, climate change impact, and diversity and inclusion, to variations of a 100-point score. Increasingly, investors and companies have come to rely on these metrics either because shareholders consider them important or because scoring well on these metrics increases its valuation. Regardless of the reasons why anyone uses them, it seems ESG is here to stay. This is where securities law comes into play. Securities laws aim to protect investors by requiring companies to disclose their activities that the

shareholders ought to know. The big question now is whether securities laws should begin to explicitly account for environmental and social justice issues.

As ESG factors have become more prevalent, the United States Securities and Exchange Commission ("SEC") has had to address these factors on multiple occasions. Since investors were relying on voluntary disclosures by companies about their ESG metrics, the primary concern for the SEC was to make sure that investors were protected from fraud. To protect investors, the SEC has taken several steps to incorporate ESG issues into its regulatory framework.

However, the SEC disclosure framework relies on what companies consider to be material, which is defined as information a reasonable investor would consider when making investment decisions. Courts typically determine who the reasonable investor is on a case-by-case basis. In the context of ESG, the question of materiality arises when one considers whether the effects of climate change or specific company practices will affect the financial health of a company. This is the conception of materiality currently used in the United States ("U.S."), sometimes referred to as "single materiality."

The European Union ("E.U.") has reimagined its conception of materiality to reflect the reciprocal nature between a company's practices and environmental and social impacts, known as "double materiality." Additionally, the E.U. has also taken steps to classify what economic activities are considered sustainable through the E.U. Taxonomy Regulation (the "E.U. Taxonomy"). The E.U. has used this regulation alongside double materiality to begin establishing a comprehensive disclosure mandate through other regulations such as the Corporate Sustainability Reporting Directive ("CSRD") and Sustainable Finance Disclosure Regulation ("SFDR").

This Comment will argue that the U.S.—through the SEC—should follow the E.U.'s lead and begin adopting similar regulations to establish an ESG disclosure mandate. Part II of this Comment will discuss the origins of ESG, some of its flaws and criticisms, and its current role within these U.S. This Comment will then discuss the

current state of a disclosure mandate in the U.S., relevant regulations, and then dive deeper into the U.S. conception of materiality. Part II concludes with a look into double materiality, the CSRD, and the E.U. Taxonomy.

Part III of this Comment will argue that the U.S. needs to do three things in order make significant steps towards an ESG disclosure mandate. First, the U.S. needs to lower the reasonable investor standard to the reasonable passive investor to cover a wider population of investors. Second, the U.S. should explicitly adopt double materiality to account for the reciprocal nature of the effects of companies' activities on their valuation. Third, the U.S. should adopt definitions, like the E.U. Taxonomy, to give substance to nebulous words like sustainable. Through these acts, the U.S. can get one step closer to an ESG disclosure mandate.

II. BACKGROUND

A. ESG Generally

ESG refers to an investment strategy that emphasizes corporate practices such as "climate change, human capital management, supply chain management, human rights, cybersecurity, diversity and inclusion, corporate tax policy, corporate political spending, executive compensation practices, and more."[1] ESG is a metrics-based subcategory of CSR, a concept that suggests that companies should not just be motivated by profit maximization, but also should incorporate the public good.[2] The concept of ESG ratings originally had moral and ethical origins in the socially

[1] Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1822 (2021); *accord* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 388 (2020).

[2] 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, 745 (2021); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1415–16 (2020) (discussing the inconsistent definition of ESG and how the term is interchangeable with corporate social responsibility).

responsible investing ("SRI") movement in the 1970s, developing into modern-day ESG.[3]

In recent years, ESG investing has shifted to a risk-based model.[4] As consumer demand for more sustainable practices has grown, institutional investors have begun to view a firm's ESG rating as a way to measure the risk of their investment.[5] Professors Sitkoff of Harvard Law School and Schanzenbach of Northwestern University Law School attempt to clarify the ambiguous definition of ESG investing by dissecting the investor's motive.[6] One major motivation is that an investor hopes to provide a benefit to a third party or invests simply for moral or ethical reasons.[7] For example, an investor motivated by morals and ethics might refuse to invest in a fossil fuel company for the benefit of reducing pollution. In contrast, an investor may invest based on the expected risk of a company. For instance, an investor might refuse to invest in a fossil fuel company because he believes the company's shares are overvalued given the company's litigation and regulatory risk in the face of climate change.[8] This distinction in motivation is useful in issues of fiduciary loyalty in trust law but also effectively characterizes the two main motivations of ESG investing. [9]

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[3] *See* Schanzenbach & Sitkoff, *supra* note 1.

[4] *See id.* at 388-89.

[5] *See* Hazen, *supra* note 2, at 742 (discussing how the waves of corporate boycotts in the wake of general social protests have encouraged companies to focus more on their practices and responsibilities); *see also* Edouard Dubois & Ali Aribas, *Making Corporate Purpose Tangible—A Survey of Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jun. 19, 2020), https://corpgov.law.harvard.edu/2020/06/19/making-corporate-purpose-tangible-a-survey-of-investors/ (noting that investors are showing a stronger interest in corporate purpose and how corporations are updating their practice and by-laws alongside this increase in interest).

[6] *See* Schanzenbach & Sitkoff, *supra* note 1, at 397-99.

[7] *Id.* at 397 (referring to ESG investing based on this motivation as collateral benefits ESG).

[8] *Id.* at 398 (referring to this ESG investment motivation as risk-return ESG).

[9] *See id.* at 390.

A growing interest in sustainable investment has put a greater emphasis on ESG scores.[10] More importantly, institutional investors are aware of the impact that these scores have on a company's valuation thus impacting how they invest.[11] What was initially viewed as a non-financial risk has become relevant and financial.[12] Subsequently, the practice of publicly held companies voluntarily sharing their ESG ratings with investors became more common. In 2018, it was estimated that 86% of the companies in the S&P 500 Index published a sustainability or corporate responsibility report.[13] While the primary reason firms have begun to include ESG is risk management, other reasons include regulatory pressure, social pressure, external events, brand image and reputation, improved long-term returns, and altruistic values.[14]

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[10] *See* John Hale, *Sustainable Funds U.S. Landscape Report*, MORNINGSTAR 6 (Jan. 2018), https://cdn.ymaws.com/dciia.org/resource/collection/8606CD14-06A5-4277-9507-C397C1C8DEA0/Sustainable_Funds_Landscape_013018.pdf [https://perma.cc/4Z5V-ATGU] (showing a steady increase of sustainable mutual funds and ETFs between 2013 and 2017); *Global Investor Study 2019*, SCHRODER INV. MGMT. AUSTL. LTD. 5 (2019), https://tinyurl.com/2emfj9v6 (noting that 57% of people surveyed will always consider sustainability factors when selecting an investment and 61% of those surveyed believe all funds should consider sustainability factors).

[11] Betsy Atkins, *Demystifying ESG: Its History & Current Status*, FORBES (Jun. 8, 2020) https://www.forbes.com/sites/betsyatkins/2020/06/08/demystifying-esgits-history--current-status/?sh=3edaa8572cdd.

[12] *See* John Coates, *ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets,* SEC. & EXCH. COMM'N (Mar. 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121.

[13] *FLASH REPORT: 86% of S&P 500 Index® Companies Publish Sustainability / Responsibility Reports in 2018*, GOVERNANCE & ACCOUNTABILITY INST., INC. (May 16, 2019), https://tinyurl.com/yvjy7rym.

[14] Rakhi Kumar et. al., *Into the Mainstream: ESG at the Tipping Point*, HARV. L. SCH. F. ON CORP. GOVERNANCE (2020), https://corpgov.law.harvard.edu/2020/01/13/into-the-mainstream-esg-at-the-tipping-point/; *The ESG Global Survey 2019*, BNP PARIBAS 13-14 (June 4, 2019), https://securities.cib.bnpparibas/app/uploads/sites/3/2021/03/ss-brochure-esg-global-survey-2019.pdf; Kosmas Papadopoulos, et. al., *ESG Drivers and the COVID-19 Catalyst*, HARV. L. SCH. F. ON CORP. GOVERNANCE (2020), https://corpgov.law.harvard.edu/2020/12/27/esg-drivers-and-the-covid-19-catalyst/; RICCARDO BOFFO & ROBERT PATALANO, ESG

There are a few benefits to ESG ratings. First, they are an easy way to show whether a firm is fulfilling any promises it made. Additionally, companies that have strong ESG practices in place tend to have a higher stock liquidity.[15] This phenomenon likely exists because of the self-reinforcing nature of the stock market; the more people that believe that ESG metrics benefit the value of stock, the more likely an investor will buy that stock, thus increasing its value. Embracing and maximizing ESG metrics can also attract value-driven investors, streamline operations, and mitigate long-term risk.[16]

Many privately held companies, such as Bloomberg,[17] MSCI,[18] and Refinitiv,[19] have developed ESG metrics and disclosure scores based on assorted criteria.[20] In published reports, the corporation's alignment with relevant ESG frameworks is typically reduced to a score. Following a 100-point scale, a higher ESG score, in theory, demonstrates the firm's better fulfillment of a variety of ESG criteria.[21] Different firms use different metrics and differ in which

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INVESTING: PRACTICES, PROGRESS AND CHALLENGES, OECD PARIS 6 (2020) https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf.

15 Betsy Atkins, *Strong ESG Practices Can Benefit Companies and Investors: Here's How*, NASDAQ (June 5, 2018), https://www.nasdaq.com/articles/strong-esg-practices-can-benefit-companies-and-investors-2019-03-13.

16 *Understanding the Alphabet Soup of ESG Reporting*, CONSERVICE (Nov. 23, 2020), https://www.gobyinc.com/esg-solutions/the-esg-reporting-matrix/.

17 *See Global Environmental, Social & Governance – ESG Data*, BLOOMBERG PRO. SERVICES, https://www.bloomberg.com/professional/dataset/global-environmental-social-governance-data/ (last visited Nov. 29, 2022).

18 *ESG Ratings Key Issue Framework*, MSCI, https://www.msci.com/our-solutions/esg-investing/esg-ratings/esg-ratings-key-issue-framework (last visited Nov. 29, 2022).

19 *Environmental, Social and Corporate Governance – ESG*, REFINITIV, https://www.refinitiv.com/en/financial-data/company-data/esg-data (last visited Nov. 29, 2022).

20 *See* Betty Moy Huber & Michael Comstock, *ESG Reports and Ratings: What They Are, Why They Matter*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 27, 2017), https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/ (summarizing several ESG data providers rating scales and methodologies).

21 E. Napoletano & Benjamin Curry, *Environmental, Social and Governance: What Is ESG Investing?*, FORBES (Mar. 1, 2021), https://www.forbes.com/advisor/investing/esg-investing/.

factors to weigh.[22] However, some have noted the lack of correlation between the different scoring mechanisms; a higher score using Bloomberg's scoring method, for example, may not correlate to a higher score using MSCI's method.[23] The primary reason that metrics differ so significantly between methods is likely due to the ratings' divergence in: (1) scope, such as carbon emissions or labor practices; (2) measurement, such as evaluating labor practices based on workforce turnover instead of the number of labor-related court cases brought against a firm; and (3) weight, the relative importance of different attributes.[24] The lack of correlation between ratings casts a shadow on the efficacy of ESG ratings.

A common criticism of ESG ratings is the lack of standardization in both the method of data collection and the framing of ESG disclosures.[25] This lack of standardization creates fears of inconsistency in reporting, resulting in reduced usefulness in investment analysis.[26] Moreover, this lack of standardization creates more opportunities for firms and companies to attract investors by overstating their ESG practices.[27]

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22 *Id.*

23 *See* Kevin Prall, *ESG Ratings: Navigating Through the Haze*, CFA INST. (Aug. 10, 2021), https://blogs.cfainstitute.org/investor/2021/08/10/esg-ratings-navigating-through-the-haze/; Rakhi Kumar & Ali Weiner, *The ESG Data Challenge at* 2 (Mar. 2019), https://www.ssga.com/investment-topics/environmental-social-governance/2019/03/esg-data-challenge.pdf.

24 *See* Florian Berg et al., *Aggregate Confusion: The Divergence of ESG Ratings* (Aug. 15, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533.

25 Hazen, *supra* note 2, at 749; *see also Recommendation of the SEC Investor Advisory Committee Relating to ESG Disclosure,* SEC. & EXCH. COMM'N INV. ADVISORY COMM. AT 5 (May 21, 2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/esg-disclosure.pdf.

26 Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT'L L. 249, 254 (2019); *see also Public Companies Disclosures of Environmental, Social, and Governance Factors and Options to Enhance Them*, U.S. GOV'T ACCOUNTABILITY OFF. 12 (2020), https://www.gao.gov/assets/gao-20-530.pdf (noting the lack of ESG standardization, generally).

27 Quinn Curtis et al., *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 408 (2021) (explaining that particularly in the environmental context, this overstating is known as "greenwashing.").

Additionally, there is a debate as to whether institutional investors including ESG in investment decisions is a breach of fiduciary duty to stockholders.[28] Commissioner Peirce of the SEC has expressed skepticism at the idea of shifting the current people-centered disclosure framework to a metric-based one. She argues that "[a] single set of metrics will constrain decision making and impede creative thinking. . . . ESG factors, which continue to evolve, are complex and not readily comparable across issuers and industries."[29] Regardless of the pros and cons, investors increasingly rely on ESG, suggesting that it is here to stay.[30] Given that high ESG scores are becoming more correlated with profitability and inversely correlated with volatility, ESG is becoming harder to ignore.[31]

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[28] Compare Max M. Schanzenbach & Robert H. Sitkoff, *The Law and Economics of Environmental, Social, and Governance Investing by a Fiduciary*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 20, 2018), https://corpgov.law.harvard.edu/2018/09/20/the-law-and-economics-of-environmental-social-and-governance-investing-by-a-fiduciary/ (proposing that a fiduciary can include ESG when making investment decisions if the fiduciary has a good faith belief that an ESG program will benefit the beneficiary and "fiduciary's exclusive motive for adopting the ESG investment program is to obtain this direct benefit") with Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 734-35 (2019) (noting that outdated understandings of social investing cause some officers to worry about breaches of fiduciary duty) and Carlos Micames, *Socially Responsible Lawyering: How ESG Investing Is Shaking Up the Role of the Corporate Lawyer*, 27 J. L. BUS. & ETHICS 9, 20 (2021) (noting that "ESG factors are not necessarily inconsistent with the fiduciary duty to investors"); *see also* Kumar et al., *supra* note 14 (noting that fiduciary duty is one of the key factors in driving investors towards ESG).

[29] Hester Pierce, *Rethinking Global ESG Metrics*, SEC. AND EXCH. COMM'N (Apr. 14, 2021), https://www.sec.gov/news/public-statement/rethinking-global-esg-metrics.

[30] *The Importance of Knowing Your Investors and How They Use ESG Rating Agencies*, MORROW SODALI (Feb. 25, 2020), https://morrowsodali.com/insights/the-importance-of-knowing-your-investors-and-how-they-use-esg-rating-agencies .

[31] Subodh Mishra, *ESG Matters*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 14, 2020), https://corpgov.law.harvard.edu/2020/01/14/esg-matters/; Tensie Whelan et al., *ESG and Financial Performance: Uncovering the Relationship by Aggregating Evidence from 1,000 Plus Studies Published Between 2015 – 2020* (2021), https://www.stern.nyu.edu/sites/default/files/assets/documents/NYU-RAM_ESG-Paper_2021%20Rev_0.pdf.

B. Disclosure Mandates and Standards in the U.S.

In response to the increasing importance of ESG, both critics and proponents of ESG have argued that the SEC, tasked with overseeing federal securities laws, should impose a comprehensive ESG disclosure mandate and framework or drastically alter the current system.[32] This would require the SEC to overhaul some or all aspects of the current securities disclosure system.

The Securities Act of 1934 (the "Act") requires publicly held companies to file periodic reports once the company is made public. The Act notes this requirement is necessary to protect investors.[33] The basic reports include a quarterly report in Form 10-Q, an annual report 10-K, and, as needed, an interim report on Form 8-K.[34] More importantly, Regulation S-K and Regulation S-X outline what information a company needs to include in the reports.[35] Depending on the company's activity, the SEC's disclosure requirements could involve ESG-related disclosures. For example, Item 105 requires companies to include any material factors that may increase the risk of an investment offering.[36] Similarly, Item 303 requires companies to disclose information material to the financial condition of the company's operations.[37] These disclosure requirements can account for ESG-related issues, however, since the company largely determines what is material, these regulations are effectively voluntary.[38]

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[32] *See, e.g.*, Rose, *supra* note 1, at 1828; Hazen, supra note 2 (arguing that the SEC should improve CSR and ESG disclosures); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 929 (2019) (suggesting that the SEC adopt a principles-based sustainability disclosures); Veena Ramani & Jim Coburn, *The Need for SEC Rules on ESG Risk Disclosure*, 50 ENVTL. L. REP. 10, 650 (2020) (proposing adopting a principles-based approach to disclosure).

[33] 15 U.S.C.A. § 78m(a).

[34] 17 C.F.R. § 249.308a (2022) (Form 10-Q); 17 C.F.R. § 249.310 (2022) (Form 10-K); 17 C.F.R. § 249.308 (2022) (Form 8-K).

[35] 17 C.F.R. § 239.0-.900 (2022) (Regulation S-K); 17 C.F.R. § 210 (2022) (Regulation S-X).

[36] 17 C.F.R. § 229.105 (2022).

[37] 17 C.F.R. § 229.303 (2022).

[38] Hazen, *supra* note 2, at 749; Ho & Park, *supra* note 26, at 254-55.

Those who call for standardization by the SEC argue that the voluntary nature of ESG metrics and reports is "episodic, incomplete, incomparable, and inconsistent, and ESG disclosure in required SEC filings is similarly inadequate."[39] The hope is that creating a standard will provide a level playing field for companies that do engage in voluntary ESG disclosure and provide predictability in reporting.[40] Some scholars have argued that "more and better CSR information can benefit capital markets through greater liquidity, lower cost of capital, and better capital allocation."[41] The stakes with making ESG reporting mandatory might even change firm behavior.[42]

The calls for this disclosure mandate and framework have been met with opposition.[43] A common argument is that disclosure mandates as a tool are largely ineffective.[44] The reason mandates fail is because consumers, presented with an abundance of detailed information, will be unable to make sense of these disclosure documents.[45] Consumers, like all people, have a limited working

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[39] Letter from Cynthia A. Williams, Osler Chair in Bus. L., Osgoode Hall L. Sch., & Jill E. Fisch, Professor of Bus. L., Univ. of Pa. L. Sch., to Brent J. Fields, Sec'y, Sec. and Exch. Comm'n. (Oct. 1, 2018) (on file with the SEC).

[40] *Id.*

[41] Hans B. Christensen et al., *Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review*, EUR. CORP. GOVERNANCE INST. 89 (May 2021), https://tinyurl.com/sp2ybmny.

[42] *Id.*

[43] *See, e.g.*, Sally R.K. Fisk & Nikki Adame-Winningham, *Sustainability Risk is Investment Risk*, 50 ENVTL. L. REP. 10, 644 (2020) (noting that the current SEC disclosure regulations are sufficient to cover ESG); Rick A. Fleming & Alexandra M. Ledbetter, *Making Mandatory Sustainability Disclosure a Reality*, 50 ENVTL. L. REP. 10647, 10648 (2020) (suggesting that sweeping changes to disclosure rules could create a difficult environment for market participants).

[44] *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 686-89 (2011) (arguing that a disclosure mandate creates an overload effect, is too costly, and is usually devoid of a coherent standard); Thomas S. Ulen, *A Behavioral View of Investor Protection*, 44 LOY. U. CHI. L.J. 1357, 1370 (2013) ("Consumers, who are presumed to benefit from the information disclosures, often find themselves overwhelmed by the amount of information with which they must deal.").

[45] Ben-Shahar & Schneider, *supra* note 44, at 687-90; Ulen, *supra* note 44, at 1370.

memory, so they cannot retain the information long enough to be able to make sense of it, and this may, in fact, have harmful consequences such as crowding out useful information, harming competition, and fostering inequity.[46] Some scholars push back on this argument, suggesting that failing to look at the specific purpose the disclosure is meant to achieve in its specific context is misguided.[47]

Another primary issue is the cost of compliance. Collecting relevant ESG data is a costly and time-consuming task, and many firms claim that they lack the resources to collect and manage the relevant data.[48] Any resources given to collect such data would inevitably take resources away from core operations.[49]Additionally, the potential litigation costs are relatively high.[50]

Negative externalities are a common concern. If an ESG disclosure is mandated, companies that voluntarily disclose ESG information to distinguish themselves from competitors might be put at a disadvantage.[51] If firms cannot distinguish themselves from their competitors, their valuation may suffer. Some have even suggested that the adoption of an ESG mandate is "not well-aligned with the SEC's stated mission," nor does the SEC have the "expertise nor the political accountability to pursue climate, diversity, and other public policy goals."[52]

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46 Ben-Shahar & Schneider, *supra* note 44, at 737-40; Ulen, *supra* note 45.

47 *See, e.g.*, Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 337-38 (2013).

48 Rose, *supra* note 1, at 1832; *see* Maitane Sardon, *The Potentially High Cost of Not Disclosing ESG Data*, WALL ST. J. (Sep. 22, 2019), https://www.wsj.com/articles/the-potentially-high-cost-of-not-disclosing-esg-data-11569204241; Laura Weiss, *House Passes ESG, Climate Disclosure Rules for Public Companies*, ROLL CALL (Jun. 16, 2021), https://rollcall.com/2021/06/16/house-passes-esg-climate-disclosure-rules-for-public-companies/.

49 Rose, *supra* note 1.

50 Christensen, *supra* note 41, at 90.

51 Elsa Allman & Joonsung Won, *Can ESG disclosure improve investment efficiency?*, WORLDBANK BLOGS (Sept. 20, 2021), https://blogs.worldbank.org/allaboutfinance/can-esg-disclosure-improve-investment-efficiency.

52 Paul G. Mahoney & Julia G. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2 COLUM. BUS. L. REV. 840, 843 (2021).

In response to the calls for a disclosure mandate and framework, in 2016, the SEC requested public input on climate change disclosures, suggesting an increasing interest in addressing the call for a comprehensive ESG framework.[53] The majority of the unique public responses called for some kind of disclosure reform.[54] In 2019, the SEC made a minor push to reform its disclosure rules by proposing to add "human capital" disclosures under Item 101 of Regulation S-K.[55] In 2020, the SEC made another push to create a standardized ESG framework, with the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure releasing draft recommendations; however, the SEC has yet to act on the recommendations.[56] Currently, some legislation and regulations mandate some degree of ESG disclosure.[57] However, Congress has yet to enact a comprehensive ESG plan despite these efforts.[58]

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[53] Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*, SEC. & EXCH. COMM'N. (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[54] *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 (2020); Comment Letter from J. Robert Brown, Jr., Professor of L., Univ. of Denver Sturm Coll. of L., to Brent J. Fields, Sec'y, Sec. and Exch. Comm'n. on the Regulation S-K Concept Release (Oct. 3, 2016) (on file with the SEC).

[55] Modernization of Regulation S-K Items 101, 103, and 105, 84 Fed. Reg. 44,358, 44,396 (Aug. 23, 2019).

[56] *Recommendation of the SEC Investor Advisory Committee Relating to ESG Disclosure*, *supra* note 25, at 6 (noting that the SEC should adopt of standard of material ESG risks, use known frameworks to require disclosure, and require material ESG risks be disclosed).

[57] 15 U.S.C. §§ 78a (2021) (imposing periodic requirements on publicly held companies); 17 C.F.R. § 229.303(b)(2) (2021) (requires companies to report "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations").

[58] In 2019, Senator Elizabeth Warren introduced the Climate Risk Disclosure Act of 2019 to the Senate that would "require issuers to disclose certain activities relating to climate change, and for other purposes" and direct the SEC to mandate that all public companies disclose its greenhouse gas emissions, fossil-fuel related assets, and its risk due to climate change. Climate Risk Disclosure Act of 2019 , S. 2075, 116th Cong. (2019). In February 2021, the U.S. House of Representatives introduced the Corporate Governance Improvement and Investor

Various nonprofit organizations have attempted to create ESG standards,[59] which the SEC has staunchly resisted incorporating into its own regulatory framework.[60] The mission of these international bodies is the same as the SEC's: transparency, accountability, and efficiency.[61] The Global Reporting Initiative ("GRI"), an international sustainability standards organization, released a report in 2020 stating that "[m]aterial topics are topics that reflect the organization's most significant impacts on the economy, environment, and people, including impacts on human rights."[62] Similarly, in 2020, the Sustainability Accounting Standards Board ("SASB") also released an exposure draft announcing a re-definition

Protection Act in February 2021, a combination of ESG-related bills, which would create a Sustainable Finance Advisory Committee under the SEC and make ESG metrics de facto material. This bill has currently stalled in the House. Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. (2021).

[59] Some organizations include: the Sustainability Accounting Standards Board (SASB), the Global Reporting Initiative (GRI), the Financial Stability Board (FSB), and the International Financial Reporting Standards Foundation (IFRS). Congress, in the ESG Disclosure Simplification Act of 2019, would explicitly allow the SEC to adopt internationally recognized ESG standards. The implications of this legislation are beyond the scope of this article.

[60] Commissioner Daniel M. Gallagher, *Remarks at the 26th Annual Corporate Law Institute, Tulane University Law School: Federal Preemption of State Corporate Governance*, SEC. & EXCH. COMM'N (Mar. 27, 2014), https://www.sec.gov/news/speech/2014-spch032714dmg.html (decrying attempts by international organizations like the SASB to influence SEC regulation). However, the SEC under the Biden administration has taken steps suggesting that it is more open to conversation about a standard ESG framework. *See* Allison Herren Lee, *Climate, ESG, and the Board of Directors: "You Cannot Direct the Wind, But You Can Adjust Your Sails,"* SEC. & EXCH. COMM'N. (June 28, 2021), https://www.sec.gov/news/speech/lee-climate-esg-board-of-directors.

[61] *Why Global Accounting Standards?*, INT'L FIN. REPORTING STANDARDS FOUND., https://www.ifrs.org/use-around-the-world/why-global-accounting-standards/ (last visited Nov. 29, 2022).

[62] Barbara Strozzilaan, *GRI Universal Standards: GRI 101, GRI 102, and GRI 103 – Exposure Draft*, GLOB. SUSTAINABILITY STANDARDS BD. 4 (June 11, 2020), https://www.globalreporting.org/standards/media/2605/universal-exposure-draft.pdf.

of materiality, explicitly distinguishing it from the traditional U.S. definition.[63]

In contrast to the U.S., the E.U. has attempted to reimagine the definition of materiality. In 2019, the E.U. introduced the concept of double materiality, a two-pronged conception of materiality.[64] The first prong states that information is financially material where it is "necessary for an understanding of the company's development, performance, and position."[65] The second prong encompasses information that relates to a company's impact on a particular ESG topic, such as climate change.[66] Double materiality makes explicit the impact of a company's practices on ESG factors and vice versa. By comparison, U.S. materiality is only one-half of the European equation, focusing only on the monetary impacts that external factors have on a company's valuation. Double materiality, however, focuses on the interconnectivity between a company's actions and the environment. The International Financial Reporting Standards Foundation ("IFRS") has considered incorporating the principles of double materiality into future standards.[67]

C. Materiality & the Reasonable Investor in U.S. Securities Law

The crux of the issue of whether to install an ESG mandate within the U.S. comes down to materiality. Congress first introduced materiality in the Securities Act of 1933 and again in the Securities

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[63] *Proposed Changes to the SASB Conceptual Framework & Rules of Procedure: Bases for Conclusions & Invitation to Comment on Exposure Drafts*, SUSTAINABILITY ACCT. STANDARDS BD. 7 (Aug. 28, 2020), https://www.sasb.org/wp-content/uploads/2020/08/Invitation-to-Comment-SASB-CF-RoP.pdf.

[64] Eur. Comm'n, *Communication from the Commission—Guidelines on non-financial reporting: Supplement on reporting climate-related information*, 2019 O.J. (C 209) 1, 5.

[65] *Id.* at 4.

[66] *Id.*

[67] *Consultation Paper on Sustainability Reporting*, IFRS FOUND. 13 (Sept. 2020), https://www.ifrs.org/content/dam/ifrs/project/sustainability-reporting/consultation-paper-on-sustainability-reporting.pdf.

Act of 1934.[68] Under the overarching goal of protecting investors, the Acts established general disclosure obligations for publicly traded companies while attempting to balance the overwhelming amount of possible information about a company that an investor could use.[69] Materiality is meant to distinguish what companies *should* disclose from what companies are *required* to disclose.[70] However, these Acts fail to define what can be classified as material. The Supreme Court filled in the gaps in *TSC Industries, Inc. v. Northway*, stating that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[71] The Supreme Court in *Basic v. Levinson* established an important caveat: that an omission of information, even material information, isn't actionable unless there is a duty to disclose.[72] Thus,

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[68] Securities Act of 1933, Pub. L. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-mm); Securities Act of 1934, Pub. L. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-kk).

[69] Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645, 655 (2019).

[70] Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 THE BUS. LAW. 317, 318 (2007) ("Materiality represents the dividing line between information reasonably likely to influence investment decisions and everything else."). For example, on Item 303 within regulation S-K, publicly traded companies are required to disclose "material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition . . . [including] matters that are reasonably likely . . . to have a material impact on future operations." 17 C.F.R 229.303(a) (2021). Additionally, publicly traded companies are required to disclose "any changes . . . which have a material effect on the financial statements." 17 C.F.R 210.2-02(c) (2022).

[71] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[72] Basic Inc. v. Levinson, 485 U.S. 224, 239, n.17 (1987) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5."); *see also* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44 (2011) ("Moreover, it bears emphasis that §10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required . . . only when necessary 'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'"); ZVI Trading Corp. Employees' Money Purchase Pension Plan & Tr. v. Ross (In re Time Warner Inc. Sec. Litig.), 9 F.3d 259, 267 (2d Cir. 1993) ("[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact. Rather, an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose

unless the SEC has explicitly mandated that disclosure is required or failure to disclose would make other statements inaccurate or misleading, a company has not necessarily breached a duty.[73]

The SEC has been consistent in its understanding of materiality in the wake of *TSC*, generally taking a broad view.[74] It has done so by defining what is *not* material per se.[75] The problem with such a broad definition is that one of the considerations of the Securities Exchange Act of 1934—the amount of information investors need to absorb—falls to the wayside, ultimately providing companies with little guidance on what to disclose. Investors increasingly view the risk factors that ESG metrics identify as a reflection on long-term profitability, likely falling under the definition of material.[76] Even though the current "reasonable" standard is flexible, companies have repeatedly called for a more bright-line rule

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the omitted facts."); Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 430 ("The limited amount of material ESG information contained in most firms' financial reports is due in part to the fact that federal securities law does not require issuers to disclose all material information within periodic reporting.").

73 Allison H. Lee, Comm'r, Sec. & Exch. Comm'n, *Living in a Material World: Myths and Misconceptions about "Materiality"* (May 24, 2021), https://www.sec.gov/news/speech/lee-living-material-world-052421; Alexandra Thornton & Tyler Gellasch, *The SEC Has Broad Authority to Require Climate and Other ESG Disclosures*, CTR. FOR AM. PROGRESS 8 (June 2021), https://cf.americanprogress.org/wp-content/uploads/2021/06/SEC-Climate-Disclosures.pdf?_ga=2.28807545.411883581.1644338079-813186264.1643924126.

74 17 C.F.R. § 230.405 (2021) (defining material as "those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered").

75 This includes information concerning earnings; mergers and acquisitions, or changes in assets; new products default events; and bankruptcies. Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,715 (Aug. 24, 2000).

76 Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 122 HARV. L. REV. 1197, 1284 (1999) ("[I]t is quite difficult to draw a meaningful distinction between a corporate 'financial issue' and a corporate 'social issue,' because social, consumer, and investor trends with respect to the corporation's relationship with society can eventually affect a company's profitability.").

from the SEC.[77] However, both the Supreme Court and the SEC have yet to adopt anything resembling a bright-line rule.[78]

As noted in the *TSC* decision, materiality ultimately depends on what a reasonable shareholder would consider material.[79] The SEC has defined the reasonable shareholder as the reasonable investor.[80] However, the definition and traits of the reasonable investor vary on a case-by-case basis, making an exact definition difficult. Courts and scholars have long analogized the idea of the reasonable investor with the reasonable person in other areas of law such as in tort law.[81] The reasonable person standard in tort law has well-known benefits—such as aiding administrability and incentivizing predictable behavior—and notable shortcomings—like vagueness and fueling gender and racial biases.[82] On the other hand, a more subjective bright-line rule approach increases the likelihood that

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77 *See* Comment Letter from Heather Slavkin Corzo, Director, Off. of Inv., Am. Fed'n of Lab., to Brent J. Fields, Sec'y, Sec. and Exch. Comm'n. on Proposed Rule "Disclosure Update and Simplification" (Oct. 31, 2016) (on file with the SEC); Comment Letter from Marcie Frost, Chief Exec. Officer, Cal. Pub. Employees' Ret. Sys., to Brent J. Fields, Sec'y, Sec. and Exch. Comm'n. on Proposed Rule "Disclosure Update and Simplification" (Nov. 2, 2016) (on file with the SEC).

78 *See* Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988) ("A bright-line rule indeed is easier to follow than a standard . . . [but] [a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be over- or underinclusive.").

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

80 17 C.F.R § 210.1-02(a)(4)(o) (2021) ("The term material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters about which an average prudent investor ought reasonably to be informed."); *Staff Accounting Bulletin: No. 99-Materiality,* SEC. AND EXCH. COMM'N (1999), https://www.sec.gov/interps/account/sab99.htm ("A matter is 'material"' if there is a substantial likelihood that a reasonable person would consider it important."); *see also* 17 C.F.R. 229.303(a)(1) (2021).

81 *See, e.g.*, Johns Hopkins Univ. v. Hutton, 422 F.2d 1124, 1129 (4th Cir. 1970) (equating the expectations of a reasonable person with a reasonable investor); Piambino v. Bailey, 610 F.2d 1306, 1320 (5th Cir. 1980) (analogizing the reasonable investor to the torts standard of a reasonable person); Steve Lydenberg, *On Materiality and Sustainability: The Value of Disclosure in the Capital Markets*, INITIATIVE FOR RESPONSIBLE INV. 13 (2012), http://www.sasb.org/wp-content/uploads/2012/10/On-Materiality-and-Sustainability.pdf.

82 Rose, *supra* note 1, at 83-86.

a regulation will be either over- or under-inclusive.[83] Thus, the reasonable person standard relies on both "an objective but at the same time highly contextualized analysis."[84] The main pro of the reasonable person standard in tort law—avoiding the difficulty of crafting an ex-ante rule—is the same as in U.S. securities law.[85] Additionally, the reasonable person standard may create incentives for people to act in a predictable manner.[86] However, the downside to this standard is its practicability; defining this standard for a jury can be very difficult and casts doubt on whether lay juries are adequate in complex cases.

This issue with the reasonable person standard carries over to securities cases in that the reliability of the fact-finder to effectively represent the conscience of the community is questionable.[87] Securities trials are significantly more complicated than most tort cases, so it may be impractical for courts and parties to expect any fact-finder to apply the reasonable investor standard consistently.[88] A clearer definition of who the reasonable investor is may help the fact-finder apply this standard more consistently.[89]

In essence, whether ESG metrics are material under the Securities Exchange Acts boils down to whether a prototypical, reasonable investor would consider the metrics material.[90] Proponents of an SEC disclosure mandate for ESG argue that the

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[83] *Id.* at 102.

[84] *Id.* at 103.

[85] *Id.* at 79.

[86] *Id.* at 83.

[87] *Id.* at 104.

[88] *Id.* at 109.

[89] *Id.*

[90] *See generally* Aisha I. Saad & Diane Strauss, *The New "Reasonable Investor" and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17 BERKELEY BUS. L.J. 397 (2020) (arguing that as socially responsible investing has increased, so has the need to consider ESG disclosures material in securities litigation); Emily Steinbarth & Scott Bennett, *Materiality Matters: Targeting the ESG Issues that Impact Performance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 10, 2018), https://tinyurl.com/mrxrjf98 (discussing which ESG issues are most important to predicting performance and value and are therefore material).

demographics and attributes of the reasonable investor as previously understood have evolved such that there is now a need to change the scope of materiality.[91] Some have suggested changes at the judicial level, such as reinvigorating the reliance-based approach to the reasonable investor. Under this approach, the SEC would require companies to report expressed commitments, and a factfinder can weigh non-financial considerations in the context of a securities fraud claim.[92] Others have suggested that restructuring how disclosure operates is needed, such as a comply-or-explain approach to disclosure, which provides default rules that companies can opt out of if they have an acceptable reason for doing so.[93]

The most common argument attacks the idea of the reasonable investor itself. For example, Associate Professor Tom Lin of Temple University Beasley School of Law and others argue that to use this prototypical conception of the reasonable investor—a perfectly rational, passive, long-term, private person of average wealth and intelligence—and apply it to a modern, heterogeneous population is flawed and antiquated.[94] Having a homogeneous reasonable investor is inherently disconnected from the nature of heterogeneous regulation, which the SEC attempts to embody.[95] To overcome this fundamental flaw, Lin has suggested re-conceptualizing the reasonable investor, offering a slate of different investor profiles.[96] By having a more nuanced slate of investors,

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91 Saad & Strauss, *supra* note 90, at 418.

92 *Id.* at 431.

93 *See, e.g.*, Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317 (2017); Ho, *supra* note 72, at 467. Some aspects of the SEC disclosure framework, such as Item 407, have such comply or explain regimes in place already. 17 C.F.R. § 229.407(a) (instructing publicly trading companies to "explain the basis for [their] conclusion that [an] exemption is applicable").

94 Tom C.W. Lin, *Reasonable Investor(s)*, 95 BOS. UNIV. L.R., 461, 466-69 (2015); *accord* David A. Hoffman, *The "Duty" to Be a Rational Shareholder*, 90 MINN. L. REV. 537, 539-40 (2006) (analogizing the dissonance between the objective and subjective components in the term "reasonableness" in tort and contract law to the same dissonance in securities law).

95 Lin, *supra* note 94, at 464.

96 *Id.* at 501–502 (asserting that a new typology of investors that includes the diversity of modern investors would benefit the marketplace).

securities law may begin to make more sense in a modern environment.[97] However, it is possible that this argument is simply the traditional view of the reasonable investor at work, as the reasonable person standard is designed to afford some flexibility.[98]

Instead of simply reconceptualizing the reasonable investor, Margaret Sachs of the University of Georgia Law School has suggested replacing it altogether with the "Least Sophisticated Investor" in certain markets.[99] Sachs argues that the reasonable investor tends to be unrepresentative of "underclass investors"—those who lack access to financial knowledge, people with financial knowledge, or the market itself.[100] Especially given the rise of the internet and telemarketing, vulnerable populations, such as the elderly, disabled, and immigrants, are susceptible to fraud.[101] In theory, dropping the standard of the reasonable person would allow the SEC to take more action against fraud. However, this approach does create the potential for over inclusiveness by protecting a more sophisticated investor who might not need such protections.[102]

D. Materiality and ESG Disclosure in E.U. Securities Law

The E.U. and the U.S. operate on a similar federal model regarding securities law but with some differences. In the E.U., the European Commission proposes Directives which, if enacted, create

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97 *See id.* at 461.

98 Restatement (Second) of Torts § 283 (Am. L. Inst. 1965) ("The standard provides sufficient flexibility, and leeway, to permit due allowance to be made for such differences between individuals as the law permits to be taken into account . . . and at the same time affords a formula by which . . . a uniform standard may be maintained."); David A. Katz & Laura A. McIntosh, *Corporate Governance Update: "Materiality" in America and Abroad*, HARV. L. SCH. FRM. CORP. GOVERNANCE (May 1, 2021), https://corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/ ("The genius of the 'reasonable investor' definition of materiality is that the formulation already accomplishes the worthwhile aspects of the new concepts of double and dynamic materiality.").

99 *See* Margaret V. Sachs, *Materiality and Social Change: The Case for Replacing "the Reasonable Investor" with "the Least Sophisticated Investor" in Inefficient Markets*, 81 TUL. L. REV. 473, 481 (2006).

100 *Id.* at 476, n.19.

101 *Id.* at 492–498.

102 *Id.* at 507.

binding obligations by Member states to create national legislation that must fall in line with the policy of the Directive.[103] In contrast, states in the U.S. must comply with the letter of federal law. The European Securities and Markets Authority ("ESMA") is the nearest equivalent to the SEC. The ESMA advises and protects investors and promotes market stability. However, the main difference between ESMA and SEC is that ESMA's guidelines, opinions, and recommendations are non-binding.[104]

The most notable difference between the E.U. and the U.S. in securities law is their conceptions of materiality. The E.U. has explicitly adopted the idea of double materiality while the U.S. has maintained the more traditional notion of materiality. U.S. critics favoring the European conceptualization of materiality attack it from two angles. The first addresses the implications of a broad reimagining of materiality. Once materiality is expanded beyond the financial realm into non-financial matters, like environmental concerns, there is no limit as to what it can cover.[105] This could include information that investors ultimately may not care about.[106] The second argument suggests that the current definition of the reasonable investor already accomplishes the goal of double materiality.[107]

The E.U. has taken a markedly different approach to ESG disclosure from the U.S. While the U.S. has opted for a more laissez-

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[103] *See Types of Legislation*, EUR. UNION, https://europa.eu/european-union/law/legal-acts_en (last visited Nov. 29, 2022); Eric Engle, *The E.U. Means Business: A Survey of Legal Challenges and Opportunities in the New Europe*, 4 DEPAUL BUS. & COMM. L.J. 351, 358-59 (2006).

[104] Council Regulation 1095/2010, ch. 2, art. 8, 2010 O.J. (L 331), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R1095&qid=1656556853355.

[105] Katz & McIntosh, *supra* note 98.

[106] *Id.*

[107] *Id.*; *see also The Materiality Standard for Public Company Disclosure: Maintain What Works*, BUS. ROUNDTABLE, https://www.businessroundtable.org/the-materiality-standard-for-public-company-disclosure-maintain-what-works (last visited Nov. 29, 2022) ("[T]he concept [of materiality] also naturally evolves over time to address new issues and developments and takes into account the facts and circumstances relevant to each company.").

faire approach—relying on voluntary disclosure and corporate peer pressure—the E.U. has built a framework to regulate ESG disclosures. The primary facets that make up this framework are the SFDR, the E.U. Taxonomy, and the CSRD.

1. Sustainable Finance Disclosure Regulation

After the E.U. officially announced its incorporation of double materiality, the European Parliament passed the SFDR.[108] The purpose of the SFDR is to create coherent rules for "financial market participants and financial advisers on transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with respect to financial products."[109] This Directive creates more strict requirements for all financial-market participants ("FMPs")—from asset managers to venture-capital funds and banks—when disclosing ESG information.[110] FMPs are required to disclose adverse sustainability impacts at the company and product levels. At the company level, FMPs must publish on their websites the overall impact of their investments on ESG factors.[111] FMPs are also required to provide an explanation of whether a fund has an impact on ESG factors.[112] The European Supervisory Authorities, which includes the ESMA, has the authority to review FMPs conformity with the SFDR.[113]

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108 Council Regulation 2019/2088, 2019 O.J. (L 317). The E.U. initially set the SFDR to take effect March 10, 2021, but has delayed it to January 1, 2023. Letter from John Berrigan, Director-Gen., Eur. Comm'n, to Irene Tinagli, Chair, Comm. on Econ. and Monetary Affs. & Andrej Šircelj, President, Ecofin Council, Council of the Eur. Union (Nov. 25, 2021) (on file with the Euro. Comm'n).

109 Council Regulation 2019/2088, art. 1, 2019 O.J. (L 317).

110 *Id.*

111 Council Regulation 2019/2088, art. 4, 2019 O.J. (L 317); *see also* Cary Springfield, *What Is the Sustainable Finance Disclosure Regulation?*, INT'L BANKER (Apr. 13, 2021), https://internationalbanker.com/finance/what-is-the-sustainable-finance-disclosure-regulation/.

112 Council Regulation 2019/2088, art. 7-9, 2019 O.J. (L 317).

113 Council Regulation 2019/2088, art. 18, 2019 O.J. (L 317).

The primary goal of the SFDR is to drive capital towards sustainable businesses.[114] Additionally, this Directive is meant to prevent greenwashing through transparency.[115] While not explicitly labeled an ESG initiative, the SFDR goes to the heart of the original purpose of ESG: sustainable investment practices. By requiring companies to consider sustainability practices in its investments, the SFDR forces companies to undergo due diligence at various points of corporate transactions, accounting for specific environmental and social-related risks.[116]

That said, there have been some concerns about the efficacy of the SFDR, many of which echo the concerns about ESG itself. Some have argued that the SFDR does not give sufficient additional guidance regarding what specific data is needed for disclosures.[117] In essence, the SFDR does not provide enough structure and, therefore, muddies the water. Thus, an attempt at a disclosure mandate is a fruitless endeavor.

Another potential issue with the SFDR is that it only applies to companies with 500 employees or more and not companies based on the number of assets under management.[118] In theory, a firm with 501 employees and USD $100 million assets under management would be subject to the SFDR disclosure requirements, but a company with 499 employees and USD $100 billion assets under

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114 Nadia Humphreys, *Demystifying the Sustainable Finance Disclosure Regulation*, BLOOMBERG (Feb. 5, 2021), https://www.bloomberg.com/professional/blog/demystifying-the-sustainable-finance-disclosure-regulation/.

115 *Id.*; Springfield*, supra* note 111.

116 3 ANNEMARGARET CONNOLLY, ENVIRONMENTAL LAW IN REAL EST. & BUS. TRANSACTIONS § 25.03 (2021) ("As with traditional environmental diligence, ESG-related diligence requires the person conducting due diligence to consider different sector specific risks and opportunities from an ESG perspective.").

117 Volker Lainer, *On Closer Look, SFDR Raises More Questions Than Answers*, GOLDENSOURCE BLOG (Sep. 25, 2020), https://www.thegoldensource.com/sfdr-raises-questions-answers/; Natalie Kenway, *SFDR May Deter the Greenwashers but Will It be the Source of More Confusion?*, BONHILL GRP. (Mar. 12, 2021), https://esgclarity.com/sfdr-may-deter-the-greenwashers-but-will-it-be-the-source-of-more-confusion/.

118 Council Regulation 2019/2088, art. 4, 2019 O.J. (L 317); Lainer, *supra* note 117.

management would not.[119] Thus, companies on the border of 500 employees, but with significant assets, could exploit this hardline rule by laying off employees and stripping themselves of disclosure requirements. Lastly, the SFDR-specific issue that arose was the timeline of its implementation. Firms feared that the requirements would come too quickly, and they would not have enough time to organize the needed infrastructure to align their reporting with the SFDR requirements.[120]

2. The Corporate Sustainability Reporting Directive and E.U. Taxonomy

The CSRD is a European law adopted in April 2021 that requires large companies to disclose information on how they manage ESG issues.[121] It expanded the scope of the Non-Financial Reporting Directive ("NFRD") after the European Commission determined that the sustainability reporting guidelines it published in 2017 and 2019 did not noticeably improve the quality of the reporting data.[122] The objective of the CSRD is "to improve sustainability reporting at the least possible cost . . . [and] to ensure that there is adequate publicly available information about the risks that sustainability issues present for companies, and the impacts of companies themselves on people and the environment."[123] By this

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119 Lainer, *supra* note 117.

120 Harald Glander & Daniel Lühmann, *Overview on New European ESG Disclosure Requirements for Asset Managers*, 11 J. OF INT'L BANKING & FIN. L. 763 (2020).

121 *Corporate Sustainability Reporting*, EUROPEAN COMM'N, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en (last visited Jun. 29, 2022).

122 Council Directive 2014/95/EU, 2014 O.J. (L 330); *Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting*, COM (2021) 189 final (Apr. 21, 2021); *see also* Jason Halper et al., *Worldwide: Investors And Regulators Turning Up the Heat on Climate-Change Disclosures: Attempting to Make Sense of the State of Play in the US, EU, and UK*, MONDAQ (Sep. 16, 2021), https://tinyurl.com/yduxukju.

123 *Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation*

language, the European Commission is explicitly adopting a double materiality framework.

The CSRD contains new provisions and requirements for companies regarding ESG disclosure. The new provisions require companies to seek assurance of their sustainability data by third-party auditors.[124] This is an attempt to overcome the larger issue of inconsistency and certifiability between ESG methods. More importantly, the CSRD requires companies to report their sustainability performance using disclosure standards that will be drafted by the European Financial Reporting Advisory Group ("EFRAG").[125] These provisions represent a huge step in creating a comprehensive, workable disclosure framework.

The E.U. Taxonomy is at the core of the environmental aspect of ESG.[126] It "recognises as . . . 'environmentally sustainable', economic activities that make a substantial contribution to at least one of the EU's climate and environmental objectives, while at the same time not significantly harming any of these objectives and meeting minimum social safeguards."[127] It helps to establish a common understanding of environmentally sustainable economic activities to make it easier for companies to align their business activities with Europe's obligations under the European Green Deal and the Paris Agreement.[128] The E.U. Taxonomy works in conjunction with the CSRD and the SFRD to ensure that companies disclose their environmental performance information for the green

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(EU) No. 537/2014, as regards corporate sustainability reporting, COM (2021) 189 final (Apr. 21, 2021) (section 1 of the explanatory memorandum).

124 *Id.* art. 2(20).

125 *Id.* art. 1, p.11. EFRAG began cooperating with the Global Reporting Initiative to draft these standards. *EFRAG & GRI landmark Statement of Cooperation*, EUROPEAN FIN. REPORTING ADVISORY GRP. (Jul. 8, 2021), https://www.efrag.org/News/Project-516/EFRAG--GRI-landmark-Statement-of-Cooperation.

126 Council Regulation 2020/852, 2020 O.J. (L 198) 13.

127 *FAQ: What is the EU Taxonomy and How Will it Work in Practice?*, EUROPEAN COMM'N. 1 (Apr. 21, 2021), https://tinyurl.com/29phpddr.

128 *Id.* at 3; *Communication from the Commission: The European Green Deal*, at 3, COM (2019) 640 final (Dec. 11, 2019); Council Regulation 2020/852, art. 2, 10, 2020 O.J. (L 198) 13.

portion of their portfolios. The concrete definitions will allow for more transparency and better comparisons.[129]

III. ANALYSIS

This comment proposes that for the U.S. to adopt a comprehensive ESG disclosure framework at the federal level, three steps must be taken. First, either the U.S.'s traditional definition of the reasonable investor must be expanded to the reasonable passive investor, or the U.S. must explicitly adopt double materiality. Second, like the European Commission in the E.U. Taxonomy, the SEC should create concrete definitions as to what constitutes sustainable economic activities. Third, Congress should enact a policy like the CSRD. While building a new framework through the SEC would be a piecemeal process, the SEC could propose a series of regulations to adopt the above points ultimately allowing an ESG disclosure mandate to be possible.

A. Adjusting the Reasonable Investor Standard

Generally, the reasonable investor standard has worked to help combat securities fraud.[130] The flexibility of the reasonable investor on a philosophical level is well-accepted. However, as the priorities of the global investing community have changed, the old idea of who is the reasonable investor is less relevant. A primary notion of the identity of the reasonable investor is that the investor is both active and educated. However, passive investing has increased

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[129] Anu Bradford & Kalin Anev Janse, *The Brussels Effect on Sustainable Finance*, CUMB. BUS. SCH. (Apr. 27, 2021), https://www8.gsb.columbia.edu/articles/chazen-global-insights/brussels-effect-sustainable-finance.

[130] Since 2016, securities and investment fraud has decreased by 35.7%. *Quick Facts: Securities and Investment Fraud Offenses, Fiscal Year 2020*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Securities_Fraud_FY20.pdf (last visited Feb. 8, 2022). However, evidence suggests that this was in part due to court disruptions and a general economic slowdown due to the COVID-19 pandemic. James R. Carroll et al., *Developments and Trends in Securities Litigation: Mid-Year Update 2020*, SKADDEN (Oct. 28, 2020), https://www.skadden.com/insights/publications/2020/10/key-takeaways-developments-and-trends.

exponentially in the U.S.[131] Over half of American families have some level of investment in the market, yet many do not fully understand the full extent of how the market works.[132] The current definition of the reasonable investor, while helpful in "maintaining fair, orderly, and efficient markets," falls short in helping the SEC fulfill its mission to protect all investors.[133] The SEC should lower the standard of the reasonable investor by adopting a standard akin to a reasonable passive investor.

An increasing number of people are passive investors, most having money in individual retirement accounts ("IRAs"), account-type job pensions such as 401(k)s, or defined-benefit pension plans.[134] Investing with one's liquid assets has become increasingly more convenient through technology, and companies have increasingly relied on defined contribution plans.[135] This combination incentivizes retail investors to enter the market instead of relying on companies or practiced individuals to understand the intricacies of

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131 Giovanni Strampelli, *Are Passive Index Funds Active Owners? Corporate Governance Consequences of Passive Investing*, 55 SAN DIEGO L. REV. 803, 810 (2018); Jan Fichtner et al. *Hidden Power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 302 (2017).

132 Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESERVE SYS 18 (Sep. 2020), https://www.federalreserve.gov/publications/files/scf20.pdf; Kim Parker & Richard Fry, *More Than Half of U.S. Households Have Some Investment in the Stock Market*, PEW RSCH. CTR. (Mar. 25, 2020), https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market/.

133 *Our Goals*, SEC. AND EXCH. COMM'N, https://www.sec.gov/our-goals (last modified Oct. 16, 2018).

134 Jeff Cox, *Passive Investing Automatically Tracking Indexes Now Controls Nearly Half the US Stock Market*, CNBC (Mar. 19, 2019), https://www.cnbc.com/2019/03/19/passive-investing-now-controls-nearly-half-the-us-stock-market.html; Bloomberg Intelligence, *Passive Likely Overtakes Active by 2026, Earlier if Bear Market*, BLOOMBERG (Mar. 11, 2021), https://www.bloomberg.com/professional/blog/passive-likely-overtakes-active-by-2026-earlier-if-bear-market/; BHUTTA ET AL., *supra* note 132, at 20.

135 Many of the large financial services corporations such as Fidelity Investments Inc., Merrill, and Morgan Stanley (via E*TRADE), and Robinhood all have mobile applications where customers can invest with relative ease.

securities trading.[136] Moreover, retail investors are repeatedly advised of the pros and cons of active versus passive investing. Most financial advisers suggest passive investing, especially if you have a longer time horizon.[137] Many passive investors may be unaware of the details or changes in particular securities. While passive retail investors might not have knowledge on markets like that of a trained professional, they still have priorities that manifest in how they invest.[138]

By lowering the bar of the reasonable investor to the reasonable passive investor in cases where the crux of the issue is ESG-related information, the SEC stands a better chance of holding those who commit securities fraud accountable and gaining relief for victims. Lowering the standard would lower the burden of proof for the SEC to bring an administrative action, allowing the SEC to enforce borderline cases of securities fraud more easily. In turn, this might disincentivize companies from exaggerating information concerning ESG. Moreover, in cases where ESG information is at the crux of a case, a lower standard may allow the SEC to present a narrative that a factfinder, in particular a jury, may more readily understand.

Additionally, the main effect that lowering the standard would have in the private sector is to incentivize companies to achieve better ESG scores. At the very least, this standard will

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136 Nathaniel Popper, *Robinhood Has Lured Young Traders, Sometimes with Devastating Results*, N.Y. TIMES https://www.nytimes.com/2020/07/08/technology/robinhood-risky-trading.html (last updated Sep. 25, 2021); Jack Stewart, *Apps Like Robinhood Make Investing Easier. Maybe Too Easy.*, MARKETPLACE TECH (Jul. 14, 2020), https://www.marketplace.org/shows/marketplace-tech/robinhood-stock-market-investing-trading-apps/.

137 Halsey Schreier, *Financial Planning for Young Adults: Active Vs. Passive Investing*, FORBES (Mar. 24, 2021), https://tinyurl.com/5n8x7byv; James Royal, *Active Investing Vs. Passive Investing: What's the Difference?*, BANKRATE (Sep. 20, 2021) https://www.bankrate.com/investing/active-versus-passive/. A time horizon is the amount of time an investor needs to achieve his financial goal. *Time Horizon*, SEC. AND EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/glossary/time-horizon (last visited Nov. 29, 2022).

138 Amanda M. Rose, *The "Reasonable Investor" of Federal Securities Law: Insights from Tort Law's "Reasonable Person" & Suggested Reforms*, 43 IOWA J. CORP. L. 77, 90 (2017).

incentivize companies to more carefully consider what data they voluntarily share. However, changing the standard will only work with an explicit ESG disclosure mandate. The downside of using this standard by itself is that it may incentivize companies to stop voluntarily releasing ESG reports, lest they be held accountable. A mandate would close this loophole.

However, a lower standard might lead to an increase in the number of administrative actions, overloading the SEC. In fiscal year 2021, the SEC filed approximately thirty more new administrative actions than in fiscal year 2020.[139] With an increase in the number of enforcements, combined with a labor shortage due to passed legislation and the lingering effects of the COVID-19 pandemic, allowing the SEC to pursue administrative action may put a strain on the agency's resources in the short term.[140]

This new standard does embrace the fear that the Supreme Court expressed in *Basic*: a lower standard would be both over-inclusive and under-inclusive, but only slightly.[141] Lowering the bar does give the SEC a broader reach, but the practicability of investigating all these new actions limits overreach.

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[139] *SEC Announces Enf't Results for FY 2021*, SEC. AND EXCH. COMM'N (Nov. 28, 2021), https://www.sec.gov/news/press-release/2021-238. This increase came after the U.S. Congress expanded § 6501 of the Securities Exchange Act of 1934 to allow the SEC to seek disgorgement for unjust enrichment for violating federal securities laws and doubles the time allowed to obtain the disgorgement. 15 U.S.C. § 78u(d)(7) (2021). This possibly incentivized the enforcement division to investigate cases that may otherwise have exceeded the statute of limitations. *See* William R. Baker III et al., *US Congress Affirms and Expands SEC's Disgorgement Authority in Annual Defense Spending Bill*, LATHAM & WATKINS (Jan. 4, 2021), https://www.lw.com/thoughtLeadership/US-Congress-Affirms-and-Expands-SECs-Disgorgement-Authority-in-Annual-Defense-Spending-Bill; Matthew Belville et al., *Congress Amends Exchange Act, Expanding SEC Enforcement Power*, JD SUPRA (Jan. 4, 2021), https://www.jdsupra.com/legalnews/congress-amends-exchange-act-expanding-8795742/.

[140] *Coronavirus (COVID-19) — Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources*, SEC. & EXCH. COMM'N (Jun. 23, 2020), https://www.sec.gov/corpfin/covid-19-disclosure-considerations.

[141] *See* Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988).

B. Adopting Double Materiality

Alternatively, the SEC can explicitly adopt double materiality, similar to what the E.U. adopted in the CSRD. It is clearly established that the SEC has the authority to require companies to disclose what is material. Sustainability reporting can be material without an ESG disclosure mandate, however, there is a gap between sustainability reporting and financial reporting. Double materiality would close that gap. In single materiality, ESG reporting is only seen in light of financial reporting instead of being viewed in its own light. By explicitly adopting the double materiality standard, the SEC would be acknowledging that the current construction of materiality is too limited.

Adopting double materiality also diminishes the confusion on whether a company should include all ESG information in its disclosures. The U.S. conception of materiality is fungible; it gives the SEC some latitude as to what is relevant for disclosure. However, such a fungible term is not sufficiently clear to establish a concrete standard. This is exemplified by the fact that investors, firms, judges, and activists continue to debate what information is material. This is because the second half of the equation is missing: the interconnectivity between a company's actions and the environment.

The SEC does not need to adopt double materiality verbatim. At the very least, it could propose a rule that more explicitly defines the reciprocal nature of investment/evaluation and environmental impact. The SEC could expand on Regulation S-K to adopt double materiality, specifically Item 105 and Item 303. [142] Item 105 requires disclosure of the most significant factors that make an offering speculative or risky, which can include risks emanating from climate change.[143] Item 303 of Regulation S-K requires companies to report

[142] 17 C.F.R. § 229.105 (2020); FAST Act Modernization and Simplification of Regulation S-K, 84 Fed. Reg. 12,674 (Apr. 2, 2019) (changing Item 503(c) to what is now Item 105); 17 C.F.R. § 229.303 (2022).

[143] *See* 17 C.F.R. § 229.105(a) (2020); Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290, 6,296 (Feb. 8, 2010) (noting that under Item 503(c), "[r]egistrants should consider specific risks they

"any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[144] It is essentially the narrative report of a company's SEC filing as to what the company believes will impact their valuation. However, Item 303 falls short in requiring companies to disclose the effects of climate change unless a discussion of climate is collateral to something else the company discloses. The SEC could propose a new regulation to change the language of Items 105 and Item 303 to explicitly require companies to disclose the impacts of the company's operation on ESG factors that the SEC outlines. While some more nuanced language would need to be included to account for the fact that some ESG topics may be relevant to companies less than others, amending Items 105 and 303 could create one of the pillars of an ESG disclosure mandate.

C. Adopting Definitions for a Comprehensive ESG Disclosure Framework

Adjusting the reasonable person standard or adopting double materiality would only represent one pillar out of the at least two needed for an SEC-enacted ESG disclosure mandate. Another pillar would be for the SEC to adopt a way to define and categorize specific activities as sustainable in the spirit of ESG, like how the E.U. enacted the E.U. Taxonomy Regulation. Definitions can act as embodiments of the law by clarifying ambiguous terms in a statute or regulation or stipulating meaning when there might be none. Definitions also serve various roles. They create a model for the behavior the rule seeks to control, establish control through the limitation of behavior, increase certainty, and level the playing field.[145] In an abstract world like securities and finance, definitions are vital.[146]

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face as a result of climate change legislation or regulation and avoid generic risk factor disclosure that could apply to any company").

[144] 17 C.F.R. § 229.303(b)(2)(ii) (2021).

[145] Jeanne F. Price, *Wagging, Not Barking: Statutory Definitions*, 60 CLEV. ST. L. REV. 999, 1017-22 (2013).

[146] *See, e.g.*, 15 U.S.C. § 77b (2012) (defining everything from "security" to "write").

One important aspect that a U.S. taxonomy should address is naming conventions in funds. An investment fund's name can reveal a lot about the contents of the fund. Many firms market their funds as "green" or "sustainable." However, because of the lack of standardization surrounding what encompasses a green or sustainable fund, there is likely to be inconsistency between funds. The SEC has attempted to address this name issue generally through the Names Rule.[147] The Names Rule is meant to address funds with misleading names that suggest that a particular fund aims to include certain types of products in its portfolio.[148] In theory, this regulation could prevent firms from marketing funds as sustainable, when they are not, unless 80% of its value is sustainable.[149] But what constitutes a sustainable fund under the Names Rule is largely open to interpretation.

Having a taxonomy resolves this issue. Adopting a taxonomy that specifically defines what is considered a sustainable fund or economic activity cuts down the variation within naming conventions. For example, a sustainable fund could be one where 80% of the value of its assets are geared towards climate change adaptation, which includes "adaptation solutions that either substantially reduce the risk of the adverse impact of the current climate and the expected future climate on that economic activity or substantially reduce that adverse impact, without increasing the risk of an adverse impact on people, nature or assets."[150] Having a taxonomy assists the SEC in creating an ESG disclosure mandate. As any lawmaker knows, the meaning of a word is its use in language; a definition frames the discussion and creates a common understanding.[151] By creating a common understanding of sustainability in the investment industry, they will have created a category for companies to work within. The SEC has begun looking

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147 17 C.F.R. § 270.35d-1 (2020).

148 17 C.F.R. § 270.35d-1(a) (2020).

149 *Id.*

150 Council Regulation 2020/852, art. 10, 2020 O.J. (L 198) 13, https://eur-lex.europa.eu/eli/reg/2020/852/oj.

151 LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 20 (trans., G. E. M. Anscombe, 3rd ed. 1991).

into updating the Names Rule to account for recent developments in sustainable investing.[152]

There are several collateral benefits to a taxonomy. Investors would have more certainty in the funds they invest in as the taxonomy acts as a kind of verification. If a fund has a "sustainable" label, an investor can be sure that the fund meets certain objective criteria. Additionally, pulling language directly from E.U. Regulations would not inconvenience larger, multinational corporations as they must already conform with the strictest global standards.

IV. CONCLUSION

In recent years, ESG factors have become increasingly important in financial markets and investment decisions. ESG metrics are meant to ensure firms are living up to the investors' expectations of CSR. While companies can claim that they care about the issues that ESG encapsulates, establishing a mandatory disclosure framework provides some accountability should a company negatively impact the environment or the general population.[153] The primary reason to adopt an ESG disclosure mandate is simple: consumer demand for ESG is significant enough that the SEC ought to address it head-on. The U.S. has lagged behind others, such as the E.U., in making headway in its securities law to address ESG issues.

Adopting aspects of E.U. securities law would bring the U.S. closer to establishing an ESG mandate. By expanding the reasonable investor to include the reasonable passive investor, the SEC paves the way for materiality to include the values and expectations of passive investors, giving the SEC more enforcement power. Alternatively, the SEC could adopt double materiality. An explicit

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[152] Gary Gensler, Chair, Sec. and Exch. Comm'n, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (Jul. 28, 2021); Gary Gensler, Chair, Sec. and Exch. Comm'n, Prepared Remarks Before the Asset Management Advisory Committee (Jul. 7, 2021), https://www.sec.gov/news/speech/gensler-pri-2021-07-28.

[153] Sally Hickey, *Hundreds of Investment Firms Unite in Climate Change Push*, FIN. TIMES ADVISER (Jun. 14, 2021), https://www.ftadviser.com/regulation/2021/06/14/hundreds-of-investment-firms-unite-in-climate-change-push/.

adoption of this concept would open the door to more comprehensive regulations or push Congress to enact legislation. Finally, adopting a set of sustainability definitions would allow the SEC to focus any disclosure mandate on a shared language. By taking these steps, the SEC could almost single-handedly adopt an ESG disclosure mandate. This disclosure mandate would establish a layer of protection for retail and institutional investors who rely on ESG metrics.