

SECURITIES AND FEDERAL CORPORATE LAW REPORT

Authored and edited by Samuel Wolff

AUGUST 2019 | VOLUME 41 | ISSUE 8

ENVIRONMENTAL, SOCIAL AND GOVERNANCE MATTERS: THE RAPIDLY EVOLVING ESG REPORTING LANDSCAPE—PART 2

By Paul A. Davies, Paul M. Dudek** and Kristina S. Wyatt****

This Report is a further discussion of environmental, social and governance matters continued from the previous Report.¹

FURTHER PROPOSALS FOR REFORM

The drumbeat for enhanced disclosure requirements continues.² Some of the recent calls for further action include those described below.

OCTOBER 2018 RULEMAKING PETITION

In October 2018, a group of academics, investors, and others petitioned the SEC to build a framework that would require public companies to disclose ESG impacts related to their businesses.³ The petition, which was signed by CalPERS, the New York State Comptroller, the PRI, various state treasurers, investors, academics, and others, asks the SEC to develop a cohesive ESG reporting framework. Specifically, the petition:

*Paul A. Davies, a Latham & Watkins partner in London, serves as the Local Department Chair of the Environment, Land & Resources Department and focuses on the environmental aspects of corporate transactions. M.Phil., University of Wales, Cardiff, 1994, Journal of Law and Society Scholarship; LL.B. (Hons), University of Wales, Cardiff, 1992.

**Paul M. Dudek, a Latham & Watkins partner in Washington, D.C., advises on all aspects of cross-border capital market transactions involving non-US companies and sovereigns. He previously served 23 years with the US Securities and Exchange Commission's Division of Corporation Finance, most recently as Chief of the Office of International Corporate Finance. JD, New York University School of Law, cum laude, Order of the Coif; BA, Fordham University, Phi Beta Kappa, summa cum laude.

***Kristina S. Wyatt, Latham & Watkins Global Commercial Transactions Senior Counsel and Senior Manager of Sustainability Programs in Washington, D.C., previously served as Legal Counsel to Commissioner Roel C. Campos of the US Securities and Exchange Commission. JD, University of Colorado, 1991; BA, Duke University, 1988.

IN THIS ISSUE:

Environmental, Social And Governance Matters: The Rapidly Evolving ESG Reporting Landscape—Part 2	141
FURTHER PROPOSALS FOR REFORM	141
SHAREHOLDER ACTIVISM	143
ESG AND THE ROLE OF STOCK EXCHANGES AND SECURITIES REGULATORS GLOBALLY	144
DISCLOSURE FRAMEWORKS OUTSIDE OF THE UNITED STATES	145
INTEGRATION OF FINANCIAL AND NON-FINANCIAL INFORMATION AND THE ONGOING DIALOGUE OVER WHERE ESG DISCLOSURES SHOULD APPEAR	149
RECONCILING THE VARIOUS REPORTING FRAMEWORKS	151
ESG INDEXES AND RATINGS	153
SOME PRACTICAL GUIDANCE	154
CONCLUSION	155

- Asks the Commission to conduct rulemaking to develop a comprehensive ESG disclosure framework
- Discusses the materiality of ESG issues
- Describes the existing calls for standardized ESG disclosure by large asset managers
- Discusses the importance of standardized ESG disclosure for companies and the competitiveness of the US capital markets
- Notes the existing rulemaking petitions, shareholder proposals, and stakeholder engagement on a number of topics under the umbrella of ESG, and suggests that “it is time for the SEC to bring coherence to this area”⁴

The petition cites a Harvard Kennedy School report that found that, as of 2015, 23 countries had enacted legislation within the prior 15 years requiring public companies to issue reports that include environmental and/or social information.⁵ Further, seven stock exchanges require social and/or environmental disclosures as part of their listing requirements. The petition emphasizes that while 93% of the largest companies globally report on ESG factors, the quality and compa-

rability of the data are not good and “the information . . . is of limited practical use.”⁶

CLIMATE RISK DISCLOSURE ACT (SENATE BILL 2018)⁷

In September 2018, Senator Elizabeth Warren introduced a bill proposing adoption of the Climate Risk Disclosure Act. The bill, if enacted, would amend the Exchange Act to, among other things, require the evaluation and disclosure of the financial impact of physical and transition risks posed by climate change and a description of the established corporate governance structures in place to assess and manage climate-related risks. The Commission would be directed to adopt rules to provide guidance to allow for comparison within and across industries using standardized industry-specific metrics. The rules also would require disclosure of GHG emissions, fossil fuel assets owned, and an allocated price of carbon to apply to the issuer’s climate-related disclosure statements.

CLIMATE RISK DISCLOSURE ACT (HOUSE BILL 2019)⁸

In July 2019, Representatives Sean Casten and Matt Cartwright introduced their own bill to propose adoption of the Climate Risk Disclosure Act. This bill, similar to Senator Warren’s bill, would amend the Exchange Act to require registrants to disclose information in their annual reports concerning physical and transition risks posed by climate change, as well as the registrants’ mitigation efforts undertaken to reduce the impact of such risks. Registrants also would be required to discuss the corporate governance processes in place to assess and manage their climate-related risks. The Commission would be directed to enact rules in specified industries that, among other things, set forth reporting standards for estimating and disclosing the direct and indirect GHG emissions and assign a social cost of carbon to such registrants’ activities.

ESG DISCLOSURE SIMPLIFICATION ACT OF 2019 (HOUSE BILL 2019)⁹

In July 2019, Representative Juan Vargas introduced

©2019 Thomson Reuters. All rights reserved.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

For authorization to photocopy, please contact the **Copyright Clearance Center** at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or **West’s Copyright Services** at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

SECURITIES AND FEDERAL CORPORATE LAW REPORT (ISSN 0273-0685)(USPS 013-840), is published MONTHLY EXCEPT DEC by Thomson Reuters, 610 Opperman Drive, Eagan, MN 55123-1340. Periodicals postage paid at St. Paul, MN.

POSTMASTER: Send address changes to *SECURITIES AND FEDERAL CORPORATE LAW REPORT*, 610 Opperman Drive, Eagan, MN 55123.

the ESG Disclosure Simplification Act of 2019, which would require the disclosure of ESG information and the formation of a Sustainable Finance Advisory Committee. The proposed ESG disclosure requirements include annual proxy statement disclosure of the link between ESG metrics and the issuer's long-term business strategy, as well as the processes the issuer uses to determine the impact of ESG metrics on its business strategy. The bill would require the SEC to mandate disclosure of ESG factors in filings requiring audited financial statements. The bill also would establish the Sustainable Finance Advisory Committee to advise the Commission on sustainable finance and report on opportunities and challenges for investors associated with sustainable finance. The Committee would further provide policy recommendations to the SEC related to facilitating the flow of capital to ESG investments.

CORPORATE HUMAN RIGHTS RISK ASSESSMENT, PREVENTION, AND MITIGATION ACT OF 2019¹⁰

This House bill would amend the Exchange Act to require registrants to disclose information about their human rights practices. Registrants would be required to conduct an annual analysis to identify and rank by severity any human rights risks in their operations and supply chains. Registrants would be required to disclose in their annual reports information related to their human rights risks and impacts, and any mitigation efforts undertaken to reduce such risks and impacts.

CALIFORNIA LAW ON PUBLIC EMPLOYEES' RETIREMENT FUND AND TEACHERS' RETIREMENT FUND: INVESTMENTS: CLIMATE-RELATED FINANCIAL RISK¹¹

California enacted a law in September 2018 that requires the California Public Employees' Retirement System (CalPERS) and the California State Teachers' Retirement System (CalSTRS), two of the country's largest pension plans, to analyze and report on the material climate-related risks in their portfolios. The law, which will be effective between 2020 and 2035, requires the boards of CalPERS and CalSTRS to report

every three years on the climate-related financial risk of their public market portfolios and their exposure to long-term risks.

SHAREHOLDER ACTIVISM

Shareholder proposals related to environmental and social issues have been a prominent feature of the proxy season landscape for the past several years. Between 2011 and 2016, governance-focused shareholder proposals outpaced environmental and social proposals. In contrast, in 2017, 2018, and 2019, the number of environmental and social proposals has exceeded governance proposals, according to an analysis published by Institutional Shareholder Services Inc. (ISS) in June 2019.¹² Fifteen environmental and social proposals were filed more than 10 times each during the 2019 proxy season. Environmental proposals received record rates of support in 2019, with 48% of such proposals receiving support from more than 30% of votes cast.¹³

The increased shareholder support for environmental and social proposals appears to reflect the growing mainstream interest in and support of environmental and social issues. According to ISS:

Historically, investors treated environmental and social issues very differently compared to governance proposals, with many abstaining from voting on these matters, and even more being very reluctant to support such proposals that may have appeared disconnected from investment management fundamentals. However, as ESG integration takes hold, recent voting trends indicate that we are entering a new era, whereby investors no longer compartmentalize environmental and social issues as a separate category from governance shareholder proposals. We are now dealing with ESG shareholder proposals, and every proposal type is evaluated based on its merits and relative to company and industry practice, without the mental barrier of the "E&S" moniker blocking investors' view from these matters.¹⁴

ISS reports that companies appear more likely to engage with proponents of environmental and social shareholder proposals than they were several years ago. Many companies agreed to implement environmental and social proposals in 2019, leading to proponents' withdrawal of a record number of such proposals.¹⁵ At the same time, the number of Fortune

100 companies voluntarily reporting on their sustainability commitments has increased from 29% in 2016 to 69% in 2019.¹⁶ This increased shareholder focus on environmental and social issues and companies' corresponding responses reflects the growing agreement that environmental and social issues are mainstream business concerns. Indeed, the discussion of environmental and social issues does not end with the annual meeting. According to a Harvard Law School forum addressing the 2019 proxy season, "Investor conversations around board oversight and company management of environmental and social (E&S) risks and opportunities have become a year-round dialogue."¹⁷

ESG AND THE ROLE OF STOCK EXCHANGES AND SECURITIES REGULATORS GLOBALLY

Stock exchanges around the world and the International Organization of Securities Commissions (IOSCO) are focused on sustainability challenges. In 2009, then UN Secretary-General Ban Ki-moon formed the Sustainable Stock Exchanges Initiative (SSE), and in 2012 the New York Stock Exchange and Nasdaq signed on as partner exchanges. The SSE is a partnership among the UN Partnership Program of the PRI, the UN Conference on Trade and Development, the UN Global Compact, and the UN Environment Program Finance Initiative.¹⁸ The SSE works with partner exchanges around the world that publicly commit to the SSE's mission "to build the capacity of stock exchanges and securities market regulators to promote responsible investment in sustainable development and advance corporate performance on environmental, social and governance issues."

The SSE has developed an action plan that articulates how securities regulators can work together in support of the UN Sustainable Development Goals and the creation of stronger, more resilient markets. The action plan recognizes that "sustainability issues can create financially material risks and opportunities for investors and may affect the resilience of the financial system as a whole."¹⁹ It includes five action areas: training market participants on sustainability topics, facilitating enhanced board governance around environmental and social factors, guiding investors on ESG

integration, strengthening disclosures of environmental and social information, and aiding the flow of investment toward the achievement of the UN Sustainable Development Goals. It also includes five supporting actions to facilitate achievement of the action areas' goals: analysis, development of road maps for national or regional sustainable finance plans, sharing of information among securities regulators, development of standardized guidelines and frameworks, and collaborating with other relevant organizations in support of the UN Sustainable Development Goals.

IOSCO issued a Statement on Disclosure of ESG Matters by Issuers in January 2019 to stress the purposes of securities regulation, including protecting investors; ensuring the fairness, transparency, and efficiency of the markets; and reducing systemic risk.²⁰ The statement emphasizes the potential significance of ESG factors: "ESG matters, though sometimes characterized as non-financial, may have a material short-term and long-term impact on the business operations of the issuers as well as on risks and returns for investors and their investment and voting decisions."²¹ The statement urges issuers to assess the materiality of ESG factors to their businesses and, when material, to disclose the impact or potential impact on financial performance as well as the potential for value creation.

In June 2019 IOSCO hosted its first Sustainable Finance Network Stakeholder Meeting, which focused on four topics: the impact of sustainability on corporate risk management, sustainability factors in the investment decision-making process, sustainability in corporate reporting, and the role of security regulators with regard to all of these issues.²² The World Federation of Exchanges (WFE) responded to IOSCO's efforts, emphasizing the importance of ESG factors to the member exchanges: "ESG is one of the WFE's strategic priorities for 2019, and we have been proactively tackling the topic since 2014. We are pleased to see the importance placed on sustainability by IOSCO in recent months. We believe that securities regulators, in line with their mandate of investor protection, can assist in moving towards the adoption of globally applicable, consistent standards, which are necessary to ensure effective, comparable disclosure and ESG labelling."²³

A month prior, in May 2019, Nasdaq published its ESG Reporting Guide 2.0.²⁴ Nasdaq does not have specific ESG listing standards but agrees with the SEC staff's position that principles-based disclosure requirements will best serve investors: "Nasdaq believes that principles-based disclosure grounded in materiality allows reporting companies the degree of flexibility needed to provide investors with the proper amount and mix of information."²⁵ The reporting guide summarizes some of the key voluntary reporting frameworks and offers a road map for disclosure of the different ESG factors.²⁶ The road map provides context to explain what is measured, why and how it is measured, why and how it is disclosed, and how it connects to the principal voluntary reporting frameworks. The reporting guide is an acknowledgement of the dynamic nature of ESG data collection and reporting and the rapid pace of change. Nasdaq issued its first ESG Reporting Guide in 2017. In explaining its reasons for issuing a second guide, Nasdaq stated, "The most important has to do with the evolving nature of the data itself. Not only is the ESG data set growing more robust, definitive, and 'mainstream' every day, but we are finding better ways to measure performance . . . In some ways, the ESG data universe is still expanding at an astounding rate. New topics are still emerging, and the connections between company operation and downstream impact are being made clear."²⁷

DISCLOSURE FRAMEWORKS OUTSIDE OF THE UNITED STATES

While the focus of this Report is the disclosure framework within the United States under the US securities laws, the broader disclosure landscape beyond the United States forms a critical backdrop. Globally, the reporting landscape is shifting, and an ever-growing number of countries are developing their own ESG reporting requirements. At the same time, numerous voluntary reporting regimes have emerged.

The PRI reported in 2016 that 38 of the 50 largest economies in the world either had or were in the process of developing corporate disclosure requirements addressing ESG issues.²⁸ And in the 50 largest economies, the PRI identified nearly 300 policy drivers that encouraged investors to consider long-term indicators

of value, such as ESG factors. Nearly half of those 300 policy drivers were implemented between 2013 and 2016.²⁹

"We found a strong correlation between responsible investment regulation and better ESG risk management by companies," the PRI reported. "This is encouraging, especially given how recent many of these policies are."³⁰ At the same time, the PRI reported investor skepticism as to the effectiveness of these policy measures due to their perception that the policies are poorly designed and implemented. Furthermore, "few of the investment-focused policy initiatives we analysed were clearly linked to specific sustainability objectives. However, there are signs that this is starting to change," specifically with the initiatives in the European Union and China to align sustainability and financial market objectives.³¹

More recently, the United Kingdom adopted a Green Finance Strategy.³² This move follows closely on the heels of its enactment of legislation committing the UK to achieve net zero GHG emissions by 2050.³³ The Green Finance Strategy's objectives are "to align private sector financial flows with clean, environmentally sustainable and resilient growth, supported by Government action. To strengthen the competitiveness of the UK financial sector."³⁴ The strategies employed to meet these objectives include three pillars: Greening Finance, Financing Green, and Capturing the Opportunity. The first pillar, Greening Finance, involves ensuring that climate and environmental factors are integrated into mainstream financial decision-making, including the evaluation and incorporation of current and future financial risks and opportunities associated with climate change and other environmental factors. Greening Finance also involves ensuring a robust market for green financial products. To meet these Greening Finance objectives, the UK government stated its expectation that all listed companies and large asset owners disclose in line with the TCFD by 2022. The second pillar, Financing Green, encourages the flow of capital into projects and solutions that will help the UK meet its long-term carbon-reduction goals. The third pillar, Capturing the Opportunity, aims to capture the economic opportunities associated with

the growth of the green financial markets and commercial innovations that arise through the transition to a greener economy.

The European Union, similarly, has announced that it is “strongly supporting the transition to a low-carbon, more resource-efficient and sustainable economy” and says that “it has been at the forefront of efforts to build a financial system that supports sustainable growth.”³⁵ On March 21, 2019, the European Commission (EC) held its Second High Level Conference on Sustainable Finance, which focused on establishing frameworks to help finance sustainable growth, deploy private capital to sustainable investments, and create a global approach to sustainable finance.³⁶

The EC formed a technical expert group (TEG) on sustainable finance to assist the EC in evaluating certain key issues around sustainable finance between July 2018 and the end of 2019. The TEG will make recommendations to the EC on (1) the development of an EU classification system, termed the EU taxonomy, to assess whether an economic activity is sustainable, (2) the development of a green bond standard, (3) methodologies for climate benchmarking, and (4) guidance on corporate disclosures of climate-related information.³⁷ The TEG published its report on climate-related disclosures in January 2019, and the EC published guidelines in June 2019 on corporate disclosure of climate-related information based on the TEG’s work.³⁸ The guidelines provide guidance to the 6,000 EU-listed companies, insurance companies, and banks that are required to disclose non-financial information pursuant to the EU’s Non-Financial Reporting Directive, which governs disclosures of non-financial information. The guidelines incorporate the recommendations of the TCFD (discussed below). Further, the EC announced its proposal to incorporate sustainability metrics in its own budgeting process: “To implement the Paris Agreement and the commitment to the United Nations Sustainable Development Goals, the Commission proposes to raise the level of ambition for climate mainstreaming across all EU programmes, with a target of at least 25% of EU expenditure contributing to climate objectives between 2017-2021.”³⁹

These examples in the EU and UK are not isolated. Indeed, regulators and markets around the world are focused on the impact of ESG factors on their growth and the strength of their capital markets.⁴⁰ Moreover, non-US regulatory initiatives naturally can be expected to have a bearing on the regulatory approach taken in the United States and on multinational companies that are faced with the challenge of meeting the expectations and standards of different regulatory systems.

VOLUNTARY DISCLOSURE FRAMEWORKS

Mandatory reporting regimes are emerging around the world, as discussed above. Against this backdrop, many “voluntary” disclosure frameworks have evolved in response to investors’ desire for more ESG information. Some of the more prominent frameworks are outlined below.

Global Reporting Initiative

The Global Reporting Initiative (GRI) was formed in 1997 to help companies and governments better understand and communicate their impact on sustainability issues such as climate change, human rights, governance, and social well-being.⁴¹ Companies around the world use the GRI’s Sustainability Reporting Standards to report on key sustainability issues. According to the GRI, “of the world’s largest 250 corporations, 92% report on their sustainability performance and 74% of these use GRI’s Standards.”⁴² The GRI also provides training, information, and support for issuers and other market participants and works to promote the broad implementation of the GRI Standards, which offer specific metrics and measurement criteria to guide reporting on a host of ESG factors.⁴³

Task Force on Climate-Related Financial Disclosures

The Financial Stability Board (FSB) formed the Task Force on Climate-Related Financial Disclosures (TCFD) in order to develop a consistent framework for companies to voluntarily make climate-related financial disclosures for investors, lenders, and others.⁴⁴ The TCFD, as its name suggests, is focused specifically on climate-related disclosures, as compared with the GRI and SASB frameworks, which

focus more broadly on ESG factors. The TCFD's framework is focused on the establishment of sound governance and reporting processes and practices rather than specific reporting metrics.

In June 2017, the TCFD issued its final report, which made broad recommendations with regard to climate-related disclosures. The TCFD explained that the report was a response to the FSB's request that the TCFD "develop voluntary, consistent climate-related financial disclosures that would be useful to investors, lenders, and insurance underwriters in understanding material risks."⁴⁵ The TCFD stressed that the recommendations were designed so that all organizations, regardless of industry, sector, or geography, should be able to adopt the recommendations. It also emphasized that climate-related financial disclosures should be incorporated in mainstream financial filings and should provide decision-useful, forward-looking information on the financial impacts of climate change. Further, the TCFD stressed its intent that the disclosures place emphasis on the risks and opportunities in transitioning to a lower-carbon economy.

In a 2019 update, the TCFD reiterated its purpose: "Now more than ever it is critical for companies to consider the impact of climate change and associated mitigation and adaptation efforts on their strategies and operations and disclose related material information. Companies that invest in activities that may not be viable in the longer term may be less resilient to risks related to climate change; and their investors may experience lower financial returns."⁴⁶

The TCFD incorporates four core themes in its recommendations with regard to climate-related financial disclosures. First, the disclosures should describe the organization's governance with regard to climate-related risks and opportunities. Second, the disclosures should explain how climate-related risks and opportunities could impact the company's business, financial condition, and strategy. Third, the disclosures should explain how the organization identifies, assesses, and manages climate-related risks, including through scenario analyses. Fourth, the disclosures should use metrics and targets to evaluate and manage these risks and opportunities.⁴⁷

The TCFD elaborates on the types of climate-related risks organizations might face. These broadly fall in two categories: transition risks and risks associated with the physical impacts of climate change. Transition risks might include policy and legal developments, such as implementation of carbon pricing, emissions caps, shifts to alternative energy sources, legal and regulatory compliance costs, and exposure to litigation. Other transition risks could relate to technological improvements that displace old systems, market risks, and reputational risks associated with changing customer perceptions of the organization's business. Physical risks might include damage to property due to rising sea levels or extreme weather in addition to resource scarcity and supply-chain risks. The TCFD report also outlines opportunities that companies might enjoy as a result of their climate strategies, including opportunities around energy efficiency, resource reuse, and the development of new products and markets.

Sustainability Accounting Standards Board

The Sustainability Accounting Standards Board (SASB), founded in 2011, is a standards-setting organization formed to help businesses to identify, manage, and report on the sustainability topics that are most important to investors.⁴⁸ Its approach closely follows the concept of materiality as articulated by the U.S. Supreme Court, and it seeks to facilitate the identification and disclosure of that information related to sustainability factors that have a material impact on companies' financial condition and prospects. The SASB has developed a set of 77 industry-specific standards that target the sustainability issues that generally are most important within an industry. These standards were developed based on surveys and interviews with investors, companies, and other market participants. The industry focus helps companies identify and focus on the issues most salient to their businesses and cut through the noise and information overload that can sometimes result from the use of more general questionnaires. The industry focus can also facilitate comparison across companies within an industry, as their disclosures are more likely to be comparable as to general sustainability topics. The SASB also regularly publishes guidance and conducts

research to advance the thinking as to best practices for sustainability reporting.

Climate Disclosure Standards Board

The Climate Disclosure Standards Board (CDSB) was founded in 2007 and comprises a consortium of NGOs and businesses that are focused on incorporating environmental effects in mainstream financial reporting. The CDSB focuses on driving decision-useful environmental information to market participants through mainstream reports.⁴⁹ While the SASB and the GRI focus on ESG factors broadly, the CDSB's focus is on the environmental impacts and the treatment of "natural capital" alongside financial capital. The CDSB explains that it is "committed to advancing and aligning the global mainstream corporate reporting model to equate natural capital with financial capital."⁵⁰ The CDSB offers companies a Climate Change Reporting Framework by which to report environmental information with a level of rigor comparable to that applied to financial information. The framework enables companies to "provide investors with decision-useful environmental information via the mainstream corporate report, enhancing the efficient allocation of capital."⁵¹ The CDSB's framework is designed to filter the information that investors, issuers, and regulators require in order to understand how climate change affects a company's financial condition and prospects.

The framework provides a detailed description of the methodology that the CDSB urges companies to apply in assessing and reporting on their climate change impacts.⁵² The guidance falls in three categories: Determination, Preparation, and Presentation. Determination requires companies to determine what information is most useful to investors based on the company's thorough assessment of how climate change has or might affect the company's strategic goals. Preparation requires companies to prepare disclosures on a consistent basis that include such information as is necessary to optimize its utility to investors. Presentation requires companies to present disclosures in a manner that makes the climate-related risks clear and understandable to investors.

CDP

The CDP (formerly the Carbon Disclosure Project) operates a disclosure system that enables companies, municipalities, and others to measure and manage the environmental impact of their activities.⁵³ According to its website, the CDP has built the most comprehensive set of self-reported environmental data in the world, with more than 7,000 companies and 620 cities reporting environmental data through the CDP in 2019.⁵⁴ The CDP requests detailed information of companies, cities, and states on their environmental performance, GHG emissions, and environmental governance. The CDP then analyzes that data with reference to critical environmental risks and opportunities and shares the analyses and resulting scores with investors and others with an interest in the information. The CDP data are designed to facilitate better-informed decision-making by investors and policy-makers.

United Nations Sustainable Development Goals

In 2015, the United Nations' member nations unanimously adopted the 2030 Agenda for Sustainable Development. The 17 Sustainable Development Goals (SDGs)⁵⁵ and 169 specific targets embedded within the 17 goals "are an urgent call for action by all countries—developed and developing—in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth—all while tackling climate change and working to preserve our oceans and forests."⁵⁶ The UN agenda is ambitious, global, and inclusive. All UN member nations have agreed to work toward the goals, and the goals flow down into states, cities, businesses, schools, and other organizations. As organizations map their activities to the UN Sustainable Development Goals, they are encouraged to identify the goals that are most relevant to their businesses and establish targets that are suitable for their own circumstances that will advance progress on the selected SDGs. Companies are not expected to map all 17 of the SDGs but rather identify which ones they can most directly impact. The SDGs are voluntary and leave companies with substantial freedom to define which goals they will disclose. The

SDGs are significant because they provide a common framework within which companies, governments, and others can work toward solutions to the problems that the United Nations has identified as most critical for the future.

INTEGRATION OF FINANCIAL AND NON-FINANCIAL INFORMATION AND THE ONGOING DIALOGUE OVER WHERE ESG DISCLOSURES SHOULD APPEAR

INTEGRATED REPORTING

The International Integrated Reporting Council (IIRC) is a global coalition composed of investors, corporations, NGOs, regulators, accountants, and standards setters.⁵⁷ The IIRC's vision is "a world in which integrated thinking is embedded within mainstream business practice in the public and private sectors, facilitated by Integrated Reporting as the corporate reporting norm."⁵⁸ A goal of integrated reporting is to explain the relationship of the resources or "capitals" used by an organization to create value over time. The six capitals are categorized as financial, manufactured, intellectual, human, social, and natural. According to the IIRC, "An integrated report is a concise communication about how an organization's strategy, governance, performance and prospects, in the context of its external environment, lead to the creation of value over the short, medium and long term."⁵⁹ Integrated reporting takes a prominent position in the ESG reporting discussion because it has been offered as a framework through which to integrate ESG factors with financial analysis and disclosures. Further, it embraces the proposition that companies, investors, and other stakeholders would benefit if ESG factors were discussed along with financial factors in financial reports rather than in separate reports.

In 2018, the Conference Board assembled an Integrated Reporting Working Group composed of investors, corporations, and professional services providers, who analyzed key trends in and challenges with regard to the implementation of integrated reporting.⁶⁰ The Conference Board report observes the economic shift toward intangible assets that the Commission notes in

its August 2019 proposing release, as discussed in Part 1 of this Report: "The dynamics of how business value is created are changing, moving from a system based largely on tangible assets to one that favors intangible ones."⁶¹ Investors increasingly take ESG factors into account in their investment processes. Many investors want companies to take a more holistic approach to reporting that accounts for not only traditional financial assets but also the six capitals identified by the IIRC. According to the Conference Board report, "How value is calculated is changing, and it would be helpful for reporting norms to change accordingly." The report notes that investors strongly support an integrated approach as evidenced by a survey of institutional investors with a collective \$33 trillion in assets under management. Eighty percent of the survey's respondents support integrated reporting.⁶² The Conference Board explains:

While investors still find financial performance disclosure important, they increasingly believe a holistic view of the way a company creates and sustains value is also crucial for insight. Investors want to understand not only a company's immediate financial performance, but also the strategy of the business, the key resources, the assets (tangible and intangible) to which it has access, and how it intends to maintain access to these resources and maintain or improve its assets while appropriately controlling its liabilities. Companies are beginning to rethink their approach to managing and reporting on their intangible assets, many aspects of which don't show up on their balance sheet.⁶³

The Conference Board views integrated reporting as a mechanism by which to provide investors with the holistic understanding that they seek. Integrated reporting encourages companies to "more comprehensively explain how the company creates value in the short, medium, and long term through the eyes of management."⁶⁴ The focus is not solely on a company's reporting to external stakeholders but also on responding to the informational needs of other stakeholders and building a more integrated approach within the company. "While integrated reporting is often thought of as a framework for external reporting," the Conference Board notes, "its greatest benefit may be its ability to foster 'integrated thinking,' enabling a better understanding within companies of the factors that

materially affect their ability to create value over time.”⁶⁵

The Conference Board report stresses that integrated reporting is still in its infancy for most public companies and that there is no one correct way to prepare an integrated report. It indicates that the most useful reports generally briefly discuss the company’s business model, the material issues that impact value creation, and stakeholder engagement. The report provides several helpful examples of integrated reports, which use graphical representations to illustrate how companies can apply the six capitals to create value.

The IIRC and the Conference Board note that integrated reports can be merged with a company’s Form 10-K and include both required information and voluntary disclosures. Alternatively, companies are free to reserve their periodic reports for required disclosures and separately produce an integrated report—perhaps to replace the sustainability report that many companies currently publish. This leads to the question of whether ESG disclosures should appear in financial reports or separate sustainability reports.

WHERE ESG INFORMATION SHOULD APPEAR

The SASB roundtable addressed the question of where sustainability information should be disclosed: “No clear consensus emerged on where companies should report their sustainability performance. The current reporting practices of corporate participants run the gamut, with most disclosing ESG information in sustainability reports, others in mainstream financial filings, and still others in annual reports, on website, or through some combination of channels. Likewise, investors’ opinions were mixed.”⁶⁶ Some investors indicated that sustainability reports can be bloated with information that is less helpful to the investor community and would prefer that financially material ESG information be included in companies’ 10-Ks or other financial filings. According to the roundtable, “At the end of the day, however, most investors generally agreed they don’t care where the information is reported as long as it’s high-quality.” Said one asset manager: “What we’re looking for is how any ESG

theme or metric is tied to a company’s value proposition . . . Whether the company conveys that in its 10-K or sustainability report—we don’t care that much.”⁶⁷

More recently, the SASB announced that it is rethinking its initial assumption that its standards would be incorporated in SEC filings. According to a Harvard Law School forum on those standards and filings, “SASB’s outreach to investors convinced it to become less focused on SEC filings as the primary location for disclosures; most investors were found to care more about obtaining sustainability disclosure that is readily available, reliable, and comparable than they do about where it is located.”⁶⁸ The SASB endorsed the idea that companies should be free to determine where to report ESG information provided that they implement appropriate disclosure controls to ensure the information is reliable.

The SASB explained that its change in thinking was informed by the concerns that companies expressed over use of the SASB standards in their SEC filings. Companies noted that the level of detail or extent of the disclosures contemplated by the SASB may go beyond that which is required. They also noted the potential liability that could result from inclusion of more detailed ESG information in SEC filings. At the same time, as the SASB points out, companies frequently provide more detailed disclosures outside their SEC filings in separate sustainability reports or on their websites, which are subject to the anti-fraud provisions of the US securities laws even if they do not appear in the company’s SEC filings. As such, this concern over enhanced liability is perhaps somewhat overstated. On the other hand, ESG disclosures in Form 10-K filings could expose companies to liability under Section 11 of the Securities Act if the 10-K is incorporated by reference in a registration statement. As such, companies’ nervousness is not without justification.⁶⁹ Finally, companies have expressed a reluctance to accept increased reporting burdens in light of the time pressures they currently face to produce and file their periodic SEC filings.

The SASB discussion highlighted some recent innovative thinking with regard to the manner of filing

ESG information with the SEC. It noted that one company recently filed its sustainability report on a Current Report on Form 8-K. The sustainability report was filed as an attachment to a press release and technically was “furnished” pursuant to Item 7.01 of Form 8-K rather than “filed.”⁷⁰ As such, the report would not be incorporated by reference into the registrant’s registration statements and would not, therefore, give rise to Section 11 liability.

If companies do provide ESG disclosures in separate reports outside of their SEC filings, they of course still must consider what disclosures are required in the SEC filings. Ideally, they will harmonize the disclosure processes within the company to ensure consistency between the sustainability reports and financial reports. Further, good practice would have the sustainability reports subjected to similar oversight and rigor as that applied to financial disclosures. This should help ensure consistency in reporting, and lead to a deeper analysis and scrutiny within the companies of the ESG disclosures.

RECONCILING THE VARIOUS REPORTING FRAMEWORKS

The SEC’s disclosure requirements typically are only the starting point in companies’ assessment of what ESG information to disclose. As noted above, most companies also follow other reporting standards and respond to private sector questionnaires that draw out information beyond that disclosed in the financial reports.

A number of initiatives have attempted to help market participants navigate the different reporting frameworks. The WBCSD has developed a comprehensive tool, the Reporting Exchange, which aggregates reporting requirements around the world. The Reporting Exchange is an online platform that offers a road map to nearly 2,000 mandatory and voluntary ESG reporting standards and frameworks in 70 countries.⁷¹ The WBCSD developed the Reporting Exchange to address the fragmentation in the reporting landscape and the resulting confusion and frustration among market participants. The WBCSD notes, “Because there isn’t standard terminology for describing

and defining the components of the reporting world, confusion and complexity continues to grow. The resulting variability in the quality, quantity and relevance of disclosures prevents investors and stakeholders from getting the information they need.”⁷²

The WBCSD’s ESG Disclosure Handbook provides further guidance for companies as they approach their ESG reporting processes.⁷³ The ESG Disclosure Handbook is designed to help companies navigate the disclosure process, giving consideration to the informational demands of multiple stakeholders and the array of reporting standards. It offers a process by which companies are encouraged to consider their internal and external reasons for reporting and to synthesize their reports to provide the key information that their stakeholders need. The guidance aims to help companies “when considering what to report, where, why, to whom and how” in response to the various mandatory and voluntary disclosure frameworks.⁷⁴

The Corporate Reporting Dialogue also aims to rationalize the ESG reporting landscape.⁷⁵ Organized by the IIRC, the Corporate Reporting Dialogue’s participants include the CDP, CDSB, GRI, International Organization for Standardization, SASB, International Financial Reporting Standards, and FASB. The Corporate Reporting Dialogue has made efforts to reconcile the different reporting regimes by providing comparisons and summaries of the principal reporting frameworks, including a “landscape map” that compares the member organizations’ disclosure standards.⁷⁶ The goal of the Corporate Reporting Dialogue’s tools is “to promote greater coherence, consistency and comparability between corporate reporting frameworks, standards and related requirements.”

The Corporate Reporting Dialogue is a sponsor of the Better Alignment Project, which aims to map the key provisions of the CDP, CDSB, GRI, IIRC, SASB, and TCFD to find points of overlap that can be harmonized.⁷⁷ The project leaders conducted roundtables with stakeholders around the globe between April and June 2019 in order to identify opportunities for better alignment in sustainability reporting and to understand the impediments to effective ESG reporting with a particular focus on efforts to adopt the

TCFD recommendations. The Corporate Reporting Dialogue announced a forthcoming publication in Q3 2019 to demonstrate the linkages of the TCFD recommendations with the CDP, CDSB, GRI, IIRC, and SASB standards.⁷⁸ Consistent with the objectives of the IIRC, the Better Alignment Project aims to facilitate integrated disclosure of financial and non-financial information.

The exchanges also recognize the need for ESG disclosure guidance to help companies navigate and reconcile the various ESG reporting standards. Half of the UN Sustainable Stock Exchanges have issued ESG reporting guidance.⁷⁹ In May 2019, Nasdaq issued its global ESG Reporting Guide.⁸⁰ The guide “will help companies understand the complex (and sometimes conflicting) world of ESG-related reporting. It provides a business-centric rationale for focusing on certain essential data points, integrating these data points into management operations, and potentially reporting them to the public.”⁸¹ Recognizing the dynamic landscape, Nasdaq acknowledged that its guide is “the beginning of a conversation rather than a final pronouncement.”

In the spring of 2019, the SASB and the CDSB published a TCFD Implementation Guide designed to help companies apply the TCFD recommendations in harmony with the SASB and CDSB standards in order to improve companies’ climate-related disclosures.⁸² This guide recognizes that, despite the TCFD’s broad support since its formation in 2015, comparatively few organizations apply its reporting guidance to address climate impacts in their disclosure documents. The guide was designed as a practical road map to remedy this disclosure gap. It explains how the three frameworks complement each other. The TCFD principles provide thoughtful processes by which to craft decision-useful disclosures. The CDSB principles can “sit on top” of the TCFD framework and provide guidance as to how companies can effectively incorporate environmental and climate information in their mainstream reports. The SASB standards can further augment the disclosure process by providing industry-specific criteria to help companies deliver material, decision-useful information to investors. The guide

also emphasizes that a company’s disclosures must first be guided by the relevant reporting requirements of the jurisdiction in which it operates, such as the SEC reporting framework.

The TCFD Implementation Guide offers a practical road map to ESG disclosures following the TCFD, CDSB, and SASB guidance. The steps outlined are to: (1) get executive and board-level support; (2) integrate climate change issues into key company governance with board-level oversight; (3) bring together key functions within the company—sustainability, governance, finance, and compliance; (4) evaluate the financial impacts of climate risk; (5) apply scenario analyses to assess climate risks; (6) apply existing risk-management processes to climate risks; (7) get feedback from investors as to what information they find most important; (8) use existing tools to collect and report climate information, rather than reinvent the wheel; (9) use the same quality assurance and compliance systems for climate-related financial information as for other disclosures; (10) obtain external assurance of climate-related information or, at least, prepare the information as if it were going to be subject to assurance; and (11) evaluate the structure of annual reports and how the recommendations would fit within Risk Factors, MD&A, and the governance disclosures.⁸³

The TCFD Implementation Guide provides some sample disclosures that illustrate “TCFD-Aligned” disclosures. These examples are a response to requests from market participants for “real-world, good-practice examples of what decision-useful, climate-related financial disclosures could look like.”⁸⁴ The sample disclosures are analyzed against the four principal elements of the TCFD recommendations: governance, strategy, risk management, and metrics and targets to illustrate how these elements can be applied in practice. Finally, the guide provides a matrix that maps the disclosure standards of the CDSB and the SASB to the TCFD recommendations to help companies see how the frameworks line up. The guide goes a long way toward providing actionable guidance to facilitate reporting. Yet it also respects the dynamic nature of this field. The guide acknowledges, “as the TCFD recommendations are more broadly adopted and the management and reporting of climate-related risks

and opportunities evolves, what is considered realistic and achievable will likely change.”⁸⁵

ESG INDEXES AND RATINGS

The financial industry has seen a surge in ESG rating and indexing services that score companies on the basis of their ESG performance, governance, and disclosures.⁸⁶ According to a “rate the raters” survey of several thousand sustainability professionals by SustainAbility, the number of ESG ratings services has increased by more than 500% since 2010, with the number currently estimated at over 600.⁸⁷

While ratings services can be helpful in the comparison of ESG risks across companies and industries, they do not appear to be a silver bullet. Ratings firms use a variety of criteria and methodologies to derive their ratings, and there is no overarching regulatory structure governing the ratings methodologies. As a result, while many investors and companies place a high value on ESG ratings services as providing a path to greater clarity and comparability, some have criticized the ratings as subjective.⁸⁸

SustainAbility’s 2019 survey notes that not all ratings systems are the same, and investors and companies are still discerning where they find value in ratings: “Although many investors and companies see the value ratings have in engaging, informing and helping to change companies, they still question the overall quality, effectiveness and impact of corporate ESG ratings.”⁸⁹ For their part, some companies expressed concern that the proliferation of ratings firms has accelerated the flow of information requests.⁹⁰ On the other hand, the survey found that close to two-thirds of the corporate respondents reported using ESG ratings to help them to inform their internal corporate decision-making: “In open-ended responses, sustainability experts most often mentioned using ratings for internal assessments and strategy, to help inform what data to disclose, identify trends and support stakeholder engagement.”⁹¹

Traditional credit rating agencies also are increasing their focus on ESG factors. The S&P Global Ratings announced the launch of its ESG Evaluation in April

2019⁹² and published its first ESG Evaluation in June 2019.⁹³ It explains its rationale to help investors manage and rationalize the ESG information that they are trying to integrate in their investment analyses: “Today, investors who deliberately apply an ESG lens to investing are growing rapidly worldwide as more come to realize the risks of separating such issues from business fundamentals. The lack of consistency, standards, and forward view of the majority of ESG information providers result in widespread difficulties for investors looking to integrate ESG factors into their investment decisions.”⁹⁴

In May 2019, Moody’s Investors Service solicited feedback on a new carbon transition risk-assessment tool for rated companies.⁹⁵ The proposed carbon transition assessments (CTAs) are not traditional credit ratings but rather tools to provide market participants with greater clarity as to carbon transition risks for companies in selected sectors as well as rankings of issuers within sectors. The CTAs will apply a materiality, risk, and mitigation assessment. The key risks that will be scrutinized are a company’s current carbon profile, its medium-term exposure to technology risk, near- and medium-term mitigation strategies, and long-term risks associated with a rapid transition to a low-carbon economy.⁹⁶

Fitch launched its ESG Relevance Scores in January 2019.⁹⁷ Fitch applies a sector-based standardized scoring system that began with 1,500 non-financial corporate ratings across asset classes. Fitch’s announcement of the ESG Relevance Scores explained that it planned to follow the initial non-financial sector ESG scoring with similar scoring for banks, non-bank financial institutions, insurance companies, sovereigns, public finance, global infrastructure, and structured finance.⁹⁸ The initiative results from market feedback Fitch received that indicated the importance of ESG information to credit risk: “We actively engaged with investors and other market participants to understand what they want to see from CRAs before devising the new relevance scores. Our focus is purely on fundamental credit analysis and so our ESG Relevance Scores are solely aimed at addressing ESG in that context. The scores do not make value judgements on whether an

entity engages in good or bad ESG practices, but draw out which E, S, and G risk elements are influencing the credit rating decision.”⁹⁹

PRI launched its ESG in Credit Risk and Ratings Initiative “to enhance the transparent and systematic integration of ESG factors in credit risk analysis.”¹⁰⁰ The effort highlights the fact that credit risks are evolving and the incorporation of material ESG factors into the credit risk analysis is critical to properly evaluating a company’s default risk. The ESG Credit Risk and Ratings Initiative brings together fixed-income investors and credit rating agencies to promote understanding and identify areas in which ESG factors are not being taken into account in the credit rating process. The discussion between fixed-income investors and credit rating agencies has illustrated that “ESG consideration in credit risk analysis is still not addressed consistently and systematically by all (fixed income) market participants.”¹⁰¹ Nonetheless, a recent report from the initiative pointed to a positive trajectory with increased transparency as to how ESG factors are incorporated in investors’ and credit rating agencies’ analyses and better alignment between investors and credit rating agencies. Furthermore, ESG factors are viewed not merely as sources of risk but also as opportunities: “Perceptions are shifting and ESG signals are beginning to be used not only to manage downside risks but also to spot investment opportunities.”¹⁰²

SOME PRACTICAL GUIDANCE

ESG reporting requirements and voluntary reporting regimes are propagating at a dizzying pace. The SEC appears to be patiently watching these developments. As William Hinman noted in his recent speech, “The marketplace evolution of sustainability disclosures is ongoing.”¹⁰³ The process will likely be long, and companies and investors are likely to face ongoing challenges as they sort what information is most useful, in what format, and in what forum. In the interim, certain guidelines might be useful for companies to consider as they navigate their ESG disclosures.

MATERIALITY IS DYNAMIC

The concept of what is material is evolving. While

the U.S. Supreme Court’s black letter law is the law of the land and the North Star in guiding what information should be disclosed, the question of what information is significant to the reasonable investor in making its investment decision is changing. ESG issues are increasingly prominent in the minds of investors and are recognized as significant to financial results. At the same time, there is no “one size fits all” materiality analysis. Each company should assess what information would be considered important to its investors in making their investment decisions in light of the total mix of information for that company.

BREAK DOWN SILOS

Companies must understand how ESG factors present risks and opportunities. Ideally, companies will integrate ESG factors across and through all relevant functions to enable a meaningful understanding of the risks and opportunities that ESG factors present. This understanding will facilitate risk mitigation, contingency planning, leveraging new market opportunities, and ultimately more meaningful reporting on companies’ ESG risks and opportunities.

TREAT MATERIAL ESG RISKS LIKE FINANCIAL INFORMATION

In order to ensure information is accurate and presented in a manner that is complete and trustworthy, companies are advised to treat material ESG information as if it were financial information, applying internal controls processes to their management and reporting, regardless of whether formal assurance processes are used. Ideally, ESG disclosures should be crafted in conjunction not only with the sustainability team within the company but also the legal, finance, and other relevant groups, and with executive- and board-level oversight.

EXPLAIN THE RELEVANCE OF ESG FACTORS TO INVESTORS

Companies should disclose ESG factors in a manner that highlights the material information and explains why the information is material to the company. Companies should avoid boilerplate disclosures and give meaningful context to the information disclosed.

TAKE A LONGER VIEW. ESG risks and opportunities might not play out over quarterly or annual reporting cycles. If the risks and opportunities are material to investors, companies should consider providing disclosures that look further into the future.

RECONCILE AND HARMONIZE DISCLOSURES IN DIFFERENT LOCATIONS

If the company elects to disclose ESG information in its financial reports and in separate sustainability reports or websites, it should be careful to harmonize those disclosures so they are consistent. If information is required to be reported in the company's financial reports, then the disclosure must appear there even if the information is separately disclosed in a sustainability report. Companies should be mindful that the anti-fraud provisions of the US securities laws apply to disclosures outside the filed reports, including in sustainability reports or on websites. Those disclosures should be scrutinized to ensure they don't contain materially false or misleading information or omit information necessary to make the statements made not misleading.

USE VOLUNTARY DISCLOSURE STANDARDS AS TOOLS TO AUGMENT DISCLOSURES

The starting point for companies reporting under the US securities laws is the law itself and the forms, rules, and regulations under the Securities Act and Exchange Act. The various voluntary disclosure standards can augment the SEC reporting obligations and provide guidance and structure for disclosures in the company's financial reports or sustainability reports, whether presented in integrated reports or separately. When considering reporting under other frameworks such as the TCFD, CDSB, SASB, and UN SDGs, companies should continue to consult the required SEC disclosure requirements as the foundation. The TCFD Implementation Guide provides a useful map that illustrates how the TCFD, SASB, and CDSB guidance can operate in concert. The WBCSD ESG Disclosure Handbook and the Corporate Reporting Dialogue, among other resources, also provide useful guidance to companies trying to reconcile the various voluntary reporting

frameworks. These different standards will evolve, as will the efforts to harmonize and reconcile them. It is safe to say that this landscape will continue to change over time.

CONCLUSION

The ESG reporting landscape is dynamic, fragmented, and evolving. Companies operate in an environment in which the SEC reporting framework has remained essentially unchanged even as much of the rest of the world is taking action to require enhanced ESG reporting. This is not to say that ESG disclosures by US public companies have remained static. On the contrary, disclosures under the existing principles-based framework necessarily change as the issues material to companies evolve. However, investors complain that the ESG information they currently receive in many companies' financial reports is too generic and too riddled with boilerplate. These concerns have led investor groups to call for more meaningful disclosure requirements to be issued from both the SEC and the US Congress. Investors also have attempted to fill the informational gaps by issuing questionnaires to companies seeking further ESG data. At the same time, ESG surveys, ratings, and rankings have proliferated to meet investors' informational needs. The landscape remains crowded and confusing and marked with dissatisfaction on the parts of both investors and companies. This disclosure landscape is changing and will require close attention over the coming months and years as regulatory requirements, and guidance take shape, and as disclosure practices evolve.

ENDNOTES:

¹See Davies, Dudek and Wyatt, Environmental, Social and Governance Matters: The Rapidly Evolving ESG Reporting Landscape—Part 1, 41 Sec. & Fed. Corp. Law Rep. No. 7 (July 2019).

²See James R. Barrett, Paul A. Davies, and Kristina S. Wyatt, "US House Financial Services Committee Holds Landmark Hearing on ESG Reporting," Latham & Watkins Environment, Land & Resources Blog (July 22, 2019), available at <https://www.globalelr.com/2019/07/us-house-financial-services-committee-holds-landmark-hearing-on-esg-reporting/>.

³Cynthia A. Williams and Saul A. Fox, Petition for

Rulemaking on Environmental, Social and Governance Disclosure (October 1, 2018), available at <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf>.

⁴Cynthia A. Williams and Saul A. Fox, Petition for Rulemaking on Environmental, Social and Governance Disclosure (October 1, 2018), available at <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf>. (Introductory letter to rule proposal).

⁵Cynthia A. Williams and Saul A. Fox, Petition for Rulemaking on Environmental, Social and Governance Disclosure (October 1, 2018), available at <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf>, at p. 5, citing Initiative for Responsible Investment, *Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges* (March 12, 2015), available at <http://hausercenter.org/iri/wp-content/uploads/2011/08/CR-3-12-15.pdf>.

⁶Cynthia A. Williams and Saul A. Fox, Petition for Rulemaking on Environmental, Social and Governance Disclosure (October 1, 2018), available at <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf>, citing Klaus Dingwerth & Margot Eichinger, *Tamed Transparency: How Information Disclosure Under the Global Reporting Initiative Fails to Empower*, 10:3 GLOBAL ENV. POL. 74, 88 (2010).

⁷Climate Risk Disclosure Act of 2018, S. 3481, 115th Congress (2017-2018).

⁸Climate Risk Disclosure Act of 2019, H.R. 3623, 116th Congress (2018-2019).

⁹ESG Disclosure Simplification Act of 2019, H.R. 4329, 116th Congress (2018-2019). This bill was passed by the House Financial Services Subcommittee on September 20, 2019.

¹⁰Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019 (Draft), H.R. _____, 116th Congress (2018-2019).

¹¹Public Employees' Retirement Fund and Teachers' Retirement Fund: investments: climate-related financial risk, S.B. 964 (September 23, 2018).

¹²Kosmas Papadopoulos, "Early Review of 2019 US Proxy Season Vote Results," ISS Analytics (June 5, 2019), available at https://www.issgovernance.com/file/publications/ISS_Early_Review_of_2019_US_Proxy_Season_Vote_Results.pdf.

¹³Kosmas Papadopoulos, "Early Review of 2019 US Proxy Season Vote Results," ISS Analytics (June 5, 2019), available at https://www.issgovernance.com/file/publications/ISS_Early_Review_of_2019_US_Proxy_Season_Vote_Results.pdf.

¹⁴Kosmas Papadopoulos, "Early Review of 2019 US Proxy Season Vote Results," ISS Analytics (June 5, 2019), available at <https://www.issgovernance.com/>

[file/publications/ISS_Early_Review_of_2019_US_Proxy_Season_Vote_Results.pdf](https://www.issgovernance.com/file/publications/ISS_Early_Review_of_2019_US_Proxy_Season_Vote_Results.pdf), at 5.

¹⁵Kosmas Papadopoulos, "Early Review of 2019 US Proxy Season Vote Results," ISS Analytics (June 5, 2019), available at https://www.issgovernance.com/file/publications/ISS_Early_Review_of_2019_US_Proxy_Season_Vote_Results.pdf.

¹⁶EY Center for Board Matters, "Five takeaways from the 2019 proxy season" (July 2019), available at <https://assets.ey.com/content/dam/ey-sites/ey-com/en-us/topics/cbm/ey-cbm-2019-proxy-season-preview.pdf>.

¹⁷Erica Lukoski et al, "2019 Proxy Season Takeaways," Harvard Law School Forum on Corporate Governance and Financial Regulation (July 27, 2019) available at <https://corpgov.law.harvard.edu/2019/07/27/2019-proxy-season-takeaways/>.

¹⁸Sustainable Stock Exchanges Initiative, About the SSE, <https://sseinitiative.org/about/about-the-sse/>.

¹⁹SSE, "Securities Regulators and Sustainable Development" <https://sseinitiative.org/securities-regulators/>.

²⁰International Organization of Securities Commissions, "Statement on Disclosure of ESG Matters by Issuers" (January 18, 2019), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf>.

²¹International Organization of Securities Commissions, "Statement on Disclosure of ESG Matters by Issuers" (January 18, 2019), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf>.

²²"IOSCO Holds First Sustainable Finance Network Stakeholder Meeting," Sustainable Stock Exchanges Initiative (June 19, 2019), available at <https://sseinitiative.org/home-slider/iosco-holds-first-sustainable-finance-network-stakeholder-meeting/>.

²³World Federation of Exchanges, "The World Federation of Exchanges Responds to IOSCO's Sustainable Finance Network" (June 11, 2019), quoting Nandini Sukumar, Chief Executive Officer, WFE, available at <https://www.world-exchanges.org/news/articles/world-federation-exchanges-responds-ioscos-sustainable-finance-network>.

²⁴Nasdaq "ESG Reporting Guide 2.0: A Support Resource for Companies" (May 2019), available at <https://business.nasdaq.com/marketinsite/2019/Corp/Introducing-Nasdaq-ESG-Reporting-Guide-2.html>.

²⁵Nasdaq "ESG Reporting Guide 2.0: A Support Resource for Companies" (May 2019), available at <https://business.nasdaq.com/marketinsite/2019/Corp/Introducing-Nasdaq-ESG-Reporting-Guide-2.html>, quoting Ed Knight, Nasdaq EVP and General Counsel, Comment Letter to the SEC on Concept Release (September 16, 2016).

²⁶For example, under “Environmental,” the road map identifies the following factors as potentially material and describes how they could be measured and disclosed: GHG emissions, emissions intensity, energy usage, energy intensity, energy mix, water usage, environmental operations, climate oversight by the board and by management, and climate risk mitigation. Under “Social,” the road map identifies CEO pay ratio, gender pay ratio, employee turnover, gender diversity, temporary worker ratio, non-discrimination, injury rates, global health and safety, child and forced labor, and human rights. Under “Governance,” the factors identified are board diversity, board independence, incentivized pay, collective bargaining, supplier codes of conduct, ethics and anti-corruption, data privacy, ESG reporting, disclosure practices, and external assurance.

²⁷Nasdaq “ESG Reporting Guide 2.0: A Support Resource for Companies” (May 2019), available at <https://business.nasdaq.com/marketinsite/2019/Corp/Introducing-Nasdaq-ESG-Reporting-Guide-2.html>, at 13.

²⁸Principles for Responsible Investment, “Global Guide to Responsible Investment Regulation,” (2016), available at <https://www.unpri.org/download?ac=325>.

²⁹Principles for Responsible Investment, “Global Guide to Responsible Investment Regulation,” (2016), available at <https://www.unpri.org/download?ac=325>.

³⁰Principles for Responsible Investment, “Global Guide to Responsible Investment Regulation,” (2016), available at <https://www.unpri.org/download?ac=325>.

³¹Principles for Responsible Investment, “Global Guide to Responsible Investment Regulation,” (2016), available at <https://www.unpri.org/download?ac=325>.

³²HM Government, Green Finance Strategy: Transforming Finance for a Greener Future (July 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/813656/190701_BEIS_Green_Finance_Strategy_Accessible_PDF_FINAL.pdf.

³³UK Department for Business, Energy & Industrial Strategy and Chris Skidmore MP, “UK Becomes First Major Economy to Pass Net Zero Emissions Law: New target will require the UK to bring all greenhouse gas emissions to net zero by 2050” (June 27, 2019), available at <https://www.gov.uk/government/news/uk-becomes-first-major-economy-to-pass-net-zero-emissions-law>.

³⁴HM Government, Green Finance Strategy: Transforming Finance for a Greener Future (July 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/813656/190701_BEIS_Green_Finance_Strategy_Accessible_PDF_FINAL.pdf, at 6.

³⁵European Commission, “Sustainable Finance,”

available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en.

³⁶European Commission, “High-Level Conference: A Global Approach to Sustainable Finance” (March 21, 2019), available at https://ec.europa.eu/info/events/finance-190321-sustainable-finance_en.

³⁷European Commission, Financial Stability, Financial Services and Capital Markets Union “Technical Expert Group on Sustainable Finance (TEG),” https://ec.europa.eu/info/publications/sustainable-finance-technical-expert-group_en

³⁸European Commission press release, “Sustainable finance: Commission publishes guidelines to improve how firms report climate-related information and welcomes three new important reports on climate finance by leading experts” (June 18, 2019), available at http://europa.eu/rapid/press-release_IP-19-3034_en.htm?locale=en.

³⁹European Commission press release, “Sustainable finance: Commission publishes guidelines to improve how firms report climate-related information and welcomes three new important reports on climate finance by leading experts” (June 18, 2019), available at http://europa.eu/rapid/press-release_IP-19-3034_en.htm?locale=en.

⁴⁰See, for example, Jacqueline Poh and Mariko Ishikawa, “China Set to Lead ESG Disclosure to Lure Foreign Investments,” Bloomberg (June 20, 2019), available at <https://www.bloomberg.com/news/articles/2019-06-20/china-set-to-lead-esg-disclosures-to-lure-foreign-investments>; Japan Exchange Group, “Publication of Japanese Translation of ‘Model Guidance for Companies on Reporting on ESG Information’ ” (June 3, 2019), available at <https://www.jpx.co.jp/english/corporate/news/news-releases/0060/20190603-01.html>; Nathalie Borgeaud, “Article 173: Lessons Learned from 2018 Climate Risk Disclosures in France” (April 30, 2019), available at <http://427mt.com/2019/04/30/article-173-lessons-learned-from-2018-climate-risk-disclosures-in-france/>.

⁴¹See GRI website <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx>.

⁴² <https://www.globalreporting.org/information/sustainability-reporting/Pages/gri-standards.aspx>.

⁴³For example, the environmental standards include standards on materials, energy, water and effluents, biodiversity, emissions, effluents and waste, environmental compliance, and supplier environmental assessments. The social standards include standards on employment, labor/management relations, occupational health and safety, training and education, diversity and equal opportunity, non-discrimination, freedom of association and collective bargaining, child

labor, forced labor, security practices, rights of indigenous people, human rights, local communities, supplier social assessment, and consumer health and safety.

⁴⁴See <https://www.fsb-tcfd.org/about/>.

⁴⁵Final Report, Recommendations of the Task Force on Climate-Related Financial Disclosures (June 2017), available at <https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf>.

⁴⁶TCFD: 2019 Status Report (June 2019), available at <https://www.fsb-tcfd.org/publications/tcfd-2019-status-report/>.

⁴⁷Final Report, Recommendations of the Task Force on Climate-Related Financial Disclosures (June 2017), available at <https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf>, at 176.

⁴⁸See <https://www.sasb.org/>.

⁴⁹See <https://www.cdsb.net/our-story>.

⁵⁰See <https://www.cdsb.net/our-story>.

⁵¹See <https://www.cdsb.net/our-story>.

⁵²Climate Disclosure Standards Board, “Climate Change Reporting Framework: Advancing and aligning disclosure of climate change-related information in mainstream reports” (October 2012), available at https://www.cdsb.net/sites/default/files/cdsb_climate_change_reporting_framework_edition_1.1_0.pdf.

⁵³See <https://www.cdp.net>.

⁵⁴See <https://www.cdp.net>.

⁵⁵The 17 Sustainable Development Goals are:

Goal 1: End poverty in all its forms everywhere

Goal 2: End hunger, achieve food security and improved nutrition, and promote sustainable agriculture

Goal 3: Ensure healthy lives and promote well-being for all at all ages

Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all

Goal 5: Achieve gender equality and empower all women and girls

Goal 6: Ensure availability and sustainable management of water and sanitation for all

Goal 7: Ensure access to affordable, reliable, sustainable, and modern energy for all

Goal 8: Promote sustained, inclusive, and sustainable economic growth, full and productive employment and decent work for all

Goal 9: Build resilient infrastructure, promote inclusive and sustainable industrialization, and foster innovation

Goal 10: Reduce inequality within and among countries

Goal 11: Make cities and human settlements inclusive, safe, resilient, and sustainable

Goal 12: Ensure sustainable consumption and production patterns

Goal 13: Take urgent action to combat climate change and its impacts

Goal 14: Conserve and sustainably use the oceans, seas, and marine resources for sustainable development

Goal 15: Protect, restore, and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss

Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions for all levels

Goal 17: Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development

⁵⁶See <https://sustainabledevelopment.un.org/?menu=1300>

⁵⁷International Integrated Reporting Council, “The International <IR> Framework” (December 2013), available at <http://integratedreporting.org/wp-content/uploads/2015/03/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf>.

⁵⁸International Integrated Reporting Council, “The International <IR> Framework” (December 2013), available at <http://integratedreporting.org/wp-content/uploads/2015/03/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf>.

⁵⁹International Integrated Reporting Council, “The International <IR> Framework” (December 2013), available at <http://integratedreporting.org/wp-content/uploads/2015/03/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf>.

⁶⁰The Conference Board, “Integrated Reporting Working Group: The Emergence of Integrated Reporting” (July 15, 2019), available at <https://www.conferece-board.org/publications/publicationdetail.cfm?publicationid=8635>.

⁶¹The Conference Board, “Integrated Reporting Working Group: The Emergence of Integrated Reporting” (July 15, 2019), available at <https://www.conferece-board.org/publications/publicationdetail.cfm?publicationid=8635>, at 3.

⁶²The Conference Board, “Integrated Reporting Working Group: The Emergence of Integrated Reporting” (July 15, 2019), available at <https://www.conferece-board.org/publications/publicationdetail.cfm?publicationid=8635>, at 25.

⁶³The Conference Board, “Integrated Reporting Working Group: The Emergence of Integrated Reporting” (July 15, 2019), available at <https://www.conferece-board.org/publications/publicationdetail.cfm?publicationid=8635>, at 9.

⁶⁴The Conference Board, “Integrated Reporting Working Group: The Emergence of Integrated Reporting” (July 15, 2019), available at <https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=8635>, at 3.

⁶⁵The Conference Board, “Integrated Reporting Working Group: The Emergence of Integrated Reporting” (July 15, 2019), available at <https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=8635>, at 3.

⁶⁶Sustainability Accounting Standards Board, “Dead Cobras and Faberge Eggs: Unlocking the Potential of ESG Data” (2018), available at <https://library.sasb.org/dead-cobras-faberge-eggs-unlocking-the-potential-of-esg-data/>, at 9.

⁶⁷Sustainability Accounting Standards Board, “Dead Cobras and Faberge Eggs: Unlocking the Potential of ESG Data” (2018), available at <https://library.sasb.org/dead-cobras-faberge-eggs-unlocking-the-potential-of-esg-data/>, at 10.

⁶⁸Tom Riesenber and Alan Beller, “Sustainability Accounting Standards and SEC Filings,” Harvard Law School Forum on Corporate Governance and Financial Regulation (June 5, 2019), available at <https://corpgov.law.harvard.edu/2019/06/05/sustainability-accounting-standards-and-sec-filings/>.

⁶⁹Tom Riesenber and Alan Beller, “Sustainability Accounting Standards and SEC Filings,” Harvard Law School Forum on Corporate Governance and Financial Regulation (June 5, 2019), available at <https://corpgov.law.harvard.edu/2019/06/05/sustainability-accounting-standards-and-sec-filings/>.

⁷⁰Disclosures pursuant to Item 7.01 are made to satisfy public disclosure obligations under Regulation FD relating to selective disclosure. See form 8-K, Item 7.01, available at <https://www.sec.gov/files/form8-k.pdf>.

⁷¹See <https://www.wbcsd.org/Programs/Redefining-Value/External-Disclosure/The-Reporting-Exchange>.

⁷²See <https://www.wbcsd.org/Programs/Redefining-Value/External-Disclosure/The-Reporting-Exchange>.

⁷³See <https://www.wbcsd.org/Programs/Redefining-Value/External-Disclosure/Purpose-driven-disclosure/Resources/ESG-Disclosure-Handbook>.

⁷⁴ <https://www.wbcsd.org/Programs/Redefining-Value/External-Disclosure/Purpose-driven-disclosure/Resources/ESG-Disclosure-Handbook>.

⁷⁵See <https://corporatereportingdialogue.com/>.

⁷⁶See <https://corporatereportingdialogue.com/landscape-map/>.

⁷⁷ <https://corporatereportingdialogue.com/better-alignment-project/>.

⁷⁸*Id.* This website indicates that the report will be posted at <https://corporatereportingdialogue.com/better-alignment-project/>.

⁷⁹ESG Reporting Guide: A Voluntary Support Program for Companies, available at <https://business.nasdaq.com/esg-guide/>.

⁸⁰Nasdaq, “ESG Reporting Guide 2.0: A Support Resource for Companies” (May 2019), available at https://business.nasdaq.com/media/Nasdaq-ESG-Reporting-Guide-2019_tcm5044-70227.pdf.

⁸¹ESG Reporting Guide Questions and Answers, available at <https://business.nasdaq.com/esg-guide/>.

⁸²Sustainability Accounting Standards Board and Climate Disclosures Standards Board, “TCFD Implementation Guide: Using SASB Standards and the CDSB Framework to Enhance Climate-Related Financial Disclosures in Mainstream Reporting” (2019), available at <https://library.sasb.org/tcfd-implementation-guide/>. See also Paul A. Davies and Kristina S. Wyatt, “SASB and CDSB Issue TCFD Implementation Guide,” Latham & Watkins Environment, Land & Resources Blog (May 13, 2019), available at <https://www.globalelr.com/2019/05/tcfd-issues-implementation-guide-incorporating-sasb-and-cdsb-frameworks/>.

⁸³Sustainability Accounting Standards Board and Climate Disclosures Standards Board, “TCFD Implementation Guide: Using SASB Standards and the CDSB Framework to Enhance Climate-Related Financial Disclosures in Mainstream Reporting” (2019), available at <https://library.sasb.org/tcfd-implementation-guide/>, at 8-10.

⁸⁴Sustainability Accounting Standards Board and Climate Disclosures Standards Board, “TCFD Implementation Guide: Using SASB Standards and the CDSB Framework to Enhance Climate-Related Financial Disclosures in Mainstream Reporting” (2019), available at <https://library.sasb.org/tcfd-implementation-guide/>, at 12.

⁸⁵ Sustainability Accounting Standards Board and Climate Disclosures Standards Board, “TCFD Implementation Guide: Using SASB Standards and the CDSB Framework to Enhance Climate-Related Financial Disclosures in Mainstream Reporting” (2019), available at <https://library.sasb.org/tcfd-implementation-guide/>, at 16.

⁸⁶Betty Moy Huber and Michael Comstock, “ESG Reports and Ratings: What They Are, Why They Matter,” Harvard Law School Forum on Corporate Governance and Financial Regulation (July 27, 2017), available at <https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/>.

er/.

⁸⁷SustainAbility, “Rate the Raters 2019: Expert Views on ESG Ratings” (February 2019), page 4, available at <http://sustainability.com/our-work/reports/rate-raters-2019/>. Some of the prominent ESG rating services include MSCI ESG Rating, RobecoSAM, CDP, Sustainalytics, RepRisk, ISS Environment and Social Quality, and the Dow Jones Sustainability Index.

⁸⁸James Mackintosh, “Is Tesla or Exxon More Sustainable? It Depends Whom You Ask,” Wall Street Journal (September 17, 2018), available at <https://www.wsj.com/articles/is-tesla-or-exxon-more-sustainable-it-depends-whom-you-ask-1537199931>.

⁸⁹SustainAbility, “Rate the Raters 2019: Expert Views on ESG Ratings” (February 2019), page 4, available at <http://sustainability.com/our-work/reports/rate-raters-2019/>.

⁹⁰SustainAbility, “Rate the Raters 2018: Ratings Revisited” (March 2018), available at <http://sustainability.com/our-work/reports/rate-raters-2018-white-paper/>.

⁹¹SustainAbility, “Rate the Raters 2019: Expert Views on ESG Ratings” (February 2019), page 9, available at <http://sustainability.com/our-work/reports/rate-raters-2019/>.

⁹²S&P Global Ratings Media Release, “New market offering seeks to improve transparency, disclosure and private-sector engagement with rising environmental, social, and governance risk concerns” (April 11, 2019), available at https://www.spratings.com/en/US/media-releases/-/asset_publisher/cebizYBoiIER/content/s-p-global-ratings-launches-its-esg-evaluation?inheritRedirect=false.

⁹³“S&P Global Ratings Publishes Its First ESG Evaluation,” MarketWatch (June 17, 2019), available at <https://www.marketwatch.com/press-release/sp-global-ratings-publishes-its-first-esg-evaluation-2019-06-17>.

⁹⁴S&P Global, “ESG Evaluation: Sustainable Practices. Sustainable Returns” available at <https://www.spglobal.com/en/capabilities/esg-evaluation>.

⁹⁵Moody’s Investors Service, “Research Announcement: Moody’s requests feedback on a new

carbon transition risk assessment tool for rated companies” (May 7, 2019), available at https://m.moodys.com/research/Moodys-requests-feedback-on-a-new-carbon-transition-risk-assessment—PBC_1171112.

⁹⁶Moody’s Investors Service, “Research Announcement: Moody’s requests feedback on a new carbon transition risk assessment tool for rated companies” (May 7, 2019), available at https://m.moodys.com/research/Moodys-requests-feedback-on-a-new-carbon-transition-risk-assessment—PBC_1171112.

⁹⁷Fitch Ratings, “Fitch Ratings Launches ESG Relevance Scores to Show Impact of ESG on Credit” (January 7, 2019), available at <https://www.fitchratings.com/site/pr/10058528>.

⁹⁸Fitch Ratings, “Fitch Ratings Launches ESG Relevance Scores to Show Impact of ESG on Credit” (January 7, 2019), available at <https://www.fitchratings.com/site/pr/10058528>.

⁹⁹Fitch Ratings, “Fitch Ratings Launches ESG Relevance Scores to Show Impact of ESG on Credit” (January 7, 2019), available at <https://www.fitchratings.com/site/pr/10058528>, quoting Andrew Steel, Fitch Ratings Global Head of Sustainable Finance.

¹⁰⁰PRI, “ESG, Credit Risk and Ratings: Part 1—The State of Play. Investors and credit rating agencies (CRAs) are ramping up efforts to consider environmental, social and governance (ESG) factors in credit risk analysis” (July 3, 2017), available at <https://www.unpri.org/credit-ratings/esg-credit-risk-and-ratings-part-1-the-state-of-play/78.article>.

¹⁰¹PRI, “Shifting Perceptions: ESG, Credit Risk and Ratings: Part 3—From Disconnects to Action Areas” available at <https://www.unpri.org/download?ac=5819>.

¹⁰²PRI, “Shifting Perceptions: ESG, Credit Risk and Ratings: Part 3—From Disconnects to Action Areas” available at <https://www.unpri.org/download?ac=5819>.

¹⁰³William Hinman, “Applying a Principles-Based Approach to Disclosing Complex, Uncertain and Evolving Risks,” Remarks at the 18th Annual Institute on Securities Regulation in Europe (March 15, 2019).

<https://legal.thomsonreuters.com/>