

Winter 2023

Criminalizing ESG: A Framework to Hold Corporations Accountable for Incorrect ESG Disclosures

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Sierra Anderson, *Criminalizing ESG: A Framework to Hold Corporations Accountable for Incorrect ESG Disclosures*, 113 J. CRIM. L. & CRIMINOLOGY 175 (2023).
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COMMENTS

CRIMINALIZING ESG: A FRAMEWORK TO HOLD CORPORATIONS ACCOUNTABLE FOR INCORRECT ESG DISCLOSURES

Sierra Anderson*

Investors are increasingly interested in corporate environmental, social, and governance (“ESG”) data, so the SEC has faced pressure to create a mandated ESG disclosure regime. The Commission has begun exploring ESG disclosures, including creating a dedicated task force and opening a public comment process. But, if the SEC wants to require corporations to provide investors with meaningful ESG data, it must be able to hold corporations civilly and criminally liable for providing false information—which hinges on ESG statements being material. This article analyzes what types of ESG data would likely be found material under current laws. After applying this information, this article concludes with various ways the SEC could utilize the materiality analysis to create a functional, standardized disclosure regime. This recommended framework would benefit investors by providing key ESG information while ensuring that the SEC and DOJ could attach liability to any incorrect and fraudulent data.

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* I would like to thank Professor Paul H. Tzur for his invaluable guidance throughout the writing of this piece.

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INTRODUCTION

Over the last several years, investors have become increasingly interested in companies' strategic, long-term plans regarding certain social issues, integrating environmental, social, and governance ("ESG") factors into their decision-making processes.¹ As these factors, including those relating to climate change and diversity, gain traction in the investment community, many publicly traded corporations have begun voluntarily disclosing certain ESG data and information in their public statements and filings.² But, as the law now stands, the SEC and DOJ might not be able to regulate ESG public statements to ensure that companies are being truthful about their ESG activities.³ ESG disclosures must ultimately be material to

¹ Edouard Dubois & Ali Saribas, *Making Corporate Purpose Tangible—A Survey of Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 19, 2020), <https://corpgov.law.harvard.edu/2020/06/19/making-corporate-purpose-tangible-a-survey-of-investors> [<https://perma.cc/RM9P-SDKR>].

² Holly J. Gregory, Heather Palmer & Leonard Wood, *Emerging ESG Disclosure Trends Highlighted in GAO Report*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 15, 2020), <https://corpgov.law.harvard.edu/2020/08/15/emerging-esg-disclosure-trends-highlighted-in-gao-report> [<https://perma.cc/BG33-MFNM>].

³ Several courts have found that certain disclosures regarding companies' environmental, social, and governance practices are unable to be analyzed as false statements because they are non-verifiable opinions and statements of commitment. *See, e.g.*, *Ocegueda ex rel. Facebook v. Zuckerberg*, 526 F. Supp. 3d 637, 651 (N.D. Cal. 2021) (finding aspirational statements about a commitment to diversity mere puffery and non-actionable); *Klein v. Ellison*, No. 20-cv-04439-JSC, slip op. at 7 (N.D. Cal. May 24, 2021) (finding diversity statements non-actionable because they are not capable of objective verification); *Esa v. NortonLifeLock Inc.*, No. 20-cv-05410-RS, slip op. at 10 (N.D. Cal. Aug. 30, 2021) (finding proxy statements related to diversity non-actionable because "[c]ourts routinely find similar statements to be non-actionable puffery or aspirational (and hence immaterial)"), *appeal docketed*, No. 21-16909 (9th Cir. Nov. 12, 2021); *City of Pontiac Gen. Emps.' Ret. Sys. v. Bush*, No. 20-cv-06651-JST, 2022 WL 1467773, at *5 (N.D. Cal. Mar. 1, 2022) (finding that diversity statements "in Cisco's proxy statements [were] non-actionable" because they were "aspirational assertions"); *Falat v. Sacks*, No. 8:20-cv-01782-JVS-KES, 2021 WL 1558940, at *5-*6 (C.D. Cal. Apr. 8, 2021) ("[T]he statements in question that Monster 'seek[s] to

attach any liability,⁴ and materiality standards under the law seem, at first glance, difficult to apply to the type of information that ESG statements communicate.

In response to investor interest and voluntary ESG disclosures, the chairman of the U.S. Securities and Exchange Commission (“SEC”), Gary Gensler, has made statements showing his support for mandatory and uniform disclosures of ESG.⁵ In May, the SEC proposed ESG rules, signaling further the Commission’s intent to implement mandatory disclosures.⁶ Opponents of mandatory ESG disclosures are concerned that ESG information is too uncertain and varied and would subject companies to undue liability both civil and criminal.⁷ This paper explores whether ESG information can be the basis for successful civil or criminal securities fraud claims and how the SEC might create a system of mandatory disclosures to motivate companies to more accurately capture their ESG practices.

Part I of this paper provides a description of current securities laws and the standards used to determine materiality—the key to attaching liability to ESG information.⁸ In Part II, the paper examines current voluntarily-disclosed ESG information and determines the likelihood that certain statements would be material. Part III presents recommendations for how the

capture diversity in [its] candidates’ and ‘does not tolerate’ harassment or discrimination are mere puffery and do not constitute objectively verifiable statements of fact” (citation omitted)).

⁴ See *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); see also *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

⁵ See Bob Pisani, *SEC Chair Gensler Says Investors Want Mandatory Disclosure on Climate Risks*, CNBC (July 28, 2021, 10:59 AM), <https://www.cnbc.com/2021/07/28/sec-chair-gensler-says-investors-want-mandatory-disclosure-on-climate-risks.html> [<https://perma.cc/3EK3-PPSJJ>]; Gary Gensler, Chair, SEC, Prepared Remarks Before the Principles for Responsible Investment “Climate and Global Financial Markets” Webinar (July 28, 2021), <https://www.sec.gov/news/speech/gensler-pri-2021-07-28> [<https://perma.cc/YFH3-NL23>] [hereinafter SEC Prepared Remarks].

⁶ Press Release, SEC, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices (May 25, 2022), <https://www.sec.gov/news/press-release/2022-92> [<https://perma.cc/NL24-NYRZ>].

⁷ See, e.g., David A. Katz & Laura A. McIntosh, *SEC Regulation of ESG Disclosures*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 28, 2021), <https://corp.gov.law.harvard.edu/2021/05/28/sec-regulation-of-esg-disclosures> [<https://perma.cc/W8EA-LBLF>].

⁸ 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, 754–60 (2021).

SEC could adopt an ESG disclosure regime that would provide investors with practical information while also ensuring that companies could be held accountable for providing inaccurate information in their statements and filings.

I. BACKGROUND

Created in 1934 through the Securities Exchange Act,⁹ the SEC has a three-part mission: 1) protect investors, 2) maintain fair, orderly, and efficient markets, and 3) facilitate capital formation.¹⁰ To meet this mission, the Commission “require[s] public companies, fund and asset managers, investment professional[s], and other market participants to regularly disclose significant financial and other information” in an effort to meet these goals.¹¹

The SEC indirectly creates avenues of criminal law through its power to promulgate rules and regulations, as companies can be prosecuted for failure to comply with those regulations.¹² The rules and regulations the Commission creates can provide a basis for the Department of Justice (“DOJ”) to bring criminal actions through the use of 15 U.S.C. §§ 77x and 78ff, which criminalize willful violations of the statutes or rules and regulations adopted under the statutes.¹³ This includes any willful, material misstatements.¹⁴ Therefore, public companies must provide accurate information in their requisite annual reports.¹⁵ If the information provided is inaccurate and the misstatement is willful and material, the company and individuals at the company could face criminal prosecution for securities fraud within the federal criminal law system.¹⁶

⁹ *The Role of the SEC*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/role-sec> [https://perma.cc/W9PT-7T2Y].

¹⁰ *Id.*

¹¹ *What We Do*, SEC, <https://www.sec.gov/about/what-we-do> [https://perma.cc/S895-AZX2].

¹² *See, e.g.*, Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 UC IRVINE L. REV. 855, 856–57 (2020).

¹³ J. KELLY STRADER & SANDRA D. JORDAN, *WHITE COLLAR CRIME: CASES, MATERIALS, AND PROBLEMS* 192–93 (3d ed. 2015).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

A. DETERMINING MATERIALITY

A civil or criminal finding of securities fraud hinges on the question of its materiality.¹⁷ In *TSC Industries v. Northway, Inc.* and *Basic Inc. v. Levinson*, the Supreme Court determined that material statements are those that a “reasonable investor” would have considered important enough to significantly alter the total mix of information made available.¹⁸ This standard is not met just because an investor might have found the information to be of interest.¹⁹ Rather, materiality is an objective standard looking at the reasonable investor, which depends on the market and the types of investors involved.²⁰ Therefore, the standard of materiality cannot be distilled into a bright-line test and is highly fact-dependent.²¹ *TSC Industries* instructs that “[t]he determination [of materiality] requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him.”²²

Invoking this objective, reasonable-investor standard, courts have emphasized the difference between facts and opinions.²³ Courts have concluded that statements of facts express certainty about a thing, whereas statements of opinion only express a belief or view.²⁴ With this distinction in mind, some courts distinguish “hard information” from “soft information” and have concluded that only “hard information” can be regulated by the SEC

¹⁷ *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

¹⁸ *TSC Indus.*, 426 U.S. at 449; *see also Basic Inc.*, 485 U.S. at 232.

¹⁹ *See, e.g., Milton v. Van Dorn Co.*, 961 F.2d 965, 969 (1st Cir. 1992) (“The mere fact that an investor might find information interesting or desirable is not sufficient to satisfy the materiality requirement.”).

²⁰ *See United States v. Litvak*, 889 F.3d 56, 64–65 (2d Cir. 2018) (emphasizing that the reasonable investor is an objective one that varies with the nature of the traders involved in the particular markets).

²¹ *Basic Inc.*, 485 U.S. at 236 (“Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.”); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 30 (2011).

²² *TSC Indus.*, 426 U.S. at 450.

²³ *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 183–84 (2015).

²⁴ *Id.*

and prosecuted by the DOJ.²⁵ Courts have defined “hard information” as “typically historical information or other factual information that is objectively verifiable.”²⁶ On the other hand, “soft information” includes “predictions and matters of opinion” and is only actionable if it is virtually as certain as hard facts.²⁷ Therefore, misstatements that consist of vague, aspirational statements or statements of policy and values are generally not considered material.²⁸ Additionally, courts have distinguished “puffery” from material misstatements, holding that sales talk that is merely aspirational does not rise to the level of materiality.²⁹ Importantly, this materiality analysis is independent of the subject of the statement.³⁰ Thus, this materiality framework applies just as much to ESG disclosures as it does to a company’s financials and projections.

Courts also weigh both qualitative and quantitative factors when determining materiality.³¹ The SEC even provides internal guidance on qualitative materiality in its Staff Accounting Bulletin (“SAB”) No. 99,³² and some courts have found that guidance to be persuasive authority.³³ In SAB No. 99, the SEC notes that a numerical threshold, although not conclusive of

²⁵ *In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 401–02 (6th Cir. 1997); *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 572 (6th Cir. 2008).

²⁶ *In re Sofamor Danek Grp., Inc.*, 123 F.3d at 401–02; *Zaluski*, 527 F.3d at 572.

²⁷ *In re Sofamor Danek Grp., Inc.*, 123 F.3d at 401–02; *Zaluski*, 527 F.3d at 572.

²⁸ *E.g.*, *Altayyar v. Etsy, Inc.*, 731 F. App’x 35, 37–38 (2d Cir. 2018).

²⁹ *ECA v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) (finding that statements about JP Morgan Chase & Co.’s business practices were too general to cause a reasonable investor to rely on them and therefore inactionable puffery); *Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 583 F.3d 935, 943 (6th Cir. 2009) (finding that liability does not attach to mere corporate puffery or statements of corporate optimism); *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1318 (11th Cir. 2019) (finding that puffery comprises generalized, vague, nonquantifiable statements of corporate optimism).

³⁰ *E.g.*, *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

³¹ *See Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 714 (2d Cir. 2011) (stating that a quantitative analysis is not dispositive of materiality and that qualitative factors must be taken into account as well); *see also In re Ply Gem Holdings, Inc.*, 135 F. Supp. 3d 145, 150 (S.D.N.Y. 2015) (“A court must consider both quantitative and qualitative factors in assessing an item’s materiality and that consideration should be undertaken in an integrative manner.”) (quoting *Litwin*, 634 F.3d at 717)); *In re New Oriental Educ. & Tech. Grp.*, 988 F. Supp. 2d 406, 423 (S.D.N.Y. 2013) (“Under the holistic analysis . . . sufficiently strong qualitative evidence of materiality can establish materiality as a matter of law.”).

³² SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 12, 1999).

³³ *ECA*, 553 F.3d at 198 (“This Court has deemed SAB No. 99 to be persuasive authority.”).

materiality, can be an initial step in assessing materiality.³⁴ Moreover, SAB No. 99 instructs that a materiality analysis should not be concluded after a quantitative analysis but should also consider qualitative factors.³⁵ In fact, the bulletin notes several qualitative factors that allow for a finding of materiality in cases where the quantitative size of the misstatement is small but the effect of the misstatement is large.³⁶ This non-exhaustive list of factors includes: (1) whether the misstatement arises from an item capable of precise measurement or whether it arises from an estimate; (2) whether the misstatement masks a change in earnings or other trends; (3) whether the misstatement concerns a segment or other portion of the registrant's business that has been identified as playing a significant role in the registrant's operations or profitability; and (4) the management's expectation that the misstatement will result in a significant market reaction.³⁷

These factors beg the question of whether ESG statements can ever be qualitatively material because they do not directly impact a company's profitability; rather, they are a measure of a company's behavior environmentally and socially.³⁸ But, ESG data often takes the form of backward-looking metrics, meaning many statements are capable of precise measurement, a qualitative factor heavily considered when determining materiality even if the quantitative size of the misstatement is small.³⁹

All of these concepts that are intended to help courts make determinations of materiality can be applied to ESG information.⁴⁰ But, ESG information, which is currently disclosed voluntarily, can consist of a mixture of hard and soft data, opinions, estimations, and predictions; primarily, it does not impact corporations' financial standings; and it is absent of any

³⁴ SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 12, 1999). The SAB No. 99 gives 5 percent as an example of a numerical threshold that can provide the basis for a preliminary assumption of whether a statement is material or not—for example, if a company's net income is miscalculated by 4 percent, there might be a presumption that this is immaterial. *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Environmental, Social, and Governance (ESG) Principles and Criteria*, INVESTOPEDIA (Sept. 27, 2022), <https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp#toc-esg-criteria> [<https://perma.cc/4U3V-4A3P>].

³⁹ SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 12, 1999).

⁴⁰ See discussion *infra* Part III.

uniform standards, which makes finding materiality complicated.⁴¹ Nevertheless, investors are increasingly asking for more ESG information.⁴²

B. INCREASED INTEREST IN ESG DISCLOSURES

Originally, disclosures required by the SEC revolved around companies' financial performance, such as net sales, operating revenue, total assets, and cash flows.⁴³ Over the years, the SEC required disclosures of increasingly nonfinancial information, such as risk factors and stock compensation.⁴⁴ Now, more and more investors are calling for ESG data, such as climate risk data and employee diversity information.⁴⁵ Since Gary Gensler has taken over as SEC Chairman during the Biden Administration, he has continued to steer the Commission toward adopting mandatory disclosures of ESG data, specifically focusing on disclosures of greenhouse gas emissions and climate change risk management plans.⁴⁶ In early 2021, the Commission asked for public input from investors, registrants, and other market participants regarding climate change information and whether current disclosures adequately inform investors.⁴⁷

The SEC also announced the creation of the Climate and ESG Task Force in the Division of Enforcement.⁴⁸ This Task Force was created to develop initiatives and proactively identify ESG-related misconduct, with an initial focus on identifying material gaps or misstatements in issuers' voluntary disclosure of climate risks.⁴⁹ For issuer disclosure of ESG risks, the subcommittee proposes that the SEC require the adoption of standards by

⁴¹ See Hazen, *supra* note 8, at 748, 764.

⁴² See discussion *supra* Part III.A.

⁴³ SEC Prepared Remarks, *supra* note 5.

⁴⁴ See *id.*; see also Hazen, *supra* note 8, at 775.

⁴⁵ *Id.*; Boss, Bodnar & Kent, *infra* note 202, at 1.

⁴⁶ SEC Prepared Remarks, *supra* note 5; Andrew Ramonas, *SEC Eyes Phased Approach to Climate Reporting, Gensler Says*, BLOOMBERG L. (Oct. 5, 2021; 3:26 PM), <https://news.bloomberglaw.com/esg/sec-eyes-phased-approach-to-climate-reporting-gensler-says> [<https://perma.cc/JP6L-USDP>].

⁴⁷ Statement, Allison Herren Lee, Acting Chair, SEC, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures#_ftn2 [<https://perma.cc/M8MT-ZVUB>].

⁴⁸ Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), <https://www.sec.gov/news/press-release/2021-42> [<https://perma.cc/5VVM-BF53>].

⁴⁹ *Id.*

which corporate issuers disclose material ESG risks, utilize standard setters' frameworks to require disclosures of material ESG risks, and require that material ESG risks be disclosed in a manner consistent with the presentation of other financial disclosures.⁵⁰ Presumably, these rules could be adapted to diversity and inclusion disclosures and regulated in a similar way.⁵¹

Continuing with its focus on ESG, in March, the SEC proposed a new set of rules that would require companies to make certain climate-related disclosures.⁵² Under these proposed rules, companies would be required to describe what climate-related risks they face and how they identify and manage those risks.⁵³ Companies would also have to disclose their greenhouse gas emissions.⁵⁴ And companies would be required to describe any climate-related targets, goals, or transition plans made to adapt to a warming world.⁵⁵

But the question still remains whether and what types of ESG data are material. To create a mandated regime that would successfully hold companies accountable both civilly and criminally for ESG misstatements, courts must first find the ESG disclosures material.⁵⁶

The following section of this paper applies the existing case law to ESG disclosures to determine when ESG information is material.

II. LOOKING TO CURRENT, VOLUNTARILY DISCLOSED ESG STATEMENTS FOR GUIDANCE

In trying to determine if and how ESG statements are material, this section of the paper analyzes several examples of voluntarily provided ESG information from ExxonMobil and Meta to determine whether any of this information is material and can be regulated by the DOJ and SEC.⁵⁷ These

⁵⁰ *Id.*

⁵¹ *See* discussion *infra* Part II.

⁵² The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21334–35 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, 249), <https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf> [<https://perma.cc/QAH3-QS63>].

⁵³ *Id.* at 21345.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See* *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also* *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

⁵⁷ *See* discussion *supra* Part II.

examples are from the two corporations' 2020 10-K reports and proxy statements.⁵⁸ If these statements are not material, then these companies cannot face criminal or regulatory repercussions, even if the reports are later found to be wrong or even intentionally misleading.⁵⁹

A. THE "REASONABLE INVESTOR"

ExxonMobil is one of the largest publicly traded oil and gas companies in the world.⁶⁰ In its 2020 10-K filing and annual proxy statement, ExxonMobil made several environmental statements regarding sustainability and climate change.⁶¹ ExxonMobil may have provided this environmental information in response to pressure from activist investors who want to understand the corporation's long-term energy plans.⁶² But whether ExxonMobil actually provides useful data that changes the mix of information for the reasonable investor—who might not be the activist investor—is unclear. And materiality hinges on this question.⁶³

In one statement, ExxonMobil declared, “[M]easures are taken to prevent and minimize the impact of our operations These include a significant investment in refining infrastructure and technology to manufacture clean fuels, as well as projects to monitor and reduce nitrogen oxide, sulfur oxide and greenhouse gas emissions, and expenditures for asset retirement obligations.”⁶⁴ This sentence alone provides several areas where

⁵⁸ See discussion *infra* Section III.A.

⁵⁹ Hazen, *supra* note 8, at 755–60.

⁶⁰ *Who We Are*, ExxonMobil, <https://corporate.exxonmobil.com/About-us/Who-we-are> [<https://perma.cc/68PS-8VDY>].

⁶¹ See Exxon Mobil Corp., Annual Report (Form 10-K), at 1 (Feb. 23, 2020) [hereinafter Exxon Annual Report], <https://www.sec.gov/ix?doc=/Archives/edgar/data/34088/000003408822000011/xom-20211231.htm> [<https://perma.cc/ANH5-K6J2?type=image>]; see also Exxon Mobil Corp., Proxy Statement (Schedule 14-A), at 19 (Apr. 9, 2020), <https://www.sec.gov/Archives/edgar/data/34088/000119312520102226/d869473ddef14a.htm> [<https://perma.cc/5G3S-PZXA>].

⁶² See, e.g., Eric Rosenbaum, *Oil Giant Exxon Mobil Pushes New Climate Change Plan as Activist Investors Circle*, CNBC (Dec. 14, 2020, 11:09 PM), <https://www.cnbc.com/2020/12/14/exxon-mobil-begins-to-mount-defense-of-itself-and-a-big-as-activists-circle.html> [<https://perma.cc/L9FG-HXZL>] (detailing how investor groups have targeted ExxonMobil for failing to address long-term energy transition needs and how the corporation may be responding to the pressure by providing climate-related goals and information).

⁶³ Hazen, *supra* note 8, at 755–60.

⁶⁴ Exxon Annual Report, *supra* note 61, at 1.

ExxonMobil could have made a misstatement. Are “measures” being “taken”?⁶⁵ Are these measures “preventing and minimizing” the impact of ExxonMobil’s operations or are they negligible?⁶⁶ Is ExxonMobil committing a “significant investment” into these measures?⁶⁷ Do these measures include projects to “monitor and reduce” ExxonMobil’s greenhouse and other gas emissions?⁶⁸

If the answer to any of the above questions is “No,” then ExxonMobil has made a misstatement. But to find materiality, the question comes down to whether this statement is part of the mix of information that investors consider when deciding to trade ExxonMobil securities.⁶⁹ And not just any investor; this question must be answered through the lens of the objective, reasonable investor—the fact that a person subjectively considered the statement significant is not sufficient to establish materiality under the law.⁷⁰

Meta, one of the largest tech companies with a market value of \$1 trillion in 2021,⁷¹ also made several ESG statements in its 2020 proxy report. As discussed with ExxonMobil, the first step to find materiality is examining statements through the perspective of the “reasonable investor.”⁷² In providing voluntary sustainability information to investors, Meta stated that it is “committed to fighting climate change, and [it] embrace[s] it[s] responsibility and the opportunity to impact the world.”⁷³ Further, the report emphasizes that Meta believes sustainability is about minimizing the impact of its energy, emissions, and water usage, which includes protecting workers and the environment in the company’s supply chain, and working to develop

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

⁷⁰ *TSC Indus.*, 426 U.S. at 449; *Basic Inc.*, 485 U.S. at 231–32.

⁷¹ John Divine, *The Ten Biggest Tech Companies in the World*, US NEWS (Sept. 20, 2021), <https://wtop.com/news/2021/09/the-10-biggest-tech-companies-in-the-world> [<https://perma.cc/V3G2-5HPW>].

⁷² *TSC Indus.*, 426 U.S. at 449; see also *Basic Inc.*, 485 U.S. at 231–32 (adopting the *TSC Indus.*, 426 U.S. 438 materiality standard “in Rule 10b-5 context”).

⁷³ Meta Platforms, Inc., Proxy Statement (Schedule 14-A), at 54 (Apr. 10, 2020), <https://www.sec.gov/Archives/edgar/data/0001326801/000132680120000037/facebook2020definitiveprox.htm> [<https://perma.cc/7CF7-EQ4A>].

and share solutions for a more sustainable world.⁷⁴ In pursuing this mission, Meta has set “aggressive goals” to reduce greenhouse gas emissions by 75% and support its operations with 100% renewable energy by the end of 2020.⁷⁵

Similar to ExxonMobil, Meta’s statements include a multitude of places where the company could be providing inaccurate information.⁷⁶ Meta may not be “committed” to climate change.⁷⁷ Or maybe the corporation is not working to “minimize the impact” of its energy usage, emissions, and water usage.⁷⁸ If any of these are the case, Meta—and any executives who sign and certify the disclosures—could face civil and criminal liability if its ESG statements are found material. So, the next step is to determine what materiality looks like regarding Meta and how this analysis differs from the analysis for ExxonMobil.

In looking at the words of both ExxonMobil’s and Meta’s statements alone, neither inherently communicate anything that would make their disclosures “material.” ExxonMobil is an oil and gas company, and on the surface, its profitability and valuation seem unrelated—indeed, inversely correlated—to its expenditures to minimize the company’s climate impact.⁷⁹ Similarly, Meta’s sustainability efforts are not inherently material.⁸⁰ The words do not communicate how Meta’s reduction of greenhouse gas emissions or commitment to fighting climate change would result in a change in profitability or impact investors’ decisions.⁸¹ But dig deeper and indicia of materiality can be identified. This materiality is first seen when determining who the “reasonable investor” is and what that person wants from ExxonMobil’s and Meta’s disclosures.

First, evidence that a reasonable investor values environmental information is seen from the fact that institutional investors are paying close

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Who We Are*, EXXONMOBIL, *supra* note 60.

⁸⁰ Meta Platforms, *supra* note 73, at 54 (reporting Meta’s “sustainability impact” using vague statements of policy rather than objectively verifiable data which has been found to be material).

⁸¹ *Id.*

attention to climate change.⁸² A growing consensus among investors indicates that climate change information is generally important and can possibly impact returns.⁸³ Jeremy Grantham, a prominent investor who predicted the Dot-Com and Housing Bubble crashes, sees climate change information as a significant piece of a corporation's investing outlook and says climate change investing will offer decades of growth.⁸⁴ Other investors agree, with significant growth in climate-related investor activism in recent years.⁸⁵ BlackRock, the largest asset management firm globally,⁸⁶ considers climate risk an investment risk.⁸⁷ The firm states, "Sustainability is no longer something that can be addressed after strategic investment decisions have been made; it is indispensable to making investment decisions."⁸⁸ The investment firm assesses the impact on a company of transitioning to a low-carbon economy and scores sectors on how exposed they are to climate change.⁸⁹

Growing support for a transition to clean energy, along with government climate policies and changing investment strategies by institutions like BlackRock, has led investors to push for oil and gas companies to begin identifying and securing new opportunities in low-carbon forms of energy.⁹⁰ And it's not just BlackRock.⁹¹ Vanguard, the second largest asset

⁸² *Investor Focus on Climate Change Continues to Rise*, JONES DAY (Nov. 2021), <https://www.jonesday.com/en/insights/2021/11/investor-focus-on-climate-change-continues-to-rise> [https://perma.cc/9NAY-9MBG].

⁸³ Ben Steverman, *Bubble or Not, Jeremy Grantham Bets Fortune on Green Investing*, BLOOMBERG L. (Nov. 15, 2021, 8:00 AM), <https://news.bloomberglaw.com/esg/bubble-or-not-jeremy-grantham-bets-fortune-on-green-investing?context=article-related> [https://perma.cc/NVM6-KRH9].

⁸⁴ *Id.*

⁸⁵ Jonathan M. Gilligan, *Carrots and Sticks in Private Climate Governance*, 6 TEX. A&M L. REV. 179, 187 (2018).

⁸⁶ *World's Top Asset Management Firms*, ADV RATINGS, <https://www.advratings.com/top-asset-management-firms> [https://perma.cc/KJK3-SAWH].

⁸⁷ *Launching Climate-Aware Return Assumptions*, BLACKROCK INVESTMENT INSTITUTE, <https://www.blackrock.com/us/individual/insights/blackrock-investment-institute/investing-in-climate-awareness> [https://perma.cc/A3A3-DX85] ("We believe climate risk is investment risk. That is why we are incorporating it into our portfolio design . . .").

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Sustainability in the Oil and Gas Industry*, PwC, <https://www.pwc.de/en/sustainability/sustainability-in-the-oil-and-gas-industry.html> [https://perma.cc/A89G-Q2GK].

⁹¹ *World's Top Asset Management Firms*, *supra* note 86.

management firm globally,⁹² also considers climate risks when making investment decisions,⁹³ further proof that investors care about this information. Additionally, in late 2020, Russell Reynolds Associates “interviewed over 40 global institutional and activist investors . . . to identify the governance trends most relevant to boards” and found that climate change risk was the number one factor identified.⁹⁴

Second, these institutional investors are aligned with activist investors in their desire for climate information, which is further support that the reasonable investor is one who values this information. For example, in early 2021, an activist investment firm focused on climate change dealt ExxonMobil a stunning defeat in a highly-publicized proxy battle.⁹⁵ The investment firm only owned 0.02% of ExxonMobil’s outstanding stock, but it convinced enough other investors (including Vanguard Group, BlackRock Inc., and State Street Corp.) that ExxonMobil’s strategic plan to transition to cleaner energy was lacking, resulting in the ouster of three board members.⁹⁶ Additionally, shareholders voted that ExxonMobil must provide a report describing how the company’s lobbying efforts align with the goal of limiting global warming—a proposal the board of directors had recommended to vote against.⁹⁷ This proxy fight is a true example of the growing interest in ESG

⁹² *Id.*

⁹³ See generally *Vanguard Investment Stewardship Insights: How Vanguard Addresses Climate Risk*, VANGUARD (June 2020), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/ISHVAC_062020.pdf [<https://perma.cc/4L7P-KAFH>] (describing how Vanguard addresses climate risk through its investment stewardship by advocating for strong governance practices and offering an ESG fund lineup because “[f]ew companies—and few if any long-term investors—will be exempt from the far-reaching implications of climate risk”).

⁹⁴ Rusty O’Kelley & Andrew Droste, *Why ExxonMobil’s Proxy Contest Loss is a Wakeup Call for all Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 5, 2021), <https://corpgov.law.harvard.edu/2021/07/05/why-exxonmobils-proxy-contest-loss-is-a-wakeup-call-for-all-boards> [<https://perma.cc/3KXG-6G25>].

⁹⁵ Christopher M. Matthews & Emily Glazer, *Chevron Girds for Activist Challenge After Exxon’s Proxy Battle Defeat*, WALL ST. J. (Sept. 3, 2021, 2:57 PM), <https://www.wsj.com/articles/chevron-girds-for-activist-challenge-after-exxons-proxy-battle-defeat-11630666801>.

⁹⁶ *Id.*

⁹⁷ Richard J. Grossman & Neil P. Stronski, *What the Exxon Mobil Shareholder Votes Mean*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (June 16, 2021), <https://www.skadden.com/insights/publications/2021/06/the-informed-board/what-the-exxon-mobil-shareholder-votes-mean> [<https://perma.cc/HPD4-UD2T>]. Chevron is now gearing up for a similar battle, highlighting the possibility that oil and gas investors are genuinely interested in climate change information when they are choosing where to put their

information because “it was the first time that a board election truly turned on ESG issues.”⁹⁸

And third, recent empirical data suggests that investing in sustainability is actually *profit-maximizing* behavior, meaning investors’ desire for more climate information is economically rational.⁹⁹ In *Corporate Sustainability: First Evidence on Materiality*, the authors found that investments in material sustainability issues can be value-enhancing for shareholders.¹⁰⁰ Using calendar-time portfolio stock return regressions, the research demonstrated that firms with good performance on material sustainability issues significantly outperform firms with poor performance.¹⁰¹ Additionally, reports have found that funds and indexes that only invest in sustainable companies are seeing significant success.¹⁰² In fact, “three out of every four sustainable equity funds ranked in the top half of” groups of funds with similar holdings.¹⁰³ Investors are beginning to see the additional profits to be made, as well as the losses to be avoided, when they consider how the changing climate will impact companies and markets long-term.¹⁰⁴ If institutional investors, activist investors, and pure profit-maximizing investors alike care about climate change information, this information likely matters to the reasonable investor, and ExxonMobil’s ESG statements regarding climate change are material.

And while many investors may want to see investment in carbon-reducing strategies, still other investors might want to see this same information for the opposite reason. That is, a significant investment into reducing greenhouse gas emissions, as ExxonMobil claims it is making, is an

money. Peter Whoriskey, *Shareholders Asked Oil Giant Chevron to Cut Emissions. Now Some Want the Chairman Ousted*, WASH. POST (Mar. 8, 2022, 8:22 AM), <https://www.washingtonpost.com/business/2022/03/08/chevron-shareholders-climate> [https://perma.cc/LC3K-8PP8].

⁹⁸ *Id.*

⁹⁹ See Mozaffar Khan, George Serafeim & Aaron Yoon, *Corporate Sustainability: First Evidence on Materiality*, 91 ACCT. REV. 1697, 1715 (2016).

¹⁰⁰ *Id.* at 1716–17.

¹⁰¹ *Id.* at 1706–10.

¹⁰² Alicia Adamczyk, *Sustainable Investments Hit Record Highs in 2020—and They’re Earning Good Returns*, CNBC (Feb. 11, 2021, 4:22 PM), <https://www.cnbc.com/2021/02/11/sustainable-investments-hit-record-highs-in-2020.html> [https://perma.cc/6T55-7N93].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

investment that is *not* going towards any profit-making activities.¹⁰⁵ The amount of money that ExxonMobil is investing into monitoring and reducing greenhouse gas emissions is likely money that is not coming back to the investor in any way.¹⁰⁶ The money is not going towards researching new oil sites or purchasing more rigs, which are activities connected to ExxonMobil's profitability. Investors are looking to make a return on the capital they invested. Therefore, activities that reduce the amount of money available to be returned as dividends and require capital not being reinvested in the businesses' profit-making operations are likely important to this group of investors.

As for Meta, along with the research above, which shows that investors do care about ESG information and that companies' ESG behavior can affect profitability, another sign that the company's investors care about ESG data can be implied from Meta's "ESG Resources" section on their Meta Investor Relations homepage.¹⁰⁷ This information is provided in a mix with Meta's financial statements, stock information, and SEC filings—all of which are significant information investors desire.¹⁰⁸ Further, this information is a permanent fixture on Meta's site specifically for investors, which boasts links to an "Investor Education Center" and "Investor Events," suggesting that this information is created for continual investor access rather than good press for the general public.¹⁰⁹ If Meta itself believes that its investors care enough about ESG information to consolidate it in one place that is highly visible and easily accessible for investors, then it logically follows that its investors would care.¹¹⁰

¹⁰⁵ Matthew Johnston, *How ExxonMobil Makes Money*, INVESTOPEDIA (Mar. 4, 2022), <https://www.investopedia.com/how-exxonmobil-makes-money-5116766> [<https://perma.cc/L8NW-FGSF>] (“[ExxonMobil’s] primary business is the exploration for, and production of, crude oil and natural gas, as well as the manufacture, trade, and transportation of crude oil, natural gas, petroleum products, and petrochemicals.”).

¹⁰⁶ *Id.*

¹⁰⁷ *Meta Investor Relations*, META, [hereinafter *Meta Investor Relations*], <https://investor.fb.com/home/default.aspx> [<https://perma.cc/5L4T-9TQG>] (select dropdown menu at the top right corner); *see also Environmental, Social, Governance Resources*, META, [hereinafter *Environmental, Social, Governance Resources*], <https://investor.fb.com/esg-resources/default.aspx> [<https://perma.cc/DYU4-M8TM>].

¹⁰⁸ *Meta Investor Relations*, *supra* note 107.

¹⁰⁹ *Id.*

¹¹⁰ *See Meta Investor Relations*, *supra* note 107; *Environmental, Social, Governance Resources*, *supra* note 107.

In sum, huge institutional investors and small activist investors all want—and are demanding—these climate disclosures from ExxonMobil and Meta.¹¹¹ And empirical evidence suggests that companies that care about climate tend to be more profitable.¹¹² This is all strong support to conclude that the “reasonable investor” thinks these ESG disclosures matter and would rely on climate change data.¹¹³ The resulting logical conclusion is that climate change data is material.¹¹⁴

Despite this strong evidence that climate information is material, one New York court recently found the exact opposite.¹¹⁵ In 2019, the Office of the Attorney General of the State of New York brought a securities fraud case against ExxonMobil for materially false disclosures to the public regarding how ExxonMobil accounted for past, present, and future climate change risks in violation of New York’s securities laws.¹¹⁶ The case involved multiple statements made in reports and public declarations about the way ExxonMobil was addressing the evolving policies and government regulations implemented to reduce greenhouse gas emissions.¹¹⁷ The court ultimately found that ExxonMobil was not liable because the state did not have sufficient evidence to show that ExxonMobil made any material misrepresentations that would have significantly altered the total mix of information available to investors.¹¹⁸

In discussing whether the alleged misrepresentations were material to investors, the court determined that the state put forth no proof that showed the statements “affected ExxonMobil’s balance sheet, income statement, or any other financial disclosure.”¹¹⁹ Further, the court stated that ExxonMobil’s disclosures “were not intended to enable investors to conduct meaningful economic analyses of ExxonMobil’s internal planning assumptions.”¹²⁰ The court concluded by stating that one of the publications containing the alleged

¹¹¹ See discussion *supra* Part II.

¹¹² See discussion *supra* Part II.

¹¹³ See discussion *supra* Part II.

¹¹⁴ See discussion *supra* Part II.

¹¹⁵ *People by James v. Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771, at *29–*30 (N.Y. Sup. Ct. Dec. 10, 2019).

¹¹⁶ *Id.* at *2–*3.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *21.

¹¹⁹ *Id.* at *20.

¹²⁰ *Id.* at *19.

misstatements “had no market impact and was . . . essentially ignored by the investment community.”¹²¹ This conclusion was drawn from testimony given by the senior energy analyst at Wells Fargo, who stated that he did not find the representations in the publication significant in relation to how ExxonMobil managed the risks of climate change and regulation.¹²²

The assumptions undergirding the court’s analysis are worth revisiting. All the information previously discussed supports a conclusion that climate change information *does* impact the profitability of a company, so the court’s assumption that the information did not affect ExxonMobil’s balance sheet or other financial disclosures may be incorrect. Additionally, the court’s reliance on the Wells Fargo analyst as a proxy for the reasonable investor does not seem to line up with the above research, which shows that a reasonable investor might rely on ESG data—whether ExxonMobil intended that result or not.¹²³ If this is correct, then climate information is, in fact, material to the “reasonable investor.”¹²⁴

In sum, looking at both ExxonMobil and Meta, the evidence supports the proposition that climate change information is a significant part of the mix of information available to the reasonable investor, making it material.¹²⁵ If this is the case, the SEC has an interest in protecting investors and requiring companies to provide truthful information, and companies that provide false or misleading climate change information could face criminal and civil penalties.¹²⁶ But does this investor interest reach beyond climate change information into other types of ESG statements?

Looking at ESG diversity and inclusion statements, research has shown that workplace diversity may have an impact on a corporation’s profitability.¹²⁷ One 2019 study by S&P Global found that firms with high gender diversity on their board of directors were more profitable and that female CFOs were more profitable and generated excess profits of \$1.8

¹²¹ *Id.* at *29.

¹²² *Id.* at *21.

¹²³ See discussion *supra* Part II.

¹²⁴ See discussion *supra* Part II.

¹²⁵ See discussion *supra* Part II.

¹²⁶ *The Role of the SEC*, INVESTOR.GOV, *supra* note 9.

¹²⁷ DANIEL J. SANDBERG, S&P GLOB., *When Women Lead, Firms Win* (Oct. 16, 2019), <https://www.spglobal.com/en/research-insights/featured/when-women-lead-firms-win> [<https://perma.cc/UW5B-ZY7H>].

trillion while the study was being conducted.¹²⁸ Additionally, firms with female CEOs and CFOs produced better stock price performance than the market average.¹²⁹

Research also has shown that corporations with higher levels of diversity and inclusion, in general, are more profitable.¹³⁰ In fact, McKinsey & Company looked at over 1,000 companies in 12 countries and found a link between diversity and company financial performance.¹³¹ As investors are attempting to maximize their profits, this research points towards a finding of materiality. Additionally, BlackRock, State Street, and Vanguard, three of the largest shareholders for many public companies, each have called for boards of directors to articulate their approach to board diversity.¹³² Nasdaq also has recently implemented listing standards that would require increased disclosure of director diversity in response to investor interest.¹³³ Nasdaq relied on empirical research and peer-reviewed studies that established a link between diverse boards and enhanced company performance, innovation, long-term sustainable returns, and investor protection.¹³⁴

Overall, evidence supports the assumption that the reasonable investor cares about ESG information.¹³⁵ And if the reasonable investor cares about ESG information and considers it a significant part of the total mix of information available, then that information is material, giving the SEC and

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Dame Vivian Hunt, Lareina Yee, Sara Prince & Sundiatu Dixon-Fyle, *Delivering Through Diversity*, MCKINSEY & CO., <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/delivering-through-diversity> (last visited Nov. 6, 2022).

¹³² Marc S. Gerber, *U.S. Corporate Governance: The Ascension of ESG*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 1 (Jan. 26, 2021), https://www.skadden.com/-/media/files/publications/2021/01/2021-insights/us_corporate_governance_the_ascension_of_esg.pdf [<https://perma.cc/WH7P-XPG5>] (“BlackRock, State Street and Vanguard — for many public companies, three of their largest shareholders — have each called for boards of directors to articulate their approach to board diversity as well as to oversight of diversity matters more generally.”).

¹³³ William S. Anderson, Troy L. Harder, Jason M. Jean, Kathy Witty Medford & Caroline E. Ellis, *SEC Approves Nasdaq Board Diversity Requirements*, NAT. L. REV. (Aug. 11, 2021), <https://www.natlawreview.com/article/sec-approves-nasdaq-board-diversity-requirements> [<https://perma.cc/6MTF-NW7L>].

¹³⁴ *Id.*

¹³⁵ See discussion *supra* Part II.

DOJ the ability to impose liability on companies that fail to provide accurate ESG information to investors. But, the “reasonable investor” is not all that matters in a materiality analysis.¹³⁶ The law has also developed to consider the nature of the statements in determining whether they were material.¹³⁷

B. THE NATURE OF THE STATEMENTS

In the above statements by ExxonMobil and Meta, evidence suggests that both climate and diversity disclosures are important to the “reasonable investor.” To be material, these statements must also have some level of certainty.¹³⁸ Courts have consistently held that “puffery”—statements that are merely aspirational or only provide predictions or matters of opinion—are not material.¹³⁹ ESG disclosures that do not meet this threshold are not considered material.¹⁴⁰

Notably, courts have recently adjudicated ESG disclosures involving diversity.¹⁴¹ Several big-name corporations—including Meta, Oracle, Qualcomm, and others—were sued by their own shareholders for claims that

¹³⁶ *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 189–91 (2015).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See, e.g., Ocegueda ex rel. Facebook v. Zuckerberg*, 526 F. Supp. 3d 637, 642 (N.D. Cal. 2021) (Plaintiff alleged that the 2019 and 2020 proxy statements stating a commitment to diversity were materially false); *Klein v. Ellison*, No. 20-cv-04439-JSC, slip op. at 2–3 (N.D. Cal. May 24, 2021) (Plaintiff alleged that the Oracle’s 2019 proxy statement stating that it “‘actively seek[s] women and minority candidates from the pool from which director candidates are chosen’ was false or misleading.”); *Complaint at 24–28, Kiger v. Mollenkopf*, No. 21-409-RGA, 2021 WL 5299581 (D. Del. Nov. 15, 2021) (Plaintiff alleged that Qualcomm’s website contained materially false or misleading commitments to diversity); *Lee v. Fisher*, 34 F.4th 777, 779 (9th Cir. 2022) (Plaintiff alleged that Gap made false statements to shareholders in its proxy statements about the level of diversity it had achieved.); *Esa v. NortonLifeLock Inc.*, No. 20-cv-05410-RS, slip op. at 2–3 (N.D. Cal. Aug. 30, 2021) (Plaintiff alleged that NortonLifeLock’s 2018, 2019, and 2020 proxy statements contained materially false or misleading commitments to diversity.) *appeal docketed*, No. 21-16909 (9th Cir. Nov. 12, 2021); *City of Pontiac Gen. Emps.’ Ret. Sys. v. Bush*, No. 20-cv-06651-JST, 2022 WL 1467773, at *1–*2, *4–*5 (N.D. Cal. Mar. 1, 2022) (Plaintiff alleged that directors publicly misrepresented Cisco’s commitment to and promotion of diversity through materially false assertions in Cisco’s 2017, 2018, and 2019 proxy statements.); *Falat v. Sacks*, No. 8:20-cv-01782-JVS-KES, 2021 WL 1558940 at *1–*3 (C.D. Cal. Apr. 8, 2021) (Plaintiff alleged that Monster corporation failed to diversify its board of directors and senior management).

the companies failed to diversify their Boards while simultaneously touting strong commitments to diversity in public statements and disclosures.¹⁴² The complaints allege that through these actions, these companies have made false and misleading statements that violate § 14(a) of the Exchange Act.¹⁴³ But courts have unanimously dismissed the complaints that they have decided.¹⁴⁴ If the evidence points to the assumption that a reasonable investor would consider diversity information in the total mix of information, how are courts finding that these statements are immaterial? It turns out the cases were not dismissed because the statements were insignificant to the reasonable investor. Rather, the cases were dismissed because the statements themselves were too vague and aspirational to be material.¹⁴⁵ In other words, the statements were mere puffery.¹⁴⁶

In one case, a California district court dismissed the claim that Meta made false or misleading statements about the company's commitments to diversity in its 2019 and 2020 proxy statements, finding that the statements were nonactionable puffery or aspirational statements.¹⁴⁷ Some of the alleged misstatements in the proxy reports were:

- “We are committed to building a workforce that is as diverse as the communities we serve.”¹⁴⁸
- “To support our goals of diversifying our workforce, we globally rolled out our Diverse Slate Approach We have seen steady increases in

¹⁴² *E.g.*, *Ocegueda*, 526 F. Supp. 3d at 641; *Klein*, slip op. at 1; Complaint at 24–54, *Kiger*, 2021 WL 5299581 (No. 21-409-RGA); *Esa*, slip op. at 1–3; *City of Pontiac*, 2022 WL 1467773, at *1–*2; *Falat*, 2021 WL 1558940, at *1–*3.

¹⁴³ *Ocegueda*, 526 F. Supp. 3d at 641; *Klein*, slip op. at 1; Complaint at 24–54, *Kiger*, 2021 WL 5299581 (No. 21-409-RGA); *Esa*, slip op. at 2; *City of Pontiac*, 2022 WL 1467773, at *1–*2; *Falat*, 2021 WL 1558940, at *1–*3.

¹⁴⁴ Kevin LaCroix, *Two More Board Diversity Lawsuits Dismissed*, D&O DIARY (Sept. 2, 2021), <https://www.dandodiary.com/2021/09/articles/shareholders-derivative-litigation/two-more-board-diversity-lawsuits-dismissed> [<https://perma.cc/XWK9-TBDY>].

¹⁴⁵ *See, e.g.*, *Ocegueda*, 526 F. Supp. 3d at 641; *Esa*, slip op. at 10; *City of Pontiac*, 2022 WL 1467773, at *4–*6.

¹⁴⁶ *Puffery And The Misstatement That Wasn't*, FREIBERGER HABER LLP (Oct. 28, 2019), <https://fhnylaw.com/puffery-and-the-misstatement-that-wasnt> [<https://perma.cc/ZA3J-B9FZ>]; *see also Falat*, 2021 WL 1558940, at *6.

¹⁴⁷ *Ocegueda*, 526 F. Supp. 3d at 651.

¹⁴⁸ Complaint at 21, *Ocegueda*, 526 F. Supp. 3d 637 (No. 20-cv-04444-LB).

hiring rates for underrepresented people since we started testing this approach.”¹⁴⁹

- “We are committed to a policy of inclusiveness and to pursuing diversity in terms of background and perspective when evaluating candidates for membership on our board of directors.”¹⁵⁰
- “[I]t is the policy of our board of directors to consider candidates with diverse backgrounds . . . and to ensure that the initial list of candidates from which new director nominees are chosen includes candidates with a diversity of race, ethnicity, and gender.”¹⁵¹

The plaintiff in this case alleged that these statements were false because Meta was not as committed to diversity as it claimed.¹⁵² The problem with finding materiality in these statements is that they can be considered “soft” information, such as opinions and puffery that are merely aspirational.¹⁵³ Aspirational statements that solely emphasize a desire, commitment, or certain shared value are not capable of objective verification.¹⁵⁴ “Commitment” is not an objectively verifiable, measurable value.¹⁵⁵ A “steady increase” does not provide a clear benchmark for what is objectively “steady.”¹⁵⁶ Therefore, these types of statements—consisting of vague, aspirational statements of policy and values—are not material.¹⁵⁷ Accordingly, the court in this case found that none of the alleged misstatements went beyond non-actional puffery or aspirational assertions.¹⁵⁸

Another California court dismissed the Oracle case for similar reasons, noting that misleading statements must be capable of objective verification and that the commitments to diversity made by Oracle were merely aspirational and vague statements of optimism, not capable of objective

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 21–22.

¹⁵² *Id.* at 82.

¹⁵³ *Ocegueda*, 526 F. Supp. 3d at 651.

¹⁵⁴ *Retail Wholesale & Dep’t Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1276 (9th Cir. 2017).

¹⁵⁵ *Ocegueda*, 526 F. Supp. 3d at 651.

¹⁵⁶ *Id.*

¹⁵⁷ *E.g.*, *Altayyar v. Etsy, Inc.*, 731 F. App’x 35, 37–38 (2d Cir. 2018).

¹⁵⁸ *Ocegueda*, 526 F. Supp. 3d at 651.

verification.¹⁵⁹ Here, the challenged statements made in Oracle’s 2019 Proxy Statement were:

- “The Governance Committee values a diversity of backgrounds, experience, perspectives and leadership in different fields when identifying nominees.”¹⁶⁰
- “[T]he Governance Committee is committed to actively seeking women and minority candidates for the pool from which director candidates are chosen.”¹⁶¹
- “We believe a diverse workforce enables us to better anticipate and meet our customers’ changing needs in a fast-paced global economy and deliver greater value to our stockholders.”¹⁶²
- “Diversity and inclusion in our workforce starts at the top.”¹⁶³

Once again, these statements did not communicate anything measurable or verifiable to investors.¹⁶⁴ Investors cannot objectively verify statements that Oracle is committed to diversity, values it, or believes in a diverse workforce.¹⁶⁵ The statements merely emphasize the corporation’s commitment and shared values, neither of which provide verifiable data on which an investor reasonably might make a trade.¹⁶⁶

Courts seem inclined to find that these types of statements do not cross the line from aspirational puffery to material falsehoods.¹⁶⁷ The difference between an actionable diversity statement and puffery rests in the specificity of the statement.¹⁶⁸ In both the Meta and Oracle suits, the statements that

¹⁵⁹ Klein v. Ellison, No. 20-cv-04439-JSC, slip op. at 7, 12 (N.D. Cal. May 24, 2021).

¹⁶⁰ Complaint at 35, *Klein*, slip op. (No. 20-cv-04439-JSC).

¹⁶¹ *Id.*

¹⁶² *Id.* at 37.

¹⁶³ *Id.*

¹⁶⁴ *Klein*, slip op. at 11–12.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., *Ocegueda ex rel. Facebook v. Zuckerberg*, 526 F. Supp. 3d 637, 651 (N.D. Cal. 2021); *Klein*, slip op. at 12; *Kiger v. Mollenkopf*, No. 21-409-RGA, 2021 WL 5299581, at *3 (D. Del. Nov. 15, 2021); *Esa v. NortonLifeLock Inc.*, No. 20-cv-05410-RS, slip no. at 10 (N.D. Cal. Aug. 30, 2021), *appeal docketed*, No. 21-16909 (9th Cir. Nov. 12, 2021); *City of Pontiac Gen. Emps.’ Ret. Sys. v. Bush*, No. 20-cv-06651-JST, 2022 WL 1467773, at *6–*7 (N.D. Cal. Mar. 1, 2022); *Falat v. Sacks*, No. 8:20-cv-01782-JVS-KES, 2021 WL 1558940, at *6 (C.D. Cal. Apr. 8, 2021).

¹⁶⁸ *ECA v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009).

shareholders claimed were misleading did not include any sort of metric.¹⁶⁹ More precision likely would make diversity statements material because backward-looking, concrete numbers are definite and objectively verifiable.¹⁷⁰

If a distinction is drawn between vague, aspirational diversity commitments and specific, measurable statements about a corporation's diversity statistics, then logic suggests that a successful material misstatement claim depends on what type of diversity disclosure is challenged. For instance, ExxonMobil's statement that it considers and monitors diversity through all stages of employment is vague and hard to verify.¹⁷¹ Investors do not have a universally accepted way to measure a company's consideration and monitoring of diversity. In that way, this statement is closer to Meta and Oracle's statements that were found to be puffery.¹⁷² But, if ExxonMobil's statement that 39 percent of certain hires were female was challenged, a court may be more likely to find that this is not puffery because it is backward-looking and capable of precise measurement.¹⁷³

When ESG disclosures consist of precise, measurable statements, a court likely would find that a reasonable investor would rely on that information as part of the total mix of information.¹⁷⁴ And, if material, then misstatements can be enforced by the SEC, and intentional misstatements can be prosecuted criminally by the DOJ.

¹⁶⁹ *Klein*, slip op. at 2; *Ocegueda*, 526 F. Supp. 3d at 643.

¹⁷⁰ When looking at materiality, courts distinguish between objectively verifiable information and puffery, often finding the former material and the latter immaterial. By ensuring that the information disclosed is objectively verifiable, which concrete numbers are, rather than vague statements of opinion, corporations' diversity statements are likely to be seen as hard information that is material. *See In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 401–02 (6th Cir. 1997) (distinguishing between hard information that is objectively verifiable and soft information consisting of opinions and predictions and noting that material hard information must be disclosed, whereas soft information must only be disclosed if “virtually as certain as hard facts”).

¹⁷¹ Exxon Annual Report, *supra* note 61, at 1.

¹⁷² *Klein*, slip op. at 11–12; *Ocegueda*, 526 F. Supp. 3d at 651.

¹⁷³ *Id.* at 1. Exxon's 10-K for 2020 states that 39 percent of its global hires for certain positions were female over the last decade. *Id.*

¹⁷⁴ *See ECA*, 553 F.3d at 197 (“[F]or the misstatement to be material, ‘there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.’” (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988))).

Based on the conclusions that certain information regarding climate change and diversity would likely be found material while other information would likely not, the next section of this paper addresses how the SEC should regulate disclosures in a way that provides meaningful, comparable information.

III. MOVING FORWARD: HOW SHOULD THE SEC DEVELOP A USEFUL ESG DISCLOSURE SYSTEM?

If, as discussed earlier, ESG disclosures can sometimes be material, the SEC has a legitimate interest in requiring companies to truthfully issue ESG disclosures.¹⁷⁵

The SEC can add rules to create more precision regarding ESG information, leading to more material, actionable statements that provide investors with the accurate information they are seeking. This would in turn provide the DOJ and SEC the opportunity to civilly and criminally penalize false statements.¹⁷⁶ Some investors and scholars have noted a valid criticism that current ESG ratings are unreliable and that enforcing mandatory disclosures would, therefore, only increase business costs and undue civil and criminal liability without providing investors with any valuable ESG information.¹⁷⁷

Irrespective of this criticism, the SEC has already proposed new rules regarding certain climate information.¹⁷⁸ The SEC's proposed rules would require companies to provide both soft and hard information, including greenhouse gas emission metrics, descriptions of climate-related risks, and descriptions of climate-related targets and transitions plans.¹⁷⁹ But as the analysis above showcases, soft information may not be material enough to hold companies accountable for false information through civil or criminal avenues. Therefore, this section provides recommendations for how the SEC could adopt mandatory ESG disclosures to resolve these issues.

¹⁷⁵ *What We Do*, *supra* note 11.

¹⁷⁶ *Id.*

¹⁷⁷ Javier El-Hage, *Fixing ESG: Are Mandatory ESG Disclosures the Solution to Misleading ESG Ratings?*, 26 *FORDHAM J. CORP. & FIN. L.* 359, 368, 379 (2021).

¹⁷⁸ The Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 52.

¹⁷⁹ *Id.* at 21375–76.

A. PROVIDING USEFUL, COMPARABLE METRICS

The SEC should consider an approach that focuses on measurable, precise, and objectively verifiable metrics.¹⁸⁰ This would allow the Commission to mandate significant and meaningful metrics that are easily comparable across companies and industries.¹⁸¹ As ESG information becomes more standardized across industries, the Commission could then expand the necessary disclosures to include the most useful and comparable information.

Further, the SEC should continue to encourage organizations to supplement any mandated disclosures with ESG information where resources and expertise allow. That way, companies can provide additional ESG information based on investor interest and demand or sector-specific categories but will still be accountable, at a minimum, for the mandated information they publish.

First, the SEC should focus on mandating measurable data as opposed to aspirational principles.¹⁸² Not only does this help achieve standardization, as the SEC can mandate the way in which companies calculate the required metrics—measurable data also helps to ensure that the provided information is helpful to investors and material. As seen in the diversity discussion above, several courts have already rejected certain ESG diversity claims as too vague and aspirational to be material.¹⁸³ If investors desire accurate ESG

¹⁸⁰ See, e.g., Betsy Atkins, *ESG Metrics: A Path Forward for Companies*, FORBES (Oct. 1, 2020, 11:50 AM), <https://www.forbes.com/sites/betsyatkins/2020/10/01/esg-metrics-a-path-forward-for-companies/?sh=2a5879f376da> [<https://perma.cc/NQR4-MT6M>].

¹⁸¹ *Id.*

¹⁸² As they are commonly understood, “[m]etrics are measures of quantitative assessment commonly used for assessing, comparing, and tracking performance or production. Generally, a group of metrics will typically be used to build a dashboard that management or analysts review on a regular basis to maintain performance assessments, opinions, and business strategies.” *Metrics Definition*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/metrics.asp> [<https://perma.cc/JKK2-29NW>].

¹⁸³ See, e.g., *Ocegueda ex rel. Facebook v. Zuckerberg*, 526 F. Supp. 3d 637, 651 (N.D. Cal. 2021); *Klein v. Ellison*, No. 20-cv-04439-JSC, slip op. at 7, 12 (N.D. Cal. May 24, 2021); *Esa v. NortonLifeLock Inc.*, No. 20-cv-05410-RS, slip op. at 10 (N.D. Cal. Aug. 30, 2021); *City of Pontiac Gen. Emps.’ Ret. Sys. v. Bush*, No. 20-cv-06651-JST, 2022 WL 1467773, at *5 (N.D. Cal. Mar. 1, 2022); *Falat v. Sacks*, No. 8:20-cv-01782-JVS-KES, 2021 WL 1558940, at *5–*6 (C.D. Cal. Apr. 8, 2021).

disclosures, the SEC and DOJ must have the ability to regulate those disclosures. The way to do that is to ensure the disclosures are material.¹⁸⁴

For example, the SEC could mandate a diversity disclosure, like the new Nasdaq diversity disclosures, by requiring companies to disclose statistical information about the self-identified gender, race, and sexuality of the companies' directors.¹⁸⁵ With these metrics, the SEC could provide a standardized template that would result in straightforward information, comparable across companies that gives investors crucial material and actionable ESG information. The SEC also could require companies to provide similar diversity statistics for its workforce, providing percentages of employees based on gender, race, and LGBTQ+ identification.¹⁸⁶

By providing metrics that can be compared across businesses and industries, investors could gauge a company's commitment to certain issues.¹⁸⁷ Metrics provide more information than a vague statement that a company is "committed to diversity." Metrics allow investors to compare accurately, and when one company discloses that females make up 46% of its workforce compared to another company in the same industry which states that females make up 22% of its workforce, an investor can see measurable data that backs up (or fails to back up) a stated commitment (and the regulators can penalize untruthful metrics).

Another example is climate change. Climate change factors are a driving force behind ESG reporting.¹⁸⁸ By mandating a few key climate change metrics, such as greenhouse gas emissions, energy consumption, water usage, and waste and pollution, the Commission can provide significant data to investors in a comparable format without running into the risk of letting companies pick and choose which ESG information to provide and how to provide it.

One key metric that would be an appropriate starting point for an incremental approach, and one that the SEC has already recommended, is greenhouse gas emissions.¹⁸⁹ The Environmental Protection Agency

¹⁸⁴ Hazen, *supra* note 8, at 745, 755–56.

¹⁸⁵ Anderson et. al, *supra* note 133.

¹⁸⁶ *What We Do*, *supra* note 11.

¹⁸⁷ See El-Hage, *supra* note 177, at 377–78.

¹⁸⁸ See discussion *supra* Part II.

¹⁸⁹ The Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 52, at 21344–45.

(“EPA”) has already developed guides for calculating greenhouse gas emissions—resulting in three types of emissions: Scope 1, Scope 2, and Scope 3.¹⁹⁰ Scope 1 emissions are calculated from direct emissions from sources that are owned or controlled by a company.¹⁹¹ Examples of Scope 1 emissions are “emissions associated with fuel combustion in boilers, furnaces, [and] vehicles.”¹⁹² Scope 2 emissions are indirect emissions from sources that are owned or controlled by a company.¹⁹³ “Although Scope 2 emissions physically occur at the facility where they are generated, they are [included in a company’s greenhouse gas emissions] because they are a result of the organization’s energy use.”¹⁹⁴ Defining Scope 2 emissions may be a concern for issuers, but the EPA has already provided guidance on calculating Scope 2 emissions and created four types of purchased energy in Scope 2: electricity, steam, heat, and cooling.¹⁹⁵ Scope 3 emissions are from sources not owned or directly controlled by a company but related to company activities, such as employee commuting or contracted solid waste disposal.¹⁹⁶ Scope 3 emissions are the hardest to quantify because they are not under a corporation’s control.¹⁹⁷ But, Scope 3 emissions often represent the majority of an organization’s total GHG emissions, and many companies are beginning to reach into their value chain to calculate and understand these greenhouse gas emissions.¹⁹⁸

At a minimum, Scope 1 and Scope 2 emissions would be an appropriate ESG metric the SEC could initially mandate.¹⁹⁹ These metrics are backward-

¹⁹⁰ *Greenhouse Gases at EPA*, EPA, <https://www.epa.gov/greeningepa/greenhouse-gases-epa> [<https://perma.cc/7NCN-JUYY>].

¹⁹¹ *Id.*

¹⁹² *Scope 1 and Scope 2 Inventory Guidance*, EPA.GOV, <https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance> [<https://perma.cc/KEX3-R9RW>].

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ MARY SOTOS, WORLD RES. INST., *GHG Protocol Scope 2 Guidance* 34–35 (2015), https://ghgprotocol.org/sites/default/files/standards/Scope%20%20Guidance_Final_Sept26.pdf [<https://perma.cc/CW9W-TTLC>].

¹⁹⁶ EPA, *supra* note 190; *see also* SOTOS, *supra* note 195, at 34–35.

¹⁹⁷ *Scope 3 Inventory Guidance*, EPA.GOV, <https://www.epa.gov/climateleadership/scope-3-inventory-guidance> [<https://perma.cc/3AXC-VU9K>].

¹⁹⁸ *Id.*

¹⁹⁹ TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, *GUIDANCE ON METRICS, TARGETS, AND TRANSITION PLANS* 1, 15 (2021), https://assets.bbhub.io/company/sites/60/2021/07/2021-Metrics_Targets_Guidance-1.pdf [<https://perma.cc/7J8G-22TG>].

looking, objectively verifiable, and standardized across companies and industries.²⁰⁰ They would allow investors to compare emissions company-to-company and provide material ESG information that is useful and actionable.²⁰¹ Because Scope 3 emissions may be harder to calculate for some companies, this disclosure could be phased in later as emerging methodologies are standardized.²⁰² The EPA already provides ample guidance for companies to calculate greenhouse gas emissions, thereby giving the SEC a workable framework that many corporations likely already use.²⁰³

One concern with this framework is that the cost of requiring public companies to undertake these calculations would be too large to impose.²⁰⁴ Further, as Scope 2 emissions are not direct emissions from a company, issues of accuracy may arise.²⁰⁵ To combat these issues and balance costs across businesses, the SEC could allow corporations to rely on their public supplier's calculated Scope 1 emissions to calculate their own Scope 2 emissions. If those calculations are found to be inaccurate, the company relying on them would not be responsible for those inaccuracies. This would reduce the cost of calculations and provide a type of safe harbor when companies do not directly control the emissions.

For companies with private suppliers, the SEC could also provide a safe harbor for situations where a company is unable to obtain the necessary data

(stating that in comments regarding disclosures, “[r]espondents expressed strong support for disclosure of Scope 1 and Scope 2 GHG emissions . . . with 70% saying Scope 1 and Scope 2 GHG emissions should be disclosed”).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Sandra Boss, Paul Bodnar & Elizabeth Kent, Comment Letter on Request for Input on Climate Change Disclosures 2, 4 (June 11, 2021), <https://www.sec.gov/comments/climate-disclosure/c1112-8906794-244146.pdf> [<https://perma.cc/CAC5-4BST>] (A comment from BlackRock encourages greenhouse gas emissions as a starting point for mandated disclosures while “[r]ecogniz[ing] that Scope 3 . . . disclosures may require a phased approach . . . where data and methodologies are still emerging.”).

²⁰³ *Scope 1 and Scope 2 Inventory Guidance*, *supra* note 192; *Scope 3 Inventory Guidance*, *supra* note 197.

²⁰⁴ *See* El-Hage, *supra* note 177, at 379.

²⁰⁵ *Id.* at 368–69 (noting that inconsistent methodologies lead to different data being sought from the same company, which leads to different results); Andrew Putwain, *Inconsistent Scope 2 Reporting Endemic by Companies*, ESG INVESTOR (Jan. 12, 2022), <https://www.esginvestor.net/methodology-around-calculating-and-presenting-scope-2/> [<https://perma.cc/D2FJ-BVBE>].

to perform precise Scope 2 calculations. This safe harbor could allow the company to either opt out of Scope 2 data entirely or provide a detailed explanation of how it calculated the metric. This type of rule would help ensure that companies are not able to skirt investor scrutiny by providing inaccurate numbers and then blaming inaccuracies on a lack of information. The company must choose to either forgo providing that information to investors or provide enough information to make it clear how the company determined its calculations.

Other potential verifiable metrics could include water metrics like those put in place by the European Union mandating ESG reporting standards for financial products.²⁰⁶ Water emissions are a key metric; the SEC could mandate companies to provide the weight in tons of their water emissions.²⁰⁷ This type of data is measurable and can be calculated using a standardized equation, meeting investors' desires for climate change information.²⁰⁸ Further, the SEC could require companies to provide the average percentage of water recycled and reused—again providing the definition and calculation companies must use in doing so.²⁰⁹ Lastly, the SEC could mandate that corporations disclose the percentage of assets located in areas of high water stress.²¹⁰ To make this metric standardized, the SEC would need to define which areas fall under this term, giving companies a clear map of where these areas are located.

In determining what metrics to mandate and how to standardize calculations, the SEC could rely on preexisting ESG frameworks. There are several products on the market that help companies and investors calculate, understand, and score ESG ratings.²¹¹ These tools are already designed to

²⁰⁶ *Sustainability-related Disclosure in the Financial Services Sector*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/sustainability-related-disclosure-financial-services-sector_en [<https://perma.cc/4ERN-CPFQ>].

²⁰⁷ *How Water Metrics Can Prevent Investment Returns Washing Away*, REFINITIV (June 8, 2021), <https://www.refinitiv.com/perspectives/future-of-investing-trading/how-water-metrics-can-prevent-investment-returns-washing-away> [<https://perma.cc/T7K6-5TAZ>].

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *E.g., MSCI ESG Metrics - A Big Data Approach to ESG*, MSCI, <https://www.msci.com/esg-metrics> [<https://perma.cc/2E6L-BLZD>] [hereinafter *MSCI ESG Metrics*]; SUSTAINALYTICS, <https://www.sustainalytics.com> [<https://perma.cc/6C78-XBPX>];

deliver standardized ESG metrics, and the companies have researched and determined calculations that allow for comparison across industries.²¹² The SEC could work with these types of companies to create an approach that includes metrics already shown to be comparable and standardized without having to expend the time and resources necessary to research and test metrics and data from scratch.

Finally, the SEC should create a format that allows investors and analysts to easily compare the mandated disclosures from one company to another. This format should be included in a corporation's 10-Ks in a separate ESG section that contains all of the mandated disclosures in one place. Companies can include any supplemental ESG information in this section as well, but all mandated disclosures should be in a mandatory layout. By adopting a metric-focused approach, a table- or chart-based layout would allow investors and analysts to locate and compare figures across companies and industries for the year. This way, the format of the mandated disclosures would further support the goal of making ESG information standardized and easily comparable.²¹³

CONCLUSION

It is evident that investors are increasingly interested in ESG disclosures.²¹⁴ Investors are pressuring publicly held companies to provide information regarding climate change risks and diversity, and companies are listening.²¹⁵ Many companies are choosing to include ESG statements and metrics in their public filings.²¹⁶ Accordingly, the SEC has increased its focus on ESG issues, focusing on climate change data.²¹⁷ But, as the SEC considers mandatory ESG disclosures, the Commission should ensure that the data it is

Attract Long-Term Capital and Enhance Value Creation, NASDAQ, <https://www.nasdaq.com/solutions/corporate-esg-solutions/esg-advisory-program> (last visited Sept. 30, 2022).

²¹² *MSCI ESG Metrics*, *supra* note 211; MSCI, MSCI ESG METRICS CALCULATION METHODOLOGY 6–12 (2020), https://www.msci.com/documents/10199/1283513/MSCI_ESG_Metrics_Calc_Methodology_Dec2020.pdf/92a299cb-0dbc-63ba-debb-e821bd2e2b08 [<https://perma.cc/FN43-3JS5>].

²¹³ See Pisani, *supra* note 5; see also SEC Prepared Remarks, *supra* note 5.

²¹⁴ See discussion *supra* Part II.

²¹⁵ *Id.*

²¹⁶ Lydia Beyoud, *ESG Disclosure Plans Emerge as Corporate Priority, Study Finds*, BLOOMBERG L. (Sept. 28, 2021, 3:45 AM), <https://news.bloomberglaw.com/esg/esg-disclosure-plans-emerge-as-corporate-priority-study-finds> [<https://perma.cc/D8VV-R53L>].

²¹⁷ Ramonas, *supra* note 46.

asking companies to provide is material under the law.²¹⁸ Failure to ensure the data is material would permit companies to provide false or misleading information without any liability.²¹⁹

Companies are increasingly issuing ESG information that is numeric, precise, measurable, and verifiable. This information is also increasingly important to investors. For these reasons, ESG information is often legally material.²²⁰ Assuming this information is material, the SEC should adopt a mandatory disclosure system that is both incremental- and metric-based.²²¹ This sort of system would promote the disclosure of useful, comparable, and standardized information while helping to ensure that criminal and civil liability attaches to companies that provide deficient disclosures.²²² The approach discussed above has the benefit of reducing undue complexity for businesses that do not yet have the resources or expertise to provide full ESG data. This approach would create a regime that balances the interests of investors and corporations.²²³

²¹⁸ See discussion *supra* Part II.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*