School of Law
UNIVERSITY OF GEORGIA
Prepare.
Connect.
Lead.

Georgia Law Review

Volume 57 | Number 1 Article 9

11-18-2022

Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing

Cara Beth Musciano
University of Georgia School of Law

Follow this and additional works at: https://digitalcommons.law.uga.edu/glr

Part of the Law Commons

Recommended Citation
Musciano, Cara Beth (2022) "Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing," *Georgia Law Review*: Vol. 57: No. 1, Article 9.
Available at: https://digitalcommons.law.uga.edu/glr/vol57/iss1/9

This Note is brought to you for free and open access by Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Georgia Law Review by an authorized editor of Digital Commons @ University of Georgia School of Law. Please share how you have benefited from this access For more information, please contact tstriepe@uga.edu.

Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing

Cover Page Footnote

J.D. Candidate, 2023, University of Georgia School of Law; B.S., 2012, College of Charleston. Thank you to Professors Bruner and Mangan for your helpful comments and to my family for your love and support.

This note is available in Georgia Law Review: https://digitalcommons.law.uga.edu/glr/vol57/iss1/9

IS YOUR SOCIALLY RESPONSIBLE INVESTMENT FUND GREEN OR GREEDY? HOW A STANDARD ESG DISCLOSURE FRAMEWORK CAN INFORM INVESTORS AND PREVENT GREENWASHING

Cara Beth Musciano[*]

As environmental, social, and governance (ESG) investing exponentially increases, so does the level of inconsistent ESG disclosures, adding to investor confusion. Without any mandates for standardization, companies will continue disclosing their sustainability efforts without concrete facts behind their subjective claims in hopes that they will appear "greener" to investors. This practice—known as greenwashing—could become prevalent, resulting in capital intended for sustainable investments flowing toward harmful businesses investors sought to avoid. Regulators should develop a mandatory ESG disclosure framework to create accurate, reliable data and to prevent capital from being misallocated against investors' genuine sustainable efforts. Some existing rules could hold those misstating their ESG efforts responsible, but the potential for asset managers of ESG funds to greenwash their financial disclosures needs to be addressed by mandating a standard ESG disclosure framework.

An ESG fund disclosure framework, like those developing in other countries, is necessary for asset managers when drafting disclosures and labeling ESG products as part of an overarching guide with similar frameworks for all market participants pursuing sustainability. By creating consistent ESG data among portfolio companies, asset managers, and third-party raters, investors can properly inform themselves, better evaluate greenwashing claims, and ultimately mitigate greenwashing.

[*] J.D. Candidate, 2023, University of Georgia School of Law; B.S., 2012, College of Charleston. Thank you to Professors Bruner and Mangan for your helpful comments and to my family for your love and support.

Published by Digital Commons @ University of Georgia School of Law, 2022

TABLE OF CONTENTS

I. INTRODUCTION 429

II. INVESTMENT GREENWASHING 436
A. WHAT IS GREENWASHING? 438
1. Defining Greenwashing 438
2. History of Greenwashing Claims 439
B. ESG INVESTING 444
C. ESG FUNDS' INTERNAL POLICIES, EXTERNAL RATINGS, AND PERFORMANCE 448

III. ESG DISCLOSURES IN THE UNITED STATES 451

IV. COMPARATIVE ANALYSIS OF ESG DISCLOSURE FRAMEWORKS 457

V. REMEDYING ESG FUND GREENWASHING 463

VI. CONCLUSION 468

I. INTRODUCTION

Investors are increasingly seeking to invest in a socially responsible way by integrating environmental, social, and governance (ESG)[1] factors into their investing decisions.[2] Investment firms are responding to this rapidly growing trend by introducing socially responsible investment (SRI) products to match the rising demand.[3] The global value of firms leveraging ESG data almost doubled between 2016 and 2020 from $22.9 trillion assets under management (AUM)[4] to over $40 trillion.[5] ESG investing spans asset classes and generally relies on various ESG factors incorporated into investment processes.[6] But these supposed

---

[1] ESG investing is referred to as "sustainable investing," "socially responsible investment" (SRI), "impact investing," and "ESG investing," among other terms that cover a broad spectrum of goals and strategies. *See, e.g.*, SCHRODERS, UNDERSTANDING SUSTAINABLE INVESTMENT AND ESG TERMS 4–5, https://www.schroders.com/en/sysglobalassets/global-assets/english/campaign/sustainability/interpret/understanding-sustainable-investment-and-esg-terms.pdf (last visited Oct. 25, 2022) ("The most commonly used terms include 'sustainable', 'responsible', 'impact' and 'ESG investing.'"). This Note uses "ESG investing" for consistency.

[2] *See* SEC, THE DIVISION OF EXAMINATIONS' REVIEW OF ESG INVESTING 1 (2021), https://www.sec.gov/files/esg-risk-alert.pdf ("Investor demand for investment products and financial services that incorporate [ESG] factors has increased in recent years." (footnote omitted)).

[3] *See id.* ("In response to this demand, a range of investment advisers have offered several ESG investment options, including registered investment companies and pooled investment vehicles . . . ."); *see also* DOROTHY DONOHUE, INV. CO. INST., FUNDS' USE OF ESG INTEGRATION AND SUSTAINABLE INVESTING STRATEGIES: AN INTRODUCTION 1 (July 2020), https://www.ici.org/doc-server/pdf%3A20_ppr_esg_integration.pdf ("Managers of registered investment companies (funds) are responding to investor demand by creating funds intended to align with investors' values and, in some cases, achieve sustainability-related outcomes.").

[4] "Assets under management" are "the total market value of the investments that a person or entity manages on behalf of clients," though definitions and formulas vary. James Chen, *Assets Under Management (AUM)*, INVESTOPEDIA (Oct. 6, 2020), https://www.investopedia.com/terms/a/aum.asp. For example, some AUM calculations include bank deposits, mutual funds, and cash, while others limit it to funds under discretionary management, such as with fund managers where the investor assigns authority to the financial institution to trade on the investor's behalf. *Id.*

[5] *See* Anne-Laure Foubert, *ESG Data Integration by Asset Managers: Targeting Alpha, Fiduciary Duty & Portfolio Risk Analysis*, OPIMAS (June 17, 2020), http://www.opimas.com/research/570/detail/ (noting the overall value of [AUM] ESG funds "has increased significantly over the past four years" from $22.9 trillion to over $40 trillion).

[6] *See* DONOHUE, *supra* note 3, at 2 ("Fund managers consider ESG factors to varying degrees, and these approaches coexist on a broad investing spectrum. . . . [that] span[] asset classes and active-to-passive strategies.").

socially responsible investments may not be as green as their creators indicate.[7]

Although the Securities and Exchange Commission (SEC)[8] recently began rulemaking and soliciting comments on potential ESG disclosure mandates,[9] its past guidance from 2010 was not interpreted by market players to require industry-wide ESG disclosures, and no mandate exists in the United States yet.[10] Since the SEC's past guidance, the United States Chamber of Commerce reported that fifty-nine percent of the companies surveyed are now voluntarily disclosing more ESG information.[11] The Sustainability

---

[7] *See, e.g.*, Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 408 (2021) ("Perhaps the most serious concern is that ESG funds falsely portray themselves as adhering to an ESG investing (or voting) strategy to attract investor money, a practice characterized as 'greenwashing.'"); Rajna Gibson Brandon, Simon Glossner, Philipp Krueger, Pedro Matos & Tom Steffen, *Do Responsible Investors Invest Responsibly?* 3 (Eur. Corp. Governance Inst., Working Paper No. 712/2022, 2022), https://ssrn.com/abstract=3525530 ("Some US institutional investors might have responded to the recent popularity of ESG by signing the PRI opportunistically, but failing to incorporate ESG considerations into portfolio management.").

[8] The SEC is an independent federal agency in charge of regulating financial securities. Its mission is "to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation." *About the SEC*, SEC, https://www.sec.gov/about.shtml (last visited Oct. 28, 2021).

[9] *See, e.g.*, Gary Gensler, *Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar*, SEC (July 28, 2021), https://www.sec.gov/news/speech/gensler-pri-2021-07-28 ("Thus, I have asked SEC staff to develop a mandatory climate risk disclosure rule proposal for the Commission's consideration by the end of the year."); *see also infra* notes 139–148 and accompanying text.

[10] *See* Brian Tomlinson, *ESG and Fiduciary Duties: A Roadmap for the US Capital Market*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 1, 2016), https://corpgov.law.harvard.edu/2016/11/01/esg-and-fiduciary-duties-a-roadmap-for-the-us-capital-market/ ("Existing SEC guidance, such as the 2010 interpretive guidance on climate risks, has not been sufficient to create a perceived industry requirement to disclose against material ESG factors."). *But see* SEC, RECOMMENDATIONS FOR ESG 9 (July 7, 2021), https://www.sec.gov/files/spotlight/amac/recommendations-esg.pdf ("Existing rules for investment product disclosure and advertising are sufficient and adequate—but disclosures would be improved by elements of comparability."). For the SEC's 2010 guidance regarding climate disclosure, see SEC, COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE (Feb. 2, 2010), https://www.sec.gov/rules/interp/2010/33-9106.pdf. Since this Note's initial writing, the SEC published a Proposed Rule on April 11, 2022, yet final action is not expected until late 2022. *See infra* notes 144–145.

[11] CCMC, 2021 SURVEY REPORT: CLIMATE CHANGE & ESG REPORTING FROM THE PUBLIC COMPANY PERSPECTIVE 5 (2021) [hereinafter CCMC SURVEY REPORT], https://www.centerforcapitalmarkets.com/wp-content/uploads/2021/08/CCMC_ESG_Report_v4.pdf.

Accounting Standards Board (SASB) reported that in the United States, eighty-eight percent of the 356 large-cap firms[12] that filed with the SEC in 2017 voluntarily disclosed some internal data regarding their ESG initiatives and that fewer firms used boilerplate disclosures in 2017 than in 2016.[13] Further, nearly two-thirds of companies are engaging with their investors about climate risk, and almost half increased the detail in their climate reporting due to investor input.[14] Yet the lack of any ESG disclosure standardization creates an information gap as more companies disclose ESG risks using data each company individually handpicks.[15] This unregulated space is exhibiting increasingly inconsistent data, leaving room for companies to mislead investors by misstating their sustainability initiatives.[16] The practice of misrepresenting sustainability efforts—known as greenwashing—is a growing concern for financial market participants who must rely on companies' subjective ESG disclosures to inform their

---

[12] Large-cap firms are those with "more than $10 billion" in capitalization or financing from investors. SASB, THE STATE OF DISCLOSURE 2017, at 25 (2017), https://www.sasb.org/wp-content/uploads/2017/12/2017State-of-Disclosure-Report-web.pdf.

[13] *Id.*

[14] CCMC SURVEY REPORT, *supra* note 11, at 6.

[15] *See, e.g.*, Brendan Bailey & Edward Ivey, *New Sustainability Standards Board to Develop Global Sustainability Disclosure Standards*, JD SUPRA (Dec. 10, 2021), https://www.jdsupra.com/legalnews/sustainability-standards-board-to-2294194/ ("[T]his sector of the market has lacked any sort of disclosure standardization since its initial development."); TCFD, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES: 2021 STATUS REPORT 73 (2021) [hereinafter TCFD TASK FORCE], https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Status_Report.pdf ("Fitch [Ratings] recognize[] the emerging, latent nature of many climate-related risks, as well as widespread gaps in disclosure.").

[16] *See, e.g.*, HM TREASURY, GREENING FINANCE: A ROADMAP TO SUSTAINABLE INVESTING 21 (2021) [hereinafter GREENING FINANCE], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026224/CCS0821102722-006_Green_Finance_Paper_2021_v5_Bookmarked_48PP.pdf (discussing how the lack of a common definition of sustainability activities "makes it difficult for companies and investors to clearly understand the environmental impact of their decisions and can lead to consumer harms like greenwashing"); Beau River, *The Increasing Dangers of Corporate Greenwashing in the Era of Sustainability*, FORBES (Apr. 29, 2021, 7:16 PM), https://www.forbes.com/sites/beauriver/2021/04/29/the-increasing-dangers-of-corporate-greenwashing-in-the-era-of-sustainability/?sh=6b938d944a32 ("The allure of greenwashing sustainability initiatives often taps into what CEOs are best at: projecting confidence, managing risk, and creating followership.").

investing decisions.[17] This inconsistency is intensified by two dynamics. First, asset managers themselves lack any standardized ESG disclosure framework to reference when issuing their own financial disclosures.[18] Second, numerous third parties rate ESG funds without standardized ESG terminology, leaving investors to rely on multiple raters with vague and often conflicting ratings that only add to the already vast ESG lexicon.[19]

---

[17] *See, e.g.*, Sara Bernow, Jonathan Godsall, Bryce Klempner & Charlotte Merten, *More Than Values: The Value-Based Sustainability Reporting That Investors Want*, MCKINSEY & CO. (July 2019), https://www.mckinsey.com/business-functions/sustainability/our-insights/more-than-values-the-value-based-sustainability-reporting-that-investors-want# ("Investors must therefore reconcile corporate sustainability disclosures as best they can before trying to draw comparisons among companies."); David Hoch & Robert Franz, *Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALA. L. REV. 441, 443 (1994) ("[I]nability to distinguish between environmental pronouncements is also frustrating to the producers who do not know what environmental claims they can legitimately make in regard to their products."); River, *supra* note 16 ("This shift in urgency is forcing companies and executives to reckon with their sustainability journeys in new and more serious ways, and find the right way to articulate their progress. One impact of the groundswell towards global sustainability is that the consequences of corporate greenwashing are becoming more dire.").

[18] *See* Tim Quinson, *ESG Study Shared with SEC Reveals Fund Labels Are Often Useless*, BLOOMBERG (Jan. 11, 2022, 7:00 AM), https://www.bloomberg.com/news/articles/2022-01-11/esg-study-shared-with-sec-reveals-fund-labels-are-often-useless (quoting Andrew Behar, CEO of shareholder advocacy group As You Sow, saying that "[i]nvestors need asset managers to establish the philosophy underlying a fund and align the prospectus language and fund name with the intent and the holdings" and "[t]he problem is that there is currently no truth in labeling"). To view As You Sow's ESG study shared with the SEC, see MIN YI LI, QIANCHEN ZHENG, HAO-CHE HSU & YIN ZHU, AS YOU SOW, UCSD: IDENTIFY "GREENWASHING" FUNDS USING NLP (Jan. 10, 2022), https://www.asyousow.org/reports/ucsd-identify-greenwashing-funds.

[19] *E.g.*, Curtis et al., *supra* note 7, at 420 ("[H]undreds of providers collect ESG data and disseminate ESG ratings, and their ratings are only weakly correlated."); Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846, 72,847 (Oct. 30, 2020) (to be codified at 29 C.F.R. pts. 2509, 2550), https://www.federalregister.gov/documents/2020/11/13/2020-24515/financial-factors-in-selecting-plan-investments ("There is no consensus about what constitutes a genuine 'ESG' investment, and ESG rating systems are often vague and inconsistent, despite featuring prominently in marketing efforts."); CCMC SURVEY REPORT, *supra* note 11, at 5 ("[C]urrent use of third-party standard setters shows a wide divergence of choices made by companies: For companies that rely on one or more standard-setting bodies, 44% use the [SASB], 31% use the Global Reporting Initiative (GRI), 29% use the Task Force on Climate-Related Financial Disclosure, and 24% use CDP."). *But cf.* Curtis et al., *supra* note 7, at 448 n.205 ("Alternatively, the variety of ESG ratings and ratings providers may simply reflect that the term 'ESG' covers a mix of strategies and considerations, and investors may have different preferences with respect to those strategies.").

In April 2021, the SEC alerted asset managers about the risk of investor confusion from rapidly growing demand for ESG investing, the increasing number of ESG investment products and services, and inconsistent ESG definitions.[20] The effect is extreme in some cases: A shareholder advocacy group adviser called one investment firm "hypocritical" for promoting its SRI products while still investing in fossil fuel companies accused of suppressing climate research.[21] As ESG investing and its inconsistent terminology continue to grow, more asset managers are attracting retail investors[22] by touting their investments as sustainable while lacking objective qualifications for their claims.[23]

Various efforts by both governmental and private entities have sought to address greenwashing. The SEC initiated rulemaking for

---

[20] *See* SEC, THE DIVISION OF EXAMINATIONS' REVIEW OF ESG INVESTING, *supra* note 2, at 2 ("This rapid growth in demand, increasing number of ESG products and services, and lack of standardized and precise ESG definitions present certain risks. For instance, the variability and imprecision of industry ESG definitions and terms can create confusion among investors if investment advisers and funds have not clearly and consistently articulated how they define ESG and how they use ESG-related terms, especially when offering products or services to retail investors.").

[21] *See* Chase Woodruff & David Sirota, *Is Goldman Sachs' New Fund Really Just Greenwashing Stocks?*, GUARDIAN (Sept. 28, 2018), https://www.theguardian.com/business/2018/sep/28/is-goldman-sachs-new-fund-really-just-greenwashing-stocks ("[A] Capital & Main review of corporate documents shows that some of Just [Capital]'s largest investments are in fossil fuel firms that have been sued for suppressing global climate research . . . . 'You shouldn't be able to, with a straight face, invest in the Dakota Access Pipeline with your left hand, and with your right hand tell people that you're doing responsible investing,' Lisa Lindsley, capital markets adviser for the shareholder advocacy group SumOfUs, told Capital & Main. 'The compartmentalization is very hypocritical.'").

[22] Retail investors are "small individual investors who commit capital for their personal account rather than on behalf of another company." *Retail Investors*, NASDAQ, https://www.nasdaq.com/glossary/r/retail-investors (last visited Jan. 12, 2022).

[23] *See* discussion *supra* note 17 and accompanying text; Curtis et al., *supra* note 7, at 409 ("[ESG] funds could be capitalizing on the demand for ESG products and charging high fees while providing little incremental value to investors."); Practical Guide to Corporate Governance and Accounting: Implementing the Requirements of the Sarbanes-Oxley Act ¶ 1632, *Environmental, Social, and Governance (ESG) Risk* (2020) [hereinafter Practical Guide to Corporate Governance and Accounting ¶ 1632] ("The desire for a high ESG rating can be strong enough to cause some entities to engage in 'greenwashing,' . . . . [and a] company facing an investor revolt may be tempted to greenwash itself to obtain a higher-than-deserved ESG rating.").

potential mandatory ESG disclosures.[24] Larry Fink, CEO of BlackRock, the world's largest asset manager with over $10 trillion in AUM,[25] announced that BlackRock will incorporate the European Union's Climate Transition Benchmark into its ESG investing strategy.[26] Some scholars are generating theories to reconcile the lack of regulation with what companies must report under existing mandates.[27] Others discuss how various ESG asset managers, such as pension fund trustees and ESG mutual fund managers, could be

---

[24] *See* Gensler, *supra* note 9 ("I have asked SEC staff to develop a mandatory climate risk disclosure rule proposal . . . ."); *see also* discussion *infra* notes 139–148 and accompanying text.

[25] *See* Robin Wigglesworth & Harriet Agnew, *BlackRock Surges Past $10tn in Assets Under Management*, FIN. TIMES (Jan. 14, 2022), https://www.ft.com/content/7603e676-779b-4c13-8f46-a964594e3c2f ("BlackRock's assets under management have surged past the $10tn mark for the first time, as the shift into cheap passive investment funds and buoyant markets expanded the heft of the world's largest money manager."); Carlos Waters & Lindsey Jacobson, *How BlackRock Became the World's Largest Asset Manager*, CNBC (Oct. 13, 2021), https://www.cnbc.com/video/2021/10/13/how-blackrock-amassed-over-9-trillion-in-managed-assets.html ("[Blackrock's portfolio] gives the money managers great levels of access and influence. As the world adapts to the changing climate, BlackRock's leadership is asking major institutions to consider the risks of more extreme weather.").

[26] Tom Eckett, *BlackRock to Add EU Climate Benchmark to $9bn ESG Enhanced ETF Range*, ETF STREAM (Oct. 26, 2021), https://www.etfstream.com/news/blackrock-to-add-eu-climate-benchmark-to-9bn-esg-enhanced-etf-range/ ("Effective [December 1, 2021], the $9bn six-strong ETF range will track MSCI climate indices that are aligned to the Paris Agreement's 1.5°C trajectory."). For an overview on Europe's sustainability efforts, see also discussion *infra* Part IV. And for information on the European Union's Climate Transition Benchmark, see generally EU TECH. GRP. ON SUSTAINABLE FIN., CLIMATE BENCHMARKS AND BENCHMARKS' ESG DISCLOSURES (2021), https://ec.europa.eu/info/sites/default/files/business_economy_euro/events/documents/finance-events-190624-presentation-climate-benchmarks_en.pdf.

[27] *See, e.g.*, Kenya Rothstein, Comment, *How Existing Securities Law Authorizes the SEC to Mandate and Regulate Sustainability Reporting*, SEC (May 2, 2021) https://www.sec.gov/comments/climate-disclosure/cll12-8750003-237365.pdf (arguing for SEC regulated mandatory ESG disclosures); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 929 (2019) (proposing, as part of an issuer's disclosures, a mandatory Sustainability Discussion and Analysis (SD&A) that is modeled on existing Management Discussion and Analysis (MD&A) and Compensation Discussion and Analysis (CD&A) and reflects a similar principles-based approach to those provisions by requiring issuers to address sustainability issues most important to their operations). *But cf.* Tyler Corder, *ESG Materiality Mandates Are Out of Scope for the SEC*, TEX. PUB. POL'Y FOUND. (May 26, 2021), https://www.texaspolicy.com/esg-materiality-mandates-are-out-of-scope-for-the-sec/ (discussing the SEC's lack of authority to "pronounce subjective ESG information as being material to investors" and arguing that "materiality must be determined by the companies themselves and their external auditors").

liable for greenwashing under current laws and regulations.[28] Regardless of how greenwashing is confronted, organizations touting their sustainability need guidance from a standard ESG framework to mitigate the widespread inconsistency.

This Note argues that the appropriate regulators[29] should develop a standard ESG disclosure framework so that ESG asset managers can create market wide consistency for ESG funds' labels and prospectus disclosures. This would ultimately inform investors of material ESG risks and deter greenwashing. Part II defines greenwashing, discusses the history of greenwashing claims, and notes readily available legal actions as potential remedial avenues. Next, it discusses the rapid growth of ESG investing and the current system of various ESG metrics. Part III describes the current laws applicable to asset managers who offer ESG funds and ESG disclosure regulations. Part IV then provides a brief comparative analysis to consider foreign ESG disclosure mandates and frameworks. Finally, Part V argues how asset managers can use a standard ESG disclosure framework to better inform investors and ultimately mitigate greenwashing.

---

[28] *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 385–86 (2020) ("ESG investing is permissible for a trustee of a pension, charity, or trust subject to American trust fiduciary law if: (1) the trustee reasonably concludes that the ESG investment program will benefit the beneficiary directly by improving risk- adjusted return; and (2) the trustee's exclusive motive for adopting the ESG investment program is to obtain this direct benefit."); Zachary Barker, Note, *Socially Accountable Investing: Applying* Gartenberg v. Merrill Lynch Asset Management*'s Fiduciary Standard to Socially Responsible Investment Funds*, 53 COLUM. J.L. & SOC. PROBS. 283, 287 (2020) ("[T]he *Gartenberg* test can be employed to ensure that mutual fund directors are meeting their fiduciary duty under § 36(b) to protect SRI fund investors' non-financial interests.").

[29] Whether the SEC has authority to require corporate climate disclosures is up for debate among commentators, especially after the Supreme Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), which held that Congress did not grant the Environmental Protection Agency authority to devise caps to carbon dioxide emissions under the Clean Air Act. *See, e.g.*, Andrew Ramonas & Amanda Iacone, *SEC Climate Rules Pushed Back Amid Bureaucratic, Legal Woes*, BLOOMBERG L. (Oct. 19, 2022), https://news.bloomberglaw.com/securities-law/sec-climate-rules-pushed-back-amid-bureaucratic-legal-woes ("*West Virginia v. EPA* makes it very hard for the SEC to require any corporate climate disclosures.").

Georgia Law Review, Vol. 57, No. 1 [2022], Art. 9

II. INVESTMENT GREENWASHING

The environmental and financial sectors may not seem similar at first,[30] but their underlying, consumer-driven initiatives share a focus on sustainability.[31] For the environmental sector, efforts supporting the environmental movement are commonplace, if not pervasive. Green initiatives are now almost a requirement for major market leaders: Google states that it has been carbon neutral since 2007 and aims to be carbon free by 2030;[32] Amazon touts its "Climate Pledge Friendly" drive to support its goal to reach "net zero carbon by 2040;"[33] Nike's "Move to Zero" campaign promotes its drive for "zero carbon and zero waste" to "help protect the future of sport."[34] At first glance, these sustainability-driven initiatives may seem like little more than the latest "marketing ploy," but green consumers have long been motivated to consume responsibly and preserve the environment by factoring the planet into their

---

[30] *See* Suzanne Kröner-Rosmalen, Lisanne Baks & Marjolein Ligthart, *Environmental and Financial Worlds Meet in the "E" of ESG*, STIBBE (Oct. 12, 2021), http://www.stibbeblog.nl/all-blog-posts/environment-and-planning/environmental-and-financial-worlds-meet-in-the-e-of-esg/#page=1 ("Developments in the environmental and financial worlds may appear to be at first sight completely separate from each other. . . . In recent years, there has been an increasing focus on sustainability, including in the financial sector.").

[31] *See id.* ("The financial sector can contribute to the realisation of national and international sustainability objectives by, for example, financing sustainable initiatives or providing insights into the sustainability objectives of financial products. Additionally, (private) investors find sustainable investments increasingly important."); *see also* Gensler, *supra* note 9 ("[W]hat does the SEC have to do with climate? . . . Occasionally, investors in our capital markets tell us that they . . . want something a little bit different. When it comes to climate risk disclosures, investors are raising their hands and asking regulators for more.").

[32] GOOGLE, ENVIRONMENTAL REPORT 2021 2–3 (Dec. 2021), https://www.gstatic.com/gumdrop/sustainability/google-2021-environmental-report.pdf.

[33] *Packaging Programs*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=GMD974XRCEEJJDQJ (last visited Aug. 14, 2021). Amazon founder and CEO Jeff Bezos claims, "Climate Pledge Friendly is a simple way for customers to discover more sustainable products that help preserve the natural world," and Amazon lists over 25,000 of these products. *Amazon Launches "Climate Pledge Friendly" to Make It Easier for Customers to Discover and Shop for Sustainable Products*, BUS. WIRE (Sept. 23, 2020, 8:00 AM), https://www.businesswire.com/news/home/20200923005297/en/Amazon-Launches-%E2%80%98Climate-Pledge-Friendly%E2%80%99-to-Make-It-Easier-for-Customers-to-Discover-and-Shop-for-Sustainable-Products.

[34] *Sustainability*, NIKE, https://www.nike.com/sustainability (last visited Oct. 14, 2022).

https://digitalcommons.law.uga.edu/glr/vol57/iss1/9

purchasing decisions.[35] Consumer concerns behind the modern environmental movement began in the 1960s.[36] This movement set the stage for advertisers and marketers to target eco-conscious consumers, leading to increased regulation[37] and major legislation, such as the Clean Air Act and the Clean Water Act.[38]

Today, the sustainability movement has reached nearly every type of green consumer, including those in the financial sector.[39] For example, by June 2021, over 4,000 asset managers around the globe had committed to actively incorporating ESG factors into their investment processes by becoming signatories of the Principles for Responsible Investment (PRI).[40] Yet, despite the boom of ESG

---

[35] *See* Eric L. Lane, *Consumer Protection in the Eco-Mark Era: A Preliminary Survey and Assessment of Anti-Greenwashing Activity and Eco-Mark Enforcement*, 9 J. MARSHALL REV. INTELL. PROP. L. 742, 745 (2010) ("The green . . . consumer is motivated by a desire to consume responsibly, preserve the environment and factor the well being of our planet into her purchasing decisions. Green branding, therefore, is more than just the latest marketing ploy to get people to buy products." (footnote omitted)).

[36] *See* Eric L. Lane, *Greenwashing 2.0*, 38 COLUM. J. ENV'T L. 279, 280 (2013) [hereinafter Lane, *Greenwashing*] ("From the birth of the environmental movement in the 1960s, and through its growth over the last several decades, environmental marketing has never been far behind.").

[37] *See* David Gibson, Note, *Awash in Green: A Critical Perspective on Environmental Advertising*, 22 TUL. ENV'T L.J. 423, 428 (2009) ("During the early 1980s . . . environmental marketing experienced a surge in popularity and the complexity of environmental marketing issues proved too complex for the existing rules to adequately address.").

[38] *See* Lane, *Greenwashing*, *supra* note 36, at 284 ("Two major legislative achievements of this time were the Clean Air Act and the Clean Water Act. . . . Both continue to be viewed as landmark pieces of environmental legislation." (footnotes omitted)).

[39] *See* SCHRODERS, *supra* note 1, at 3 ("Over the last decade, sustainability has become an increasingly crucial aspect of investing. . . . Retail investors have . . . shown an appetite for products that recognize and reflect the relationship between their investments and an ever more challenging social and environmental backdrop.").

[40] *See* Lorenzo Saa, *PRI Reaches 4,000 Signatories with Emerging Markets Boosting RI Uptake*, PRI (June 14, 2021), https://www.unpri.org/pri-blog/pri-reaches-4000-signatories-with-emerging-markets-boosting-ri-uptake/7823.article (announcing PRI's 4,000th signatory). These asset managers became signatories by signing PRI's statement of six principles on ESG investing: "Therefore, where consistent with our fiduciary responsibilities, we commit to the following: Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes. Principle 2: We will be active owners and incorporate ESG issues into our ownership policies and practices. Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which we invest. Principle 4: We will promote acceptance and implementation of the Principles within the investment industry. Principle 5: We will work together to enhance our effectiveness in implementing the Principles. Principle 6: We will each report on our activities and progress towards implementing the

investing in the financial sector,[41] regulation has failed to keep up with the public's growing climate concerns, leaving much of the market unchecked and vulnerable to increasing greenwashing claims.[42]

A. WHAT IS GREENWASHING?

1. Defining Greenwashing. The increased push for ESG investing has created a relatively new challenge for financial firms and investors[43]: how to address investments marketed as sustainable yet lacking factual support for their sustainability claims, or the practice of greenwashing.[44] No universal greenwashing definition exists,[45] but an often-used definition is "the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service."[46] This attributes

---

Principles." *What Are the Principles for Responsible Investment?*, PRI, https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment (last visited Aug. 14, 2022).

[41] *See infra* Sections II.B–C.

[42] *See, e.g.*, Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1999 (2020) ("In ESG investing's low-regulation environment, these market forces are largely unchecked."); Gensler, *supra* note 9 ("More than 550 unique comment letters were submitted in response to my fellow Commissioner Allison Herren Lee's statement on climate disclosures in March. Three out of every four of these responses support mandatory climate disclosure rules."); *infra* note 50. For a global view, see Theo Andrew, *European Regulators Must Align on ESG or Risk Greenwashing Deluge*, ETF STREAM (Nov. 2, 2021) [hereinafter Andrew, *European Regulators*], https://www.etfstream.com/features/european-regulators-must-align-on-esg-or-risk-greenwashing-deluge/ ("Across the globe, financial regulators are rushing to catch up with the boom in ESG investing . . . .").

[43] *See infra* Sections II.B–C; *supra* notes 16–17.

[44] *See, e.g.*, Karl S. Coplan, *Of Zombie Permits and Greenwash Renewal Strategies: Ten Years of New York's So-Called "Environmental Benefit Permitting Strategy,"* 22 PACE ENV'T L. REV. 1, 2 (2005) ("'Greenwash' is a term used to describe the application of an environmentally friendly sounding name to an environmentally unfriendly practice.").

[45] *See* Noemi Nemes et al., *An Integrated Framework to Assess Greenwashing* 4 (Climate Soc. Sci. Network, Working Paper No. 2021:1, 2021), https://www.cssn.org/wp-content/uploads/2021/09/CSSN-Working-Paper-2021-on-Assessing-Greenwashing-1.pdf (noting the diverse perspectives of the conversation that make it unsurprising that no single definition is accepted universally).

[46] *Id.* For a commonly cited greenwashing study, see TERRACHOICE, THE SEVEN SINS OF GREENWASHING: HOME AND FAMILY EDITION 10 (2010), https://www.twosides.info/wp-content/uploads/2018/05/Terrachoice_The_Sins_of_Greenwashing_-_Home_and_Family_Edition_2010.pdf (listing seven sins of greenwashing from its 2007 study).

an intent to deceive to those making the greenwashing claims in a calculated way to become more attractive to the growing demands of eco-conscious consumers.[47]

Greenwashing has been conceptualized across many different industries and fields of research and is a part of widespread regulatory and governmental discussions, with both lending to its lack of a uniform definition.[48] In addition, the overall increase in consumer demand for socially responsible initiatives has led to a continually emerging swath of empirical reports on greenwashing.[49] This cross-industry awareness has also led to consumers becoming "increasingly savvy at detecting and suing for 'greenwashing.'"[50] Reports point to a growing number of greenwashing lawsuits, but suing for greenwashing is not a new development when considered outside of the ESG investing context.[51] A look at the history of greenwashing claims is informative as to the various approaches used in recent ESG investing claims.

*2. History of Greenwashing Claims***.** Relevant caselaw on the greenwashing of ESG funds is thin. A background on general greenwashing claims helps frame the evaluation amidst increasing litigation against companies.[52] Two main types of greenwashing

---

[47] *See, e.g.*, Will Kenton, *Greenwashing*, INVESTOPEDIA (Mar. 22, 2022), https://www.investopedia.com/terms/g/greenwashing.asp ("Greenwashing is considered an unsubstantiated claim to deceive consumers into believing that a company's products are environmentally friendly.").

[48] *See* Nemes et al., *supra* note 45, at 4 ("[G]reenwashing has been examined from a number of academic disciplines in addition to being a part of conversations among various government bodies and non-governmental organizations alike. Research contributing to its conceptualization and understanding has come from the fields of business (including advertising, ethics, and marketing), media and communications, environmental studies and management, production engineering, law, and the social sciences (including economics, geography, political science, psychology, and sociology) among others.").

[49] *See id.* at 5 ("New empirical analyses of greenwashing are constantly emerging in the wake of seemingly expanding consumer demands for corporate accountability and social responsibility alongside concerns about climate change and the environment."); *see also infra* notes 121–126 and accompanying text.

[50] Quinn Emanuel Urquhart & Sullivan, LLP, *Greenwashing Claims on the Rise: Avoiding Dirty Laundry*, JD SUPRA (Apr. 19, 2021), https://www.jdsupra.com/legalnews/greenwashing-claims-on-the-rise-1926530/.

[51] *See id.* ("Given the rise in green marketing, the capital flowing into 'green' funds, and the increasing focus on detecting greenwashing, we are likely to see more enforcement efforts and civil suits.").

[52] *See, e.g.*, David Baay, Garrett Gibson & Jay Patel, *Greenwashing: A Survey of Recent Litigation*, JD SUPRA (Dec. 10, 2021), https://www.jdsupra.com/legalnews/greenwashing-a-

claims have been made: (1) consumer protection claims and (2) securities fraud claims.[53]

First, deceptive environmental statements have been the root of certain consumer protection suits based on false advertising or marketing claims since the 1970s.[54] In the late 1980s, consumers pushed for regulation of environmental advertising, and states began enacting advertising regulations and enforcing environmental marketing claims through existing consumer protection laws.[55] With ESG matters, however, state consumer protection claims have been of "limited success," and litigation costs are "significant even when not appealed."[56] Recent claims include SeaWorld failing to disclose facts about the health and safety of its captive orcas (dismissed for lack of causation);[57] a distributor failing to disclose child labor and forced labor (dismissed for defect not relating to the product's central function);[58] and a tea manufacturer misleadingly labeling tea as "environmentally friendly" and "sustainable" when it contained traces of glyphosate (dismissed for

survey-of-recent-3195116/ ("As climate change jurisprudence continues to evolve, an offshoot of 'greenwashing' claims has generated a series of headline-grabbing lawsuits. . . . [M]ost greenwashing claims are . . . claims of misrepresentation.").

[53] *See* Sarah Fedner, Ameena Majid & William Prickett, *ESG Disclosures: Lessons Learned and Best Practices [Part 3 of 4]*, JD SUPRA (Sept. 10, 2020), https://www.jdsupra.com/legalnews/esg-disclosures-lessons-learned-and-94673/ ("Thus far, litigation resulting from ESG disclosures generally arises in two contexts: (1) securities fraud claims under federal law, or (2) consumer protection or consumer fraud claims under federal or state laws.").

[54] *See* Lane, *Greenwashing*, *supra* note 36, at 304 (noting that out of all the historical greenwashing cases, "environmental marketing claims about consumer products directed at individuals . . . formed the basis of nearly all greenwashing cases in the 1970s, 80s, and 90s").

[55] *See* Gibson, *supra* note 37, at 429 ("As consumer demand for the regulation of environmental advertising reached a fever pitch in the late 1980s, states began to enact advertising regulations and enforce existing consumer protection laws to protect against an onslaught of environmental marketing claims.").

[56] Connor Kuratek, Joseph A. Hall & Bett M. Huber, *Legal Liability for ESG Disclosures*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 3, 2020), https://corpgov.law.harvard.edu/2020/08/03/legal-liability-for-esg-disclosures/#10b.

[57] *See* Hall v. SeaWorld Ent., Inc., 747 F. App'x 449, 452 (9th Cir. 2018) (affirming dismissal due to finding of no causal connection "when a complaining party would suffer the same harm whether or not a defendant complied with the law" (quoting Daro v. Superior Ct., 61 Cal. Rptr. 3d 716, 729 (Cal. Ct. App. 2007))).

[58] *See* Hodsdon v. Mars, Inc., 891 F.3d 857, 863 (9th Cir. 2018) (affirming dismissal in part because plaintiff omitted the "crucial element" that "the defect must relate to the central functionality of the product").

implausibility of consumer confusion).[59] In class action cases, courts have largely rejected ESG complaints when the plaintiff does not "allege that they viewed and relied upon the challenged statements before making purchase decisions."[60] Generally, consumer protection greenwashing claims have been "slightly less successful on motions to dismiss than securities fraud claims."[61]

Second, in the securities context, most claims regarding misleading disclosures have been made against companies (rather than asset managers) under the anti-fraud provisions of the federal securities laws, Section 10(b) of the Securities Exchange Act of 1934[62] and SEC Rule 10b–5,[63] which apply broadly and create liability for fraudulent statements made to investors.[64] To be actionable under Section 10(b), a statement must be (1) false or misleading and (2) material to a reasonable investor.[65] Courts have found vague or aspirational language or forward-looking statements

---

[59] *See* Organic Consumers Ass'n v. Bigelow Tea Co., No. 2017 CA 8375 B, 2018 D.C. Super. LEXIS 11, at *12–13 (D.C. Super. Ct. Oct. 31, 2018) (dismissing Count III of the complaint after finding it implausible "consumers could be misled" and noting the plaintiff did not "not give any facts regarding consumer belief or cite to any consumer survey that could render th[e] claim[s] more than a nonactionable opinion").

[60] SOC'Y FOR CORP. GOVERNANCE & GIBSON DUNN, ESG LEGAL UPDATE 13 (June 2020), https://www.gibsondunn.com/wp-content/uploads/2020/10/Ising-Meltzer-McPhee-Percopo-Assaf-Holmes-ESG-Legal-Update-What-Corporate-Governance-and-ESG-Professionals-Need-to-Know-Society-for-Corporate-Governance-06-2020.pdf.

[61] Fedner et al., *supra* note 53.

[62] *See* 15 U.S.C. § 78j (proscribing the use of any "manipulative or deceptive device" in connection with a securities sale or swap agreement).

[63] For the codified version of this rule, see 17 C.F.R. § 240.10b–5 (2022).

[64] *See* SOC'Y FOR CORP. GOVERNANCE & GIBSON DUNN, *supra* note 60, at 5 (noting the "broad" application of Section 10(b) and SEC Rule 10b–5 and stating that "most" ESG disclosure related securities litigation has arisen from Section 10(b) and 20(a) of the Exchange Act); *see, e.g.*, *In re* Equifax Sec. Litig., 357 F. Supp. 3d 1189, 1219, 1224 (N.D. Ga. 2019) (denying a motion to dismiss because a jury could reasonably find defendants made material misrepresentations related to cybersecurity); City of Brockton Ret. Sys. v. Avon Prods., Inc., No. 11-CIV-4665, 2014 WL 4832321, at *16 (S.D.N.Y. Sept. 29, 2014) ("[A] reasonable investor would not rely on the statements discussed above as a guarantee that Avon would, in fact, maintain a heightened standard of legal and ethical compliance.").

[65] *See, e.g.*, *In re* Omnicare, Inc. Sec. Litig., 769 F.3d 455, 470 (6th Cir. 2014) ("Successfully pleading an actionable material misrepresentation or omission requires a plaintiff to allege facts demonstrating two things: (1) that a defendant made a statement or omission that was false or misleading; and (2) that this statement or omission concerned a material fact." (citing Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 38 (2011))).

Georgia Law Review, Vol. 57, No. 1 [2022], Art. 9

regarding ESG non-actionable.[66] Cases in which the accuracy of factual statements can be proven are more likely to proceed, but they generally settle once past the dismissal stage.[67] Examples include class action allegations of false and misleading statements and omissions to conceal an alleged tax bribery scheme in Brazil (settled for $14.5 million),[68] as well as allegations of a jeweler's misrepresentation of claims against it relating to the #MeToo movement and false or misleading statements or omissions about the jeweler's in-house financing program (settled for $240 million).[69] Additionally, under Section 11 of the Securities Act of 1933, companies can be strictly liable for material misstatements and omissions in their registration statements.[70]

For claims against asset managers, the SEC first held an active ESG fund manager liable for mismanagement in 2008 where the fund manager "failed to comply with its own internal SRI screening and periodic review policies" by purchasing securities of companies restricted by the fund.[71] The proceedings were initiated under Sections 203(e) and 203(k) of the Investment Advisers Act of 1940

---

[66] *See In re* Banco Bradesco S.A. Sec. Litig., 277 F. Supp. 3d 600, 647 (S.D.N.Y. 2017) (noting that aspirational language combined with qualifying language will generally constitute "inactionable 'puffery'").

[67] *See* SEYFARTH SHAW LLP, ESG 101: LANDSCAPE & CONSIDERATIONS 13 (Mar. 2022), https://www.conference-board.org/pdf_free/SefarthESG101.pdf ("Cases that survive the motion to dismiss phase are generally settled, sometimes for very large amounts."); *see also* Reenat Sinay, *Brazilian Bank to Pay $14.5M to End Investor Suit Over Bribes*, LAW360 (July 2, 2019, 1:53 PM), https://www.law360.com/articles/1174942/brazilian-bank-to-pay-14-5m-to-end-investor-suit-over-bribes (describing the terms and reasons for the settlement); Jonathan Stempel, *Signet Jewelers in $240 Million Settlement Over Sexual Harassment, Loan Portfolio*, REUTERS (Mar. 26, 2020, 12:59 PM), https://www.reuters.com/article/us-signet-results/signet-jewelers-in-240-million-settlement-over-sexual-harassment-loan-portfolio-idUSKBN21D2WB (same).

[68] *See Bradesco*, 277 F. Supp. 3d at 610 (stating facts related to criminal corruption charges and bribery schemes).

[69] *See In re* Signet Jewelers Ltd. Sec. Litig., No. 16-cv-6728, 2018 WL 6167889, at *2–5 (S.D.N.Y. Nov. 26, 2018) (stating facts related to risky underwriting practices and sexual harassment).

[70] *See* 15 U.S.C. § 77k ("In case any part of the registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may . . . sue . . . .").

[71] Pax World Mgmt. Corp., Investment Advisers Act Release No. 2761, Investment Company Act Release No. 28344, 2008 WL 2917614, at *8–9 (July 30, 2008) (ordering the fund manager is censured and responsible for a civil money penalty of $500,000).

and Sections 9(b) and 9(f) of the Investment Company Act of 1940.[72] Although enforcement of these regimes is under the SEC's jurisdiction, asset managers of passive ESG funds are subject to different regulatory regimes based on different investment strategies than those of active managers.[73]

For greenwashing claims, pointing to precise harms might be difficult.[74] Some commentators suggest that greenwashing, or the mere prevalence of green marketing generally, creates skepticism in the market and results in consumer cynicism; in turn, this effectively precludes green marketing from having any actual clout or influence on consumers.[75] As ecologist Jay Westerveld originally described in a 1986 essay, a classic case of greenwashing is hotel signage suggesting that guests reuse their towels for the sake of the environment.[76] Presuming the hotel's motivation behind the signs was to save costs, its conservation claim is intentionally deceptive.[77] Applying this concept to investors, Professor Miriam Cherry explains how companies that greenwash their sustainability efforts might harm retail investors by undercutting their intentions to

---

[72] *Id.* at *1.

[73] *See, e.g.*, EVA SU, CONG. RESEARCH SERV., CAPITAL MARKETS: ASSET MANAGEMENT AND RELATED POLICY ISSUES 3 (2019), https://sgp.fas.org/crs/misc/R45957.pdf (noting that "different types of asset management companies are subject to different regulatory requirements," including active versus passive strategies and private versus public firms).

[74] *See, e.g.*, Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 300 (2014) (noting how greenwashing can involve wrongdoing, distraction, deception, and hypocrisy, all of which are inherently problematic ethically and legally, but might be difficult to pinpoint the exact harm in individual cases).

[75] *See* Jessica E. Fliegelman, *The Next Generation of Greenwash: Diminishing Consumer Confusion Through a National Eco-Labeling Program*, 37 FORDHAM URB. L.J. 1001, 1007 (2010) ("One of the significant risks of greenwashing is that consumers will become skeptical and cynical of environmentally-friendly products. Marketing experts agree that the 'term green is too widespread to have any real marketing clout,' and 'has become poisoned through overuse.'").

[76] *See* Rui Guo, Wei Zhang, Tao Wang, Caroline Bingxin Li & Lan Tao, *Timely or Considered? Brand Trust Repair Strategies and Mechanism After Greenwashing in China—From a Legitimacy Perspective*, 72 INDUS. MKTG. MGMT. 127, 129 (2018) ("Since Jay Westerveld first proposed the term 'greenwashing' in 1986, there have been many academic definitions of the concept."); Bruce Watson, *The Troubling Evolution of Corporate Greenwashing*, GUARDIAN (Aug. 20, 2016), https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies (noting the impetus behind Jay Westerveld's hotel towel example).

[77] *See* Cherry, *supra* note 74, at 300 ("Assume that hotel management's true motivation is cost savings, and that the sign is therefore deceptive.").

Georgia Law Review, Vol. 57, No. 1 [2022], Art. 9

invest while supporting the environment and that the biggest loss is ultimately to the foundation of sustainability itself.[78] Attention and resources intended to be allocated toward sustainable efforts through capital raised from investors of collective ESG funds are instead diverted away from those efforts.[79] This challenge is fostered by the lack of consistent ESG reporting from investment firms combined with the coinciding rapid increase in ESG investing and the plethora of ESG terminology.[80]

B. ESG INVESTING

ESG investing is "a strategy that uses ESG analysis as a significant part of the fund's investment thesis to respond to investors' objectives, accomplish ESG-related outcomes, and pursue investment returns."[81] SRI and ESG investing have roots in faith-based investing and in the civil rights, antiwar, and environmental movements of the 1960s and 1970s.[82] The first mutual funds reflecting environmental concerns were formed in the 1970s, despite there being more critics than ESG investments, as ESG criteria upset conventional financial wisdom.[83] But as society responded to nuclear energy, sweatshops, apartheid, GMOs, climate change, human trafficking, the gender wage gap, the LGBTQ movement,

---

[78] *See id.* at 300, 302 ("Indeed, it is the collective harm that presents the most serious challenge to the [corporate social responsibility (CSR)] endeavor. . . . Among those who lose in these situations are the individual consumers and investors who care about CSR and find themselves shocked to have mistakenly invested in non-CSR companies. The biggest loss, however, is to the foundation of CSR itself.").

[79] *See, e.g.*, Teh Shi Ning, *Greenwashing Threat Grows with Rise of Sustainable Investing*, STRAITS TIMES (Oct. 24, 2021, 4:00 AM), https://www.straitstimes.com/business/invest/greenwashing-threat-grows-with-rise-of-sustainable-investing (explaining how greenwashing could result in more resources and attention being allocated away from global sustainability needs as more ESG products attract money from asset owners wishing to make an impact).

[80] *See infra* Sections II.B–C.

[81] DONOHUE, *supra* note 3, at 2.

[82] For a detailed history of SRI and ESG investing, see Blaine Townsend, *From SRI to ESG: The Origins of Socially Responsible and Sustainable Investing*, 1 J. IMPACT & ESG INVESTING 1–2 (2020). Townsend differentiates SRI and ESG by noting that "[t]he modern SRI process stands on three pillars: 1. Values-based avoidance screens[;] 2. Proactive sustainability-focused analytics—colloquially referred to as 'ESG investing'[;] and 3. Corporate engagement and impact investing." *Id.* at 1.

[83] *See id.* at 2 ("[T]raditional socially responsible investing had many more critics than investment vehicles.").

https://digitalcommons.law.uga.edu/glr/vol57/iss1/9

and a host of other policy and cultural issues, SRI followed.[84] By the 1980s, "the backbone" of United States SRI processes was a "classic avoidance screen[]," or a portfolio avoiding alcohol, tobacco, weapons, gambling, pornography, and nuclear energy investments (i.e., "sin" companies).[85] But when ESG investing was limited and focused on the exclusion of sin companies, the cost of capital for those excluded was not impacted because investors who were focused solely on profit replaced withdrawn capital with their own and were reaping high returns.[86]

In Europe, however, ESG analysis—as opposed to purely exclusionary SRI investing—was demanded by investors concerned about sustainability, climate change, and poor corporate governance's impact on the market and fiduciary duties.[87] Back in the United States, as ESG investing grew, early adopters similarly began integrating key ESG factors into their investing processes.[88] After the 2008–09 market crash and the Great Recession, asset managers wanted a better way to assess the risks of climate change, corporate governance, and corporate behavior.[89] And by further excluding sin companies, investors could raise excluded companies' capital costs, inducing them to change their practices.[90] Investors sought to "combat the risks posed by poor governance practices that threaten the stability of capital markets and the economy writ large" and "counter the existential threats posed by social inequality and climate change"[91]—bringing ESG analysis to its current fundamental focus on evaluating long-term risk.

---

[84] *See id.* at 3 (noting that innovation in the SRI market is often prompted by social catalysts).

[85] *Id.* at 5.

[86] *See* KPMG, SUSTAINABLE INVESTING: FAST-FORWARDING ITS EVOLUTION 13 (Feb. 2020), https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/02/sustainable-investing.pdf ("[I]t was recognized that exclusion reduced the scope for diversification [but] dumping 'sin' stocks yielded handsome profits to those who bought them without doing anything to pressure or influence the 'sinners.'").

[87] *See* Townsend, *supra* note 82, at 6 (describing ESG's initial growth in Europe).

[88] *See* KPMG, *supra* note 86, at 13 ("For early adopters, the journey started with the exclusion of 'sin' stocks: shares in companies associated with activities deemed unethical.").

[89] *See* Townsend, *supra* note 82, at 10 (detailing the rise of ESG analysis when "[t]raditional Wall Street analysis" did not provide the scope of risk assessment needed).

[90] *See* Schanzenbach & Sitkoff, *supra* note 28, at 398 (emphasizing the role that collateral benefits of ESG have on inducing substantive change in bad-ESG firms).

[91] Reiser & Tucker, *supra* note 42, at 1925.

Today, the continued significance of ESG investing is exponentially driving more eco-conscious investors to put their money where their mouths are—with $1.682 trillion in the United States invested in "socially conscious" investments by June 2020.[92] And reports say there is no stopping in sight[93]: Global ESG investments are on track to exceed $50 trillion AUM by 2025, or more than one-third of global AUM.[94] Some suggest that the COVID-19 pandemic will further drive ESG investing by awakening the need for different investing approaches.[95] Early ESG investing adopters indicate that advancements in skill, data, and technology will help further promote ESG investing.[96] Additionally, over the past decade, fund managers have significantly increased their consideration of ESG factors in their investment practices for multiple reasons, including differentiation, deeper client relationships, and the growing demand of ESG investing.[97]

---

[92] INV. CO. INST., NEW COMMON TERMINOLOGY FOR ESG INVESTING STRATEGIES 4 (Aug. 11, 2020), https://www.ici.org/system/files/attachments/pdf/20_webinar_ici_esg_primer_0811_slides.pdf.

[93] *See, e.g.*, Jon Hale, *Sustainable Funds in the U.S. Saw Record Flows in the First Half of 2019*, MORNINGSTAR (July 11, 2019) [hereinafter Hale, *Sustainable Funds*], https://www.morningstar.com/articles/935713/sustainable-funds-in-the-us-saw-record-%EF%AC%82ows-in-th ("Sustainable funds attracted an estimated $8.9 billion in net flows in the first half of 2019, surpassing their $5.5 billion in flows for all of 2018. Flows into sustainable funds have set calendar-year records for each of the past three years and appear headed for a fourth.").

[94] *See* Press Release, *ESG Assets Rising to $50 Trillion Will Reshape $140.5 Trillion of Global AUM by 2025, Finds Bloomberg Intelligence*, BLOOMBERG (July 21, 2021), https://www.bloomberg.com/company/press/esg-assets-rising-to-50-trillion-will-reshape-140-5-trillion-of-global-aum-by-2025-finds-bloomberg-intelligence/ ("(ESG) assets are on track to exceed $50 trillion by 2025, representing more than a third of the projected $140.5 trillion in total global [AUM] . . . .").

[95] *See Why Covid-19 Could Prove to Be a Major Turning Point for ESG Investing*, J.P. MORGAN (July 1, 2020), https://www.jpmorgan.com/global/research/covid-19-esg-investing ("As a result of the radical impact COVID-19 has had on global economies in such a short space of time, many policymakers and investors are viewing the crisis as a wake-up call that accelerates the need for a different approach to investing, as parallels have been drawn between the unforeseen risks of a pandemic and issues such as climate change.").

[96] *See* Mark Kolakowski, *The State of Sustainable Investing in 2021*, INVESTOPEDIA, https://www.investopedia.com/the-state-of-sustainable-investing-in-2020-4787996 (last updated May 23, 2022) ("[Early adopters of sustainable investing] also indicate that advances in skills, data, and technology are helping to promote sustainable investing.").

[97] *See, e.g.*, Nadia Cobalovic, David Mina & Mike Mullen, *What Does the Rise of ESG Mean for Asset Mangers' Operations?*, N. TR. (July 21, 2021),

ESG investing is progressively growing as it is "increasingly viewed as good risk management."[98] One report found that ESG investors might take on more small-cap risk, single-stock risk, and interest-rate and inflation risk than investors in a standard all-equity fund.[99] ESG investors, however, base their decision to take on that initial risk in the belief that considerations of stakeholders, such as employees or customers, must be a part of the corporation's goals—and that the corporation can no longer focus solely on maximizing returns.[100] The hope is that, over time, their decision to drop selecting where to invest based purely on profit will have a growing impact on company value and cost of capital and will provide long-term financial viability.[101] For companies that do not future-proof their business, ESG-backers believe these companies run the risk of harming the interests of their shareholders and the community at large, along with their own long-term stability.[102]

https://www.northerntrust.com/united-states/insights-research/2021/cis/rise-esg-asset-managers ("The asset management industry's embrace of . . . [ESG] investment principles has played out as a slow burn over the course of the past decade. Now, awareness of the movement and the will to implement socially responsible investing practices has picked up for asset managers."); *see also, e.g.*, Brad Allen, *Socially Responsible Investing No Longer a Fad*, STAR TRIB. (Nov. 17, 2017), https://www.startribune.com/socially-responsible-investing-no-longer-a-fad/458066383/ ("[A]dvisers and asset managers are adopting an ESG screen to their investment process for four reasons. Differentiating themselves and building deeper client relationships based on a client's values is part of the equation. The move also meets growing demand, particularly among millennials and women, for some ESG overlay to their investment portfolios."); Schanzenbach & Sitkoff, *supra* note 28, at 384–85 ("Over the past decade, trustees have come under increasing pressure to consider . . . [ESG] factors in their investment decisions, for example, by divesting from fossil fuel, tobacco, or firearms companies, or otherwise accounting for environmental or social costs in making investment decisions."); *see also* discussion *supra* Section II.C and accompanying text.

[98] Allen, *supra* note 97. For a discussion of ESG fund performance, see *infra* notes 121–126.

[99] *See* Derek Horstmeyer, *The Surprising Risks of Investing in ESG Funds*, WALL ST. J. (Sept. 16, 2021), https://www.wsj.com/articles/risks-of-esg-funds-11631539404 (noting that ESG investors might take on "more small-cap risk, interest-rate and inflation risk, and single-stock risk than an investor in a standard all-equity fund").

[100] *See* KPMG, *supra* note 86, at 23 ("[84%] of respondents agree that maximizing shareholder returns can no longer be the primary goal of the corporation . . . .").

[101] *See id.* at 39 ("Markets have been slow to fully price in these risks . . . . Over time, sustainability will likely have a growing impact on company valuation and cost of capital.").

[102] *See id.* ("Thus, by not acting to future-proof their businesses now, many listed and private companies risk harming the interests of their shareholders as well as those of wider society, not to mention their own long-term financial viability.").

C. ESG FUNDS' INTERNAL POLICIES, EXTERNAL RATINGS, AND PERFORMANCE

The lack of uniform ESG disclosures for asset managers' internal policies and investing strategies and the wide-ranging variety of ESG ratings[103] create barriers to obtaining quality ESG data for investors to compare ESG funds and evaluate their performance. These barriers only widen the opportunity for asset managers to greenwash.[104]

Depending on their internal policies, asset managers vary in the way they disclose their internal policies and the way they manage their ESG funds.[105] The SEC recently reported a lack of reasonable internal policies and procedures—or any policies and procedures at all—regarding how various asset managers respond to investor objectives and incorporate ESG factors into their investment strategies.[106] Techniques behind sustainable investing vary across asset classes and investment strategies from passive to active.[107] For passive ESG funds, retail investors rely on asset managers to follow the fund's underlying policies as provided for in the fund's prospectus.[108] These asset managers are largely institutional

---

[103] *See* discussion *supra* note 19.

[104] *See supra* notes 15–16 and accompanying text.

[105] *See* DONOHUE, *supra* note 3, at 2 ("[F]unds employ integration and sustainable investing strategies in various ways. Some funds integrate analysis of ESG factors, others use one or more sustainable investing strategies, and some integrate ESG factors and use one or more sustainable investing strategies.").

[106] *See* SEC, THE DIVISION OF EXAMINATIONS' REVIEW OF ESG INVESTING, *supra* note 2, at 3–4 (noting how, after SEC staff examined investment advisers, investment companies, and private funds, "[t]he staff noted, despite claims to have formal processes in place for ESG investing, a lack of policies and procedures related to ESG investing; policies and procedures that did not appear to be reasonably designed to prevent violations of law, or that were not implemented; documentation of ESG-related investment decisions that was weak or unclear; and compliance programs that did not appear to be reasonably designed to guard against inaccurate ESG-related disclosures and marketing materials").

[107] *See* DONOHUE, *supra* note 3, at 2 (describing how ESG investing exists along a broad investing spectrum).

[108] *See* Quinson, *supra* note 18 (discussing that investors need asset managers to establish policies in accordance with the fund's prospectus and philosophy); John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 18 (Harv. Pub. L., Working Paper No. 19-07, 2019) (noting the distinction between the interests of passive investors and fund managers and that "[i]ndex fund managers . . . are coming into their control positions as a side-effect, largely unintended or even known to their own economic principals (i.e., [retail] investors)").

investors who pursue ESG funds' objectives by exerting pressure on companies for greater ESG disclosures.[109] In turn, this increases the variability of ESG disclosures among companies and asset managers themselves, both of whom have no standardization, which makes it harder for investors to compare ESG funds.[110]

For active asset managing strategies, there is a range of qualitative and quantitative approaches.[111] For example, a quantitative approach "emphasizes mathematical and statistical analysis to help determine the value of a financial asset," while a qualitative approach is "practiced both as a stand-alone discipline and in conjunction with traditional qualitative analysis for both return enhancement and risk mitigation."[112] Another significant concern potentially contributing to the variability is managers incorporating ESG factors based on personal policy preferences at the investor's expense.[113] This variety of passive and active investing strategies inflates the variability in ESG disclosures as more asset managers incorporate ESG factors.[114]

---

[109] *See, e.g.*, Thomas Singer, *Environmental and Social Proposals in the 2017 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 26, 2017), https://corpgov.law.harvard.edu/2017/10/26/environmental-and-social-proposals-in-the-2017-proxy-season/ ("Large institutional investors, such as BlackRock and Vanguard, are beginning to exert pressure on companies by supporting E&S proposals that call for greater disclosure of issues they deem material to shareholder value."); Allen, *supra* note 97 ("[L]arge asset managers like State Street Global Advisors and BlackRock, who primarily manage passive funds, are urging companies to focus in their public disclosures on material risks to their business posed by climate change.").

[110] *See, e.g.*, Curtis et. al., *supra* note 7, at 408 ("Without consistent data for evaluating the sustainability of individual portfolio companies, it is difficult to measure the ESG orientation of a mutual fund or to compare the 'greenness' of one fund's portfolio to that of another.").

[111] *See* DONOHUE, *supra* note 3, at 2 (detailing the range of approaches across both asset classes and strategy styles).

[112] James McWhinney, *A Simple Overview of Quantitative Analysis*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/041114/simple-overview-quantitative-analysis.asp (last updated Dec. 1, 2021).

[113] *See* Schanzenbach & Sitkoff, *supra* note 28, at 436 ("A significant concern is that managers may invoke ESG factors to enact their own policy preferences at the expense of shareholders—an agency problem for which there is also some empirical evidence.").

[114] *See, e.g.*, David Ricketts, *Fund Managers Face "Urgent Reality Check" on Climate Goals Amid "Catastrophic" Failure to Meet Paris Goals*, FIN. NEWS (Oct. 27, 2021, 12:01 AM), https://www.fnlondon.com/articles/majority-of-investment-funds-out-of-step-with-climate-objectives-20211027 ("Scrutiny is also increasing on sustainable investment funds, amid fears among some asset managers that over-playing their ESG credentials could see them accused of greenwashing.").

Georgia Law Review, Vol. 57, No. 1 [2022], Art. 9

Along with firms' varying internal policies and investing strategies, the elements comprising of ESG funds' external ratings by third parties also vary due to a lack of standardization.[115] For example, one empirical study of ESG ratings found that many indicators are used by only one out of every six raters.[116] Another complicating factor is that an investment firm's regulatory and political risks might not be reflected in its ESG rating; for example, alternative energy sources may receive high ratings despite having high regulatory risk due to heavy reliance on current government policy.[117] The discernable quality of ESG ratings is further complicated by the sheer number of raters.[118] All major credit ratings agencies factor ESG criteria into their credit ratings process and ESG products.[119] The increase in ESG investing also attracts an exponential number of additional ESG raters, further increasing the variability of ESG ratings and making it difficult for many to understand how the ratings are calculated.[120]

The inconsistencies among investment firms' internal policies, investing strategies, and their external ESG ratings affects the analysis of studies attempting to square ESG funds with the firms'

---

[115] *See* Curtis et. al., *supra* note 7, at 397, 420 ("While all four of the ESG ratings that we use involve a comprehensive assessment, they employ significantly different data and methodologies."). For an empirical study on the quality of ESG ratings, see generally *id.*

[116] *See* Florian Berg, Julian F. Kölbel & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, REV. FIN., May 23, 2022, at 2, 11 ("[A] considerable number of unclassified indicators shows that there are many aspects of ESG that are only measured by one out of six raters.").

[117] *See* Schanzenbach & Sitkoff, *supra* note 28, at 436 ("Another concern is that the extent of a firm's regulatory and political risks may not be reflected in its ESG scoring. For example, companies pursuing alternative energy sources may score high on ESG factors but still face significant political and regulatory risk owing to heavy reliance on current government policy.").

[118] *See* discussion *supra* note 19.

[119] *See* KRISTIN L. PARKER & LATRICE M. BAPTISTE, CHAPMAN INSIGHTS, THE ROLE OF ESG RATINGS PROVIDERS IN ASSESSING ESG PERFORMANCE AND RISKS 2 (May 25, 2021), https://www.chapman.com/media/publication/1090_Chapman_Insights_ESG_Ratings_Providers_052521.pdf ("[A]ll of the major credit ratings agencies, including Fitch, S&P, and Moody's, factored ESG criteria into their credit ratings process long before the development of their ESG rating products.").

[120] *See* Kuratek et. al., *supra* note 56 ("The growing interest in ESG metrics has meant that the number of ESG raters has grown exponentially, making it difficult for many companies to understand how each 'rater' calculates a company's ESG score."); *supra* note 118 and accompanying text.

financial performances.[121] This market confusion leads to some ESG investing-objectors attributing added costs to ESG investments.[122] For example, the concern that ESG investing leads to added cost because it decreases portfolio diversification is in part caused by the lack of uniformity and precision of terms for describing the investments.[123] The wide-ranging difference between passive and active investment strategies adds to the complication of measuring performance.[124] But a "landmark report"[125] from 2005 found that, because "the links between ESG factors and financial performance are increasingly being recogni[z]ed," integrating ESG factors "so as to more reliably predict financial performance is clearly permissible and is arguably required in all jurisdictions."[126] Despite this, the performance and overall metrics of ESG funds will remain difficult to evaluate without a standardized ESG disclosure framework to reference.

III. ESG DISCLOSURES IN THE UNITED STATES

Due to the variety of state and federal laws regulating investment activities in the United States, their brief summary requires generalization.[127] Even with this variety, one common debate still persists over what ESG disclosures are required under

---

[121] *See* Jon Hale, *Does Sustainable Investing Help or Hurt Returns?*, MORNINGSTAR (Dec. 7, 2017), https://www.morningstar.com/articles/839607/does-sustainable-investing-help-or-hurt-returns (finding that ESG investing strategies "outperform the overall universe").

[122] *See, e.g.*, Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 COLO. L. REV. 731, 750 (2019) (noting that the "concern that SRI necessitates a cost because it imposes a restriction on diversification" is in part caused by the "continuing confusion about the definition of SRI and the lack of precision with which terms describing different investment strategies are used").

[123] *See id.* (noting concerns caused by "continuing confusion about the definition of SRI and the lack of precision with which terms describing different investment strategies are used").

[124] *See* Hale, *Sustainable Funds*, *supra* note 93 (noting how the "wide variety of investment approaches" can be "employed within a passive market-cap-weighted strategy or any number of active strategies, which further complicates performance evaluations").

[125] Townsend, *supra* note 82, at 6.

[126] FRESHFIELDS BRUCKHAUS DERINGER, UNEP FIN. INITIATIVE, A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT 13 (2005), https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf.

[127] *See id.* at 102 ("Given the variety of different federal and state law which regulates the investment behaviour of these different institutional entities, any summary of the relevant US law necessarily involves generalisation.").

Georgia Law Review, Vol. 57, No. 1 [2022], Art. 9

current SEC regulations and laws based on what is material to investors.[128] The discrepancy over what is material is in part due to the "low-regulation environment" and a lack of consistent and reliable ESG data for portfolio companies, asset managers, third-party ESG raters, and investors to rely on to make informed decisions.[129] For certain ESG investment managers, such as pension fund trustees, some scholars and practitioners say the trustees' fiduciary duties now require consideration and disclosure of ESG factors.[130] Others believe that requiring ESG disclosures is "politicization" and should not be mandated by the SEC.[131] They

[128] *See* Laura E. Deeks, *Discourse and Duty: University Endowments, Fiduciary Law, and the Cultural Politics of Fossil Fuel Divestment*, 47 ENVT'L L. 335, 418 (2017) ("[F]iduciary law arguably requires the consideration of ESG factors when doing so addresses a material risk to returns."); David A. Katz & Laura A. McIntosh, *Corporate Governance Update: "Materiality" in America and Abroad*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 1, 2021), https://corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/ ("In the current debate over materiality, two issues should remain distinct: the importance of stakeholder governance and [ESG] on the one hand, and the question of redefining the standard of materiality from a securities law and market perspective on the other.").

[129] Reiser & Tucker, *supra* note 42.

[130] *See* Schanzenbach & Sitkoff, *supra* note 28, at 385 ("[A] growing and influential group of scholars and practitioners, has even taken the position that fiduciary principles require a trustee to use ESG factors."); *see also* Janine Guillot & Jeffrey Hales, *Materiality: The Word That Launched a Thousand Debates*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 14, 2021), https://corpgov.law.harvard.edu/2021/05/14/materiality-the-word-that-launched-a-thousand-debates/ ("[T]he concept of materiality articulated by the US Supreme Court is well-suited to the evolving nature of capital markets and the changing information needs of investors.").

[131] Press Release, U.S. S. Comm. on Banking, Hous., & Urb. Affs., Toomey Presses SEC on New Climate Enforcement Task Force (Mar. 25, 2021) [hereinafter Toomey Presses SEC], https://www.banking.senate.gov/newsroom/minority/toomey-presses-sec-on-new-climate-enforcement-task-force (quoting Pat Toomey's argument that requiring ESG disclosures is "a total abuse of power and a politicization of SEC's disclosure standard")*; see also* Corder, *supra* note 27 ("Unless the SEC plans to force companies to adopt certain models, which there is no precedent for and the organization ill-equipped to do, they have no business deeming the current administration's political priorities as material."); Alexandra Thornton & Tyler Gellasch, *The SEC Has Broad Authority to Require Climate and Other ESG Disclosures*, CTR. FOR AM. PROGRESS (June 10, 2021, 9:00 AM), https://www.americanprogress.org/issues/economy/reports/2021/06/10/500352/sec-broad-authority-require-climate-esg-disclosures/ ("[S]ome companies, business representatives, and their political allies have raised questions regarding both the SEC's authority to require [ESG] disclosures and the overall wisdom of imposing mandatory disclosures for ESG issues. Some have gone so far as to disregard securities laws and regulations to argue that the SEC could or should only require disclosure of information that is financially material to investors.").

argue that what is financially material to the reasonable investor should be of primary importance rather than political opinions about humanity's general welfare.[132] This materiality concept has developed in caselaw based on the views of a reasonable investor, is backed by the Supreme Court,[133] and is a necessary element for actionable greenwashing claims by investors.[134]

This materiality issue matters today because the SEC previously rejected the idea that "disclosure of information describing corporate social practices should be specifically required"—noting how "certain types of information which are of importance only in certain instances have generally not been made the subject of specific disclosure requirements."[135]

In essence, the SEC determined that investors were not interested enough in ESG data to demonstrate it was substantially likely to be considered significant to a reasonable shareholder.[136] Yet, with the rapid growth of investor interest in ESG and the

---

[132] *See* Toomey Presses SEC, *supra* note 131 ("[N]ot if it conforms to the woke Left's opinion about what's best for humanity's general welfare.").

[133] *See, e.g.*, TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) (holding that a fact is material if there is "a substantial likelihood that the . . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"). Materiality determinations require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him." *Id.* at 450; *see also* Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, Keynote Remarks at the 2021 ESG Disclosure Priorities Event: Living in a Material World: Myths and Misconceptions About "Materiality" (May 24, 2021) [hereinafter Lee, Keynote Remarks], https://www.sec.gov/news/speech/lee-living-material-world-052421 ("Although the SEC must craft the rules, and companies . . . must comply with them, the viewpoint of the reasonable investor is the lens through which we all are meant to operate. . . . [T]hose with the money are the ones who decide how to spend it. And there is a clear corollary to that point—reinforced by Supreme Court precedent—which is that investors are also the ones who decide what information they need to make those choices." (footnotes omitted)).

[134] *See supra* Section II.A.*2*.

[135] *See* Notice of Comm'n Conclusions & Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5627, Exchange Act Release No. 11773 (Oct. 14, 1975).

[136] *See, e.g.*, Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1267 (1999) (noting that the SEC determined "there was not enough investor interest in expanded environmental . . . disclosure to demonstrate that this information was substantially likely to be significant to a reasonable shareholder—that is, that it was material").

Georgia Law Review, Vol. 57, No. 1 [2022], Art. 9

developing rise of investors' greenwashing claims,[137] the SEC has recently reconsidered mandatory ESG disclosures.[138]

The SEC began addressing the materiality debate[139] and took various actions in 2021, first by focusing on ESG disclosures.[140] In February 2021, SEC Acting Chair Allison Herren Lee directed the Division of Corporation Finance to enhance its focus on climate disclosures.[141] On March 4, the SEC created a Climate and ESG Task Force to develop initiatives to recognize ESG-related misconduct, initially focusing on identifying "any material gaps or misstatements in issuers' disclosure of climate risks under existing rules."[142] On July 28, SEC Chair Gary Gensler announced the agency will "develop a mandatory climate risk disclosure rule proposal" in late 2021,[143] though a Proposed Rule was not published

[137] *See* discussion *supra* Section II.A.*2*.

[138] *See* discussion *infra* notes 139–148.

[139] *See* Lee, Keynote Remarks, *supra* note 133 ("As we all debate and deliberate over these issues, a great deal of attention is focused on the concept of materiality. Materiality is a fundamental proposition in the securities laws and in our capital markets more broadly."); *cf.* JENNIE MORAWETZ ET AL., KIRKLAND & ELLIS, THE SEC'S RECENT AND PLANNED ACTIVITY ON CLIMATE CHANGE DISCLOSURES: WHAT COMPANIES CAN DO TO PREPARE (Oct. 1, 2021), https://www.kirkland.com/-/media/publications/alert/2021/09/the-secs-recent-and-planned-activity-on-climate-ch.pdf ("According to Commissioner Lee, the concept of materiality instead arises under the anti-fraud rules, where it functions as a limit on anti-fraud liability. . . . [O]ther recent disclosure changes that do not hinge on materiality were congressionally mandated . . . and the concept of materiality could be relevant under Section 23 of the Exchange Act, which requires the SEC to make a cost-benefit analysis during the rulemaking process to ensure a new rule does not 'impose a burden on competition not necessary or appropriate' to advance the purposes of securities law.").

[140] *See* Brian Breheny et al., *SEC Chair Gensler Outlines Roadmap for Climate Risk Disclosure Rulemaking*, JD SUPRA (Aug. 3, 2021), https://www.jdsupra.com/legalnews/sec-chair-gensler-outlines-roadmap-for-7630261/ ("Chair Gensler pointed to strong investor demand as the main driver behind the SEC's expected climate risk disclosure rulemaking.").

[141] *See* Statement, Allison Herren Lee, Comm'r, U.S. Secs. & Exch. Comm'n, Statement on the Review of Climate-Related Disclosure (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure ("Today, I am directing the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings.").

[142] *See* Press Release, U.S. Secs. & Exch. Comm'n, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 (noting how the SEC "today announced the creation of a Climate and ESG Task Force in the Division of Enforcement" with their initial focus on current misconduct of climate risk disclosure).

[143] Gensler, *supra* note 9.

until April 11, 2022,[144] and final action is not anticipated by the SEC until later in 2022.[145] This rulemaking process requires public feedback on the proposed rules, and the subsequent development of final enforceable rules takes some time.[146] It also comes on the heels of legislation introduced by Congress, namely the Climate Risk Disclosure Act, which would require the SEC to issue ESG disclosure rules if it does not do so otherwise.[147] On October 21, 2021, SEC Chair Gensler affirmed that "investors want to know more about climate risk" and that the SEC "has a role to play" in

---

[144] Since this Note's initial writing, the SEC has released its Proposed Rule mandating corporate climate disclosures. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (providing the SEC's Proposed Rule). However, debate exists as to whether the Rule would violate the major questions doctrine, with SEC Commissioner Hester Peirce dissenting to the Rule and twenty-four State Attorneys General objecting in a comment letter. *See* Hester M. Peirce, SEC Comm'r, *We Are Not the Securities and Environment Commission—At Least Not Yet* (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 ("We do not have a clear directive from Congress, and we ought not wade blithely into decisions of such vast economic and political significance as those touched on by today's proposal."); Letter from Att'ys Gen. of the States of West Virginia, Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and Wyoming 1 (Jun. 15, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131409-301574.pdf (noting that the SEC's Proposed Rule is an "ill-advised misadventure into environmental regulation").

[145] SEC, CLIMATE CHANGE DISCLOSURE, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3235-AM87 (last visited Oct. 24, 2022).

[146] *See* JOHN W. WHITE, MATTHEW MORREALE & MICHAEL ARNOLD, CRAVATH, SWAINE & MOORE LLP, NEW INSIGHTS INTO THE SEC'S CLIMATE CHANGE DISCLOSURE RULEMAKING 4 (Aug. 6, 2021), https://www.cravath.com/a/web/3qjVzkCEz9HbQBfST82db6/34i9Me/cravath-new-insights-into-the-secs-climate-change-disclosure-rulemaking.pdf ("Even after completing the significant amount of work that will lead to a proposal being presented to the Commission by year-end, there will be a number of steps required for the SEC to collect feedback, prepare and adopt a final rule and establish an effective date.").

[147] *See* Brett Thorpe, *The SEC's Rulemaking Agenda: ESG*, JD SUPRA (June 29, 2021), https://www.jdsupra.com/legalnews/the-sec-s-rulemaking-agenda-esg-4873903/ ("Congress has also been stirred to action having introduced the Climate Risk Disclosure Act, which would require the SEC to issue rules requiring an array of climate disclosures, including emissions, fossil fuel-related assets, impact of climate change on company valuation, and risk management strategies related to climate change.").

Georgia Law Review, Vol. 57, No. 1 [2022], Art. 9

facilitating any climate disclosure requirements.[148] At the same time, concerns within the SEC over the considerations regarding ESG disclosures persist and include those of SEC Commissioner Hester Peirce, who suggested that the SEC has not taken a position on ESG disclosure yet partly because "defining ESG factors is value laden and would involve confronting contentious political issues."[149]

In addition to recent SEC actions, the Department of Labor (DOL) began addressing ESG investing in the context of retirement funds by requiring fund managers to only consider "pecuniary factors."[150] After the changeover from the Trump to the Biden administration, however, the DOL announced it does not plan to enforce the Trump-era rule.[151] More recently, the DOL's Employee Benefits Security Administration (ESBA) proposed a rule that explains fund managers' consideration of ESG factors under the Employee Retirement Income Security Act (ERISA) of 1974, which closed its comment period on December 13, 2021.[152]

The inherent nature of fiduciary duties may complicate the ability to measure and regulate disclosures of ESG risk.[153] Due to the high standard of fiduciary duties, certain asset managers, like active pension fund trustees, must typically aim to maximize

---

[148] Gary Gensler, Chairman, U.S. Sec. & Exch. Comm'n, Statement Before the Financial Stability Oversight Council (Oct. 21, 2021), https://www.sec.gov/news/public-statement/gensler-statement-financial-stability-oversight-council-102121.

[149] Schanzenbach & Sitkoff, *supra* note 28, at 436 (citing Hester M. Peirce, *SEC Commissioner Airs Her Beef with Stakeholders*, CLS BLUE SKY BLOG (Sept. 26, 2018), https://clsbluesky.law.columbia.edu/2018/09/26/sec-commissioner-airs-her-beef-with-stakeholders/).

[150] *See* Financial Factors in Selecting Plan Investments, *supra* note 19 ("[A] fiduciary's evaluation of an investment [or investment course of action must] be focused only on pecuniary factors."); *see also* Reiser & Tucker, *supra* note 42, at 1926 (describing how the DOL can act as a "shadow securities regulator through its oversight of ERISA-governed plans").

[151] *See* Stephen M. Humenik & Michael G. Lee, *Environmental Considerations in Financial Regulation*, A.B.A.: BUS. L. TODAY (Oct. 21, 2021), https://businesslawtoday.org/2021/10/environmental-considerations-in-financial-regulation/ ("The EBSA under President Biden had already announced, in March 2021, that it would not enforce the ESG Rules.").

[152] *See id.* ("On [October 14,] 2021, the EBSA published a proposed rule . . . that clarifies the consideration of ESG factors by fiduciaries under [ERISA] of 1974. The comment period for the ESG Proposed Rule closes on [December 13,] 2021.").

[153] *See* Kolakowski, *supra* note 96 ("Early adopters of sustainable investing find that, because of excessive short-term focus, the markets have been slow to price in risks related to sustainability.").

returns of the fund.[154] Implementing a short-term aim to maximize funds can lead to greater capitalization of the primary drivers of the climate crisis,[155] running directly against eco-conscious investors' aims. The overarching goal of maximizing short-term returns conflicts with the long-term considerations that ESG investing requires.[156] Because of this short-term focus, markets are slower to price in long-term risks, which may not be reflected in stock prices until further down the road.[157] As current concerns grow, regulators should implement a uniform ESG disclosure framework to address the United States' unique lack of mandatory standardized reporting to allow asset managers to incorporate and disclose ESG factors more consistently and better inform investors. Looking at other nations' frameworks can help guide this process.

IV. COMPARATIVE ANALYSIS OF ESG DISCLOSURE FRAMEWORKS

Several entities have tried to create a global framework for sustainability reporting. Most notably, the International Financial Reporting Standards Foundation recently introduced a new global standard-setting board—the International Sustainability Standards Board (ISSB).[158] The ISSB is tasked with developing a

---

[154] *See* Jason Fernandes & Janelle Orsi, Commentary, *Rethinking Retirement Savings*, 134 HARV. L. REV. F. 348, 350 (2021) ("The prevailing judicial approach to this problem is to require trustees to maximize returns of the fund, collapsing the various interests of plan beneficiaries into a single monetary goal.").

[155] *See id.* at 348 ("ERISA's strict fiduciary rules have funneled assets into the industries that have been the primary drivers of the climate crisis and rising inequality, ultimately harming the people the statute is meant to protect.").

[156] *See* Practical Guide to Corporate Governance and Accounting ¶ 1632, *supra* note 23 ("Looking at risk from an ESG point of view means looking toward the horizon for risks that threaten the long-term profits and value of an enterprise. The concern is not earnings per share for the next quarter, next year, or even next five years. It looks toward generational risks that threaten the careers of young people just joining the enterprise, the retirement benefits of those leaving the enterprise . . . and long-term investors.").

[157] *See* Kolakowski, *supra* note 96 (explaining that a short-term focus slows pricing in of sustainability-based risks).

[158] *See IFRS Foundation Announces International Sustainability Standards Board, Consolidation with CDSB and VRF, and Publication of Prototype Disclosure Requirements*, IFRS (Nov. 3, 2021), https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/ (announcing the creation of ISSB to "develop—in the public interest—a comprehensive global baseline of high-quality sustainability disclosure standards to meet investors' information needs").

global standard of ESG disclosure requirements.[159] Although the ISSB proposed a set of draft requirements in March 2022,[160] its impact on investors will not occur until national and regional regulators adopt the standards, which could take years.[161] To speed up this process, ISSB offices will be placed around the world including Germany, Canada, Great Britain, and the United States, with discussions about adding offices in China and Japan.[162]

Other global standards currently in place include those from the CFA Institute, a non-profit of investing professionals that developed its *Global ESG Disclosure Standards for Investment Products* to eliminate the non-standardization of global reporting and to encourage mutually reinforcing solutions for all investment types.[163] Additionally, two of the most used sustainability reporting standards are the Sustainability Accounting Standards Board (SASB) Standard[164] and the Global Reporting Initiative (GRI)

[159] *See id.* ("[T]hese developments create the necessary institutional arrangements . . . and lay the technical groundwork for a global sustainability disclosure standard-setter for the financial markets.").

[160] *See* IFRS, [DRAFT] IFRS S1 GENERAL REQUIREMENTS FOR DISCLOSURE OF SUSTAINABILITY-RELATED FINANCIAL INFORMATION 22–39 (Mar. 2022), https://www.ifrs.org/content/dam/ifrs/project/general-sustainability-related-disclosures/exposure-draft-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information.pdf. (providing proposed guidelines for disclosing sustainability-related financial information).

[161] *See* Brendan Bailey & Edward Ivey, *New Sustainability Standards Board to Develop Global Sustainability Disclosure Standards*, JD SUPRA (Dec. 10, 2021), https://www.jdsupra.com/legalnews/sustainability-standards-board-to-2294194/ (discussing ISSB's formation and noting that "widespread adoption and impact of any new standards will take years").

[162] *Id.*

[163] *See* CFA INST., GLOBAL ESG DISCLOSURE STANDARDS FOR INVESTMENT PRODUCTS, at v (2021) https://www.cfainstitute.org/-/media/documents/ESG-standards/Global-ESG-Disclosure-Standards-for-Investment-Products.pdf ("The problems of overlapping investment product categorization, non-standardized terminology, and greenwashing are unlikely to be fully addressed by a single solution. Multiple, mutually reinforcing solutions are required if these problems are to be addressed in all markets around the world and for all types of investment products.").

[164] *See* SASB, ASSET MANAGEMENT & CUSTODY ACTIVITIES: SUSTAINABILITY ACCOUNTING STANDARD 4 (Dec. 2021), https://www.sasb.org/wp-content/uploads/2018/11/Asset_Management_Custody_Activities_Standard_2021.pdf ("SASB Standards are designed to enable communications on corporate performance on industry-level sustainability issues in a cost-effective and decision-useful manner.").

Standard.[165]—although even they have fundamentally different definitions of materiality.[166]

In addition to global standardization efforts, national and regional regulations and guidance are starting to take shape. Countries with regulations or guidance already in place include China, the European Union (EU), Japan, Malaysia, and Mongolia.[167] Those in their drafting stages include Russia, South Africa, and South Korea.[168] Those with regulations or guidance under development include Bangladesh, Canada, Chile, Colombia, the Dominican Republic, India, Indonesia, Kazakhstan, New Zealand, the Philippines, Singapore, Thailand, the United Kingdom (UK), and Vietnam.[169] Those in discussions include Mexico and Sri Lanka.[170]

The EU is the major foreign market mandating ESG disclosure. In 2020, the EU established regulations to develop a framework "to facilitate sustainable investment,"[171] and in 2021, it adopted its Sustainable Finance Package.[172] As part of its overarching climate change action plan, the EU is currently developing its EU Green Taxonomy, though its implementation is still in the works.[173] A

---

[165] *See The Global Standards for Sustainability Reporting*, GRI (2021), https://www.globalreporting.org/standards/ ("The GRI Standards enable any organization . . . to understand and report on their impacts on the economy, environment and people in a comparable and credible way . . . .").

[166] *See* Guillot & Hales, *supra* note 130 ("[T]wo of the most widely used sustainability standards—those of SASB and the Global Reporting Initiative (GRI)—have historically used fundamentally different definitions of materiality. This has led to a market dialogue in which even informed participants must take pains to avoid talking past each other.").

[167] *See Taxomania! An International Overview*, FUTURE SUSTAINABLE DATA ALL. (Sept. 2021), https://futureofsustainabledata.com/taxomania-an-international-overview/ ("The idea of regulatory guidance on what constitutes a green investment has now developed into a veritable 'Taxomania', with numerous taxonomies in development around the world . . . .").

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] Parliament and Council Regulation 2020/852, 2020 O.J (L 198) 13.

[172] *See Sustainable Finance Package*, EUR. COMM'N (Apr. 21, 2021), https://ec.europa.eu/info/publications/210421-sustainable-finance-communication_en (adopting the package as a means to "help improve the flow of money towards sustainable activities across the European Union").

[173] *See EU Taxonomy for Sustainable Activities*, EUR. COMM'N (2021), https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en (discussing the need for and the substance of the EU Taxonomy system).

Georgia Law Review, Vol. 57, No. 1 [2022], Art. 9

recent update occurred on January 12, 2022, when parties could no longer comment on the proposed classification of certain green activities—which included nuclear and gas businesses.[174] Specifically for investment managers, the EU's Sustainable Finance Disclosure Regulation (SFDR) introduced mandatory and optional ESG indicators to guide the financial market currently subject to mandatory sustainability disclosures.[175]

Despite collective disclosure efforts, one challenge EU countries face is the lack of universal regulations.[176] The UK set out new requirements for asset managers in its Sustainability Disclosure Requirements, requiring all investment products to provide their financial activities' environmental impact and substantiate all sustainability claims made of an investment product.[177] In addition, Germany and France's financial regulators, BaFin and AMF, respectively, impose certain sustainability requirements on ESG investors.[178] This supervisory variance creates a "direct risk to investors" as asset managers attempt to manage moving goalposts amongst nations.[179]

In October 2021, the UK published *Greening Finance*, a roadmap with a three-part plan for creating a uniform regime for required

---

[174] *See The EU's Green-Investing "Taxonomy" Could Go Global*, ECONOMIST (Jan. 8, 2022), https://www.economist.com/finance-and-economics/2022/01/08/the-eus-green-investing-taxonomy-could-go-global ("[T]he European Commission proposed classing some nuclear and gas projects as green in its 'taxonomy', a list meant to define sustainable investing. Austria threatened to sue; Germany cried foul. The plan is still likely to win majority support from member states, which have until January 12th to opine.").

[175] *See* NATIXIS, SUSTAINABLE FINANCE DISCLOSURE REGULATION: ENHANCING CLARITY ON SUSTAINABLE INVESTMENT PRODUCTS (2021), https://gsh.cib.natixis.com/api-website-feature/files/download/11802/Appendix_-SFDR.pdf (listing the mandatory and optional environmental and social indicators).

[176] *See* Andrew, *European Regulators*, *supra* note 42 ("Regulatory divergence across Europe on [ESG] investing is a direct risk to investors as asset managers struggle to get to grips with a rapidly changing landscape and moving goalposts.").

[177] *See* Theo Andrew, *Chancellor Sunak Sets Out Sustainability Requirements for Asset Managers Ahead of COP 26*, ETF STREAM (Oct. 18, 2021), https://www.etfstream.com/news/chancellor-sunak-sets-out-sustainability-requirements-for-asset-managers-ahead-of-cop-26/ ("For the first time, [SDR] will require every investment product to set out the environmental impact of the activities in finances and justify any sustainability claims it makes.").

[178] *See* Andrew, *European Regulators*, *supra* note 42 (describing how the UK's SDR comes as "the German and French financial regulators, BaFin and AMF, also impose their conditions on ESG investors").

[179] *Id.*

ESG disclosures to help "build trust and combat potential 'greenwashing.'"[180] Like the EU's SFDR indicators, the roadmap aims to integrate ESG risk information fully across the economy into "every investment decision and the strategy of every business."[181] The roadmap includes plans for mandatory corporate climate disclosures, reporting requirements for asset managers on how they account for sustainability, and the development of a Green Taxonomy.[182]

The UK Green Taxonomy is overseen by the Green Technical Advisory Group (GTAG), an independent body established in June 2021 to provide the government with impartial, non-binding advice.[183] The Taxonomy, like the EU's, has six total environmental objectives that are identical to the EU Taxonomy's objectives: (1) Climate change mitigation; (2) Climate change adaptation; (3) Sustainable use and protection of water and marine resources; (4) Transition to a circular economy; (5) Pollution prevention and control; and (6) Protection and restoration of biodiversity and ecosystems.[184] The Taxonomy will provide technical screening criteria for objectives one and two before the government tables legislation later in 2022.[185]

In substance, the Taxonomy is like a dictionary in that it defines what is sustainable and what is not, contains reference terms, and

---

[180] GREENING FINANCE, *supra* note 16, at 3, 5.

[181] *Id.* at 2.

[182] *See id.* at 3 ([T]his [r]oadmap . . . sets out plans for sustainability-related disclosures that will take forward the government's commitment to a sustainable financial system.").

[183] *See* David Berman et al., *UK Government Releases Roadmap to Sustainable Investing*, LATHAM & WATKINS LLP (Oct. 21, 2021), https://www.globalelr.com/2021/10/uk-government-releases-roadmap-to-sustainable-investing/#_edn2 ("The Green Technical Advisory Group, an independent body established in June 2021, will develop a set of technical screening criteria (TSC) that will underline each of the six environmental objectives."); *New Independent Group to Help Tackle "Greenwashing,"* GOV.UK (June 9, 2021), https://www.gov.uk/government/news/new-independent-group-to-help-tackle-greenwashing ("[GTAG] will provide independent, non-binding advice to the Government on developing and implementing a green taxonomy in the UK context.").

[184] *See* Berman et al., *supra* note 183.

[185] *See id.* ("TSC for objectives 1 and 2 will be subject to consultation in Q1 2022, ahead of the government's plan to table legislation later in 2022 . . . ."); *supra* note 173 (noting that on December 9, 2021, a first delegated act was published specifying how the first two objectives are applicable since January 2022, while a second act for the remaining objectives will be published in 2022).

lists members established by the GTAG.[186] The GTAG aims to develop the Green Taxonomy to help firms adapt through implementation by various sectors of the market.[187] The Green Taxonomy introduces reporting requirements and advances its sustainable labeling system for investment products, which is to be reviewed every three years.[188]

Other countries have implemented their own frameworks. For example, in 2021, China's Ministry of Ecology and Environment proposed company disclosure requirements with the rules' month-long consultation period closing on October 24, 2021.[189] Its first attempt at a mandatory ESG reporting regime imposes low penalties of around $15,536 and aims to establish a nationwide system of environmental disclosures by 2025.[190] The new scheme could help close the gap between China's reporting and that of other major markets requiring some level of ESG reporting, although China's alignment with global reporting standards is unclear.[191] With the vast variation in ESG standards among nations, global development is needed.

---

[186] *See* Jennifer Laidlaw, *New EU ESG Disclosure Rules to Recast Sustainable Investment Landscape*, S&P GLOB. (Aug. 3, 2021), https://www.spglobal.com/esg/insights/new-eu-esg-disclosure-rules-to-recast-sustainable-investment-landscape ("The taxonomy is simply a dictionary, which defines what is sustainable and what is not.").

[187] *See* GREENING FINANCE, *supra* note 16, at 38–39 (summarizing the regulatory approach to each type of entity and product).

[188] *See id.* at 20–28 (summarizing how standards will help define what is green); *see also* Berman et al., *supra* note 183 ("Creators of investment products will face new requirements to report on sustainability impacts, risks, and opportunities, which will form the basis of a sustainability labelling regime.").

[189] *See* Jingwei Jia, *Proposed Rules May Strengthen China's ESG Disclosure*, FITCH RATINGS (Oct. 28, 2021, 5:41 AM), https://www.fitchratings.com/research/corporate-finance/proposed-rules-may-strengthen-chinas-esg-disclosure-28-10-2021 ("Mandatory environmental information disclosure requirements for companies proposed by the [MEE] could improve investor access to data and risk assessment around [ESG] factors in China" and the "MEE's month-long consultation around the new requirements closed on 24 October 2021.").

[190] *Id.*

[191] *See id.* ("The new MEE rules, as put forward, could help close the reporting gap between China and international practice as most major markets require a degree of mandatory reporting on ESG factors. Nonetheless, the extent to which the scheme would be aligned with international reporting standards remains unclear.").

V. REMEDYING ESG INVESTMENT GREENWASHING

A standard ESG framework for asset managers to use will help create consistent and reliable data, better inform investors, and deter greenwashing. An ESG framework will help asset managers draft informative disclosures of their ESG funds and avoid greenwashing litigation. While existing legal avenues are available for greenwashing claims against asset managers, these actions have largely been dismissed or settled.[192] Investors would benefit from asset managers' use of an ESG framework to better assess investments, evaluate potential greenwashing claims, and deter asset managers from making misleading statements when drafting disclosures that investors rely on. This initiative comports with the SEC's Asset Management Advisory Committee's (AMAC)[193] recommendation that the SEC should "take steps to foster meaningful, consistent, and comparable disclosure of material [ESG] matters."[194]

The ESG framework for asset managers should be one part of an overarching reference guide to provide consistent ESG terminology throughout portfolio companies, investment firms, and third-party raters. Like the EU Taxonomy, the overarching guide's goal should be to inform market decisionmakers and investors of activities that significantly impact environmental objectives and help finance the sustainability goals of the United States.[195] To best implement this guide, the existing voluntary framework preparers should update their products to correspond with the new guide to eliminate the many conflicting frameworks currently using fundamentally different definitions.[196] A helpful tool to ensure uniform reporting

---

[192] *See supra* Section II.A.*2*.

[193] The AMAC subcommittee was created "generally to review matters concerning [ESG] issues and make recommendations to AMAC regarding how these matters might pertain to managed investment products." SEC, RECOMMENDATIONS FOR ESG, *supra* note 10, at 1.

[194] *Id.*

[195] *See EU Taxonomy for Sustainable Activities*, *supra* note 173 ("The EU taxonomy would provide companies, investors and policymakers with appropriate definitions for which economic activities can be considered environmentally sustainable. In this way, it should create security for investors, protect private investors from greenwashing, help companies to become more climate-friendly, mitigate market fragmentation and help shift investments where they are most needed.").

[196] *See, e.g.*, *Towards Consistent and Comparable ESG Reporting*, KPMG (2020), https://home.kpmg/xx/en/home/insights/2020/05/towards-consistent-and-comparable-esg-

Georgia Law Review, Vol. 57, No. 1 [2022], Art. 9

should be used, such as one similar to GRI's Report Registration System, which allows reports referencing GRI's standards to be uploaded for processing registration.[197] In addition, reliability can only be achieved if specific types of data points are required so companies cannot selectively choose what to disclose.[198]

The overarching guide and specific ESG framework for asset managers should be developed by building off existing frameworks. This includes, for example, the SEC's *A Plain English Handbook*;[199] global frameworks, such as the CFA Institute's *Global ESG Disclosure Standards for Investment Products*;[200] and other national taxonomies, such as the EU and UK's green taxonomies.[201] Similar to the CFA's globalization goal to support mutually reinforcing solutions, the overarching guide should be largely consistent with an enforceable global standardization once developed, such as the ISSB framework. This will encourage an all-encompassing resolution for investors and ensure that global asset managers do not face varied regulations.[202] This will also help defeat the barrier to quality ESG data created by the inability to compare ESG metrics

---

reporting.html ("A significant number of frameworks and voluntary standards already exist for ESG reporting, even running into the hundreds. But in fact, this is part of the problem. There are so many that for some preparers it can be hard to know which one to follow . . . . But this multiplicity means that it can be challenging to take an objective view because the different frameworks are often not directly comparable.").

[197] *Register Your Report*, GRI, https://www.globalreporting.org/how-to-use-the-gri-standards/register-your-report/ (last visited Sept. 2, 2022).

[198] *See* Larry D. Thompson, *The Responsible Corporation: Its Historical Roots and Continuing Promise*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 199, 223 (2015) (noting how "credible, comparable, and consistent" information cannot be achieved "if companies can effectively rate themselves and disclose only the information that they wish").

[199] *See* SEC, A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS (1998) https://www.sec.gov/pdf/handbook.pdf (providing guidance for how companies should draft their disclosures).

[200] *See* CFA INST., GLOBAL ESG DISCLOSURE STANDARDS FOR INVESTMENT PRODUCTS, *supra* note 163 ("The Global ESG Disclosure Standards for Investment Products . . . are ethical standards based on the principles of fair representation and full disclosure.").

[201] Europe is a leading region for ESG disclosures. *See* TCFD TASK FORCE, *supra* note 15, at 8 ("Europe remains the leading region for disclosures, with average level of reporting across the 11 recommended disclosures from fiscal year 2020 now at half of European companies assessed.").

[202] *See* Marc S. Gerbe & Simon Toms, *ESG: Many Demands, Few Clear Rules*, SKADDEN (Feb. 3, 2021), https://www.skadden.com/insights/publications/2021/02/the-informed-board/esg-many-demands-few-clear-rules ("With no uniform set of ESG standards, companies with global operations may face a hodgepodge of disclosure requirements.").

across industries and countries.[203] It also aligns with the AMAC's recommendation for the SEC to study third-party frameworks and acquire subject matter expertise on how frameworks can provide authoritative guidance.[204]

The core of the ESG framework for asset managers should be a classification system that determines the sustainability of different economic activities for asset managers to report against.[205] The framework should be used by asset managers to reference when integrating ESG investing policies and strategies, labeling their ESG products, and making disclosures of those products to investors. The new framework should be tailored to various specific types of asset managers, ranging from passive to active, to best suit each specific asset manager's needs.[206] This allows managers to support objective statements with concrete sustainability efforts using reliable data and sufficiently relays their internal ESG policies to investors, which will better protect themselves against increasing greenwashing litigation.[207] To encourage asset managers' use of the ESG framework, current disclosure rules sufficiently require investment products labeled as ESG funds or SRI products provide material information on ESG risks without

[203] *See, e.g.*, Alexis See Tho, *SASB Issues XBRL Taxonomy to Improve ESG Reporting Comparability*, FIN. MGMT. (Oct. 14, 2021), https://www.fm-magazine.com/news/2021/oct/sasb-xbrl-taxonomy-esg-reporting-comparability.html ("The lack of comparability of ESG metrics across industries and countries is an oft-cited barrier to quality ESG data that's useful for decision-making.").

[204] *See* SEC, RECOMMENDATIONS FOR ESG, *supra* note 10, at 8 (recommending that the SEC should "accelerate its study of third-party ESG disclosure frameworks for the disclosure of material ESG matters and acquire relevant subject matter expertise to assess how frameworks could play a more authoritative role in a near future").

[205] *See, e.g.*, Elizabeth Meager, *Who Cares If the UK and EU's Green Taxonomies Diverge?*, CAP. MONITOR (Apr. 12, 2021), https://capitalmonitor.ai/institution/government/who-cares-if-the-uk-and-eus-green-taxonomies-diverge/ ("[A] green taxonomy is a classification system that determines the sustainability of different economic activities, which companies then report against.").

[206] *See Reporting Framework Pilot: Next Steps for Signatories*, PRI (Aug. 2, 2021), https://www.unpri.org/reporting-and-assessment/reporting-framework-pilot-next-steps-for-signatories/8159.article (noting how the feedback it received regarding its model framework "varied between modules and between asset owners and investment managers, with some areas flagged as requiring attention or being less suited to specific signatory types").

[207] *See* Baay et. al., *supra* note 52 ("If a company can support concrete statements with concrete sustainability efforts and firm data, the better able they are to neutralize and defend the greenwashing claims that are now flooding the US litigation landscape.").

mandating specific approaches.[208] New regulations mandating reliance on the ESG framework, however, should ensure that asset managers claiming their investments are sustainable actually rely on the ESG framework's guidance when making these claims.[209]

Investor skepticism can also be mitigated through investor reference to the ESG framework.[210] The SEC's Core Disclosure Principles aim to help investors "find what they need, understand what they find, and use what they find to make informed investment decisions."[211] To help investors find what they need, the framework should use plain language like that suggested by the SEC's *A Plain English Handbook* but with all the necessary ESG information. To help investors understand this data and make informed decisions, the framework's classification system should provide specific terms and parameters accurately representing the relationship between the investment strategies and ESG values considered by asset managers.[212] This will help reduce subjective disclosures of asset managers' internal policies and strategies and help mitigate industry inconsistency among ESG disclosures, allowing investors to be adequately informed.[213] Informed investors

---

[208] *See, e.g.*, SEC, FORM N-1A, ITEM 4(B) https://www.sec.gov/files/formn-1a.pdf (last visited Jan. 14, 2022) (indicating funds should "summarize the principal risks of investing in the Fund, including the risks to which the Fund's portfolio as a whole is subject and the circumstances reasonably likely to affect adversely the Fund's net asset value, yield, and total return"); *see also* SEC, RECOMMENDATIONS FOR ESG, *supra* note 10, at 9 ("Existing rules for investment product disclosure and advertising are sufficient and adequate . . . .").

[209] *See* SEC, RECOMMENDATIONS FOR ESG, *supra* note 10, at 7, 9 (noting how the SEC should "provide best practice guidance rather than mandate specific approaches" and that "disclosures would be improved by elements of comparability"); *see also supra* note 29.

[210] *See* Hoch & Franz, *supra* note 17, at 442–43 ("Consumer skepticism stems in large part from false environmental advertising, but it is also attributable to the lack of uniformity in defining environmental terms such as 'biodegradable,' 'recyclable,' and 'ozone-friendly.' This lack of uniformity makes it difficult to know when a consumer product is indeed ecologically sound.").

[211] *Fund Disclosure at a Glance*, SEC, https://www.sec.gov/investment/fund-disclosure-at-a-glance (last visited Jan. 13, 2022).

[212] *See, e.g.*, Dean Ritz, *The Transformative Power of Taxonomies*, WORKIVA (Nov. 18, 2020), https://www.workiva.com/blog/transformative-power-taxonomies ("The big deal of all this is to represent the relationships you know exist between values, and document these relationship[s] . . . . It is a description of how your numbers work without the gridlock of a spreadsheet.").

[213] *See The EU's Green-Investing "Taxonomy" Could Go Global*, *supra* note 174 ("[T]he lack of a shared benchmark means scorecards remain subjective and inconsistent across the industry, which confuses investors. Having a dictionary where they can look up whether an investment can be labelled green puts everyone on the same page.").

can then invest based on sound ESG data and better assess the merits of potential greenwashing claims.[214]

Like the EU and the UK taxonomies, the United States also should address the information gap created by portfolio companies' voluntary disclosures through the creation of a framework specifically suited for portfolio companies of ESG funds. This would accompany frameworks generally suited for all types of public companies registered with the SEC that disclose ESG information. The portfolio company framework should be part of the overarching guide, but one geared for use by companies who decide to disclose ESG merits to ensure the flow of accurate data.[215] This will eliminate the clout from companies increasingly publicizing substantial information about their ESG risks and efforts[216] and the inconsistency frustrating ESG investment producers.[217] This is consistent with the AMAC's recommendation to adopt standards that guide portfolio companies under current regulations.[218] To ensure the appropriate degree of clarity that investment firms need, the portfolio companies' framework should be implemented first.[219] This would prevent the challenge that the EU is currently facing from its investment firms having to comply with the Green

[214] *See, e.g.*, Cherry, *supra* note 74, at 301 ("Given that signals in the market for CSR are noisy, consumers and investors may make assessment mistakes.").

[215] *See* GREENING FINANCE, *supra* note 16, at 7 (describing how phase one of the roadmap "address[es] the information gap for market participants, ensuring a flow of decision-useful information on environmental sustainability from corporates to financial market participants").

[216] *See* SOC'Y FOR CORP. GOVERNANCE & GIBSON DUNN, *supra* note 60, at 3 ("Companies are also increasingly disseminating significant amounts of information about [their ESG] efforts and future commitments.").

[217] *See, e.g.*, Hoch & Franz, *supra* note 17, at 443 (noting frustration of producers from inconsistent environmental terminology).

[218] *See* SEC, RECOMMENDATIONS FOR ESG, *supra* note 10 ("[R]equirements are already in place requiring issuers to disclose material risks, and the AMAC does not recommend changes to the regulatory framework.").

[219] *See* Fisch, *supra* note 27, at 930 (stating how uniform disclosures "would be an important first step toward improving the uniformity, reliability, and comparability of sustainability disclosure and would provide important data to allow the capital markets to evaluate the impact of sustainable business practices"). *But cf.* Kuratek et al., *supra* note 56 ("By understanding the current ESG market raters and methodologies, companies will be able to better align their ESG disclosures with them.").

Taxonomy before the portfolio companies are required to disclose the underlying ESG information.[220]

Another challenge the overarching guide should address is the non-standardization of ESG ratings issued by third parties.[221] By creating one overarching guide containing specific frameworks for asset managers, portfolio companies, and third-party raters, investors can be better informed, and greenwashing can be mitigated.

VI. CONCLUSION

Without any current mandate in the United States regarding ESG disclosures, investment firms promoting ESG investments lack the necessary reliable data to assess portfolio companies' ESG risks objectively and to disclose their ESG strategies accurately to investors. In addition, portfolio companies and third-party raters of ESG funds further add to the confusion of the ESG lexicon. This inconsistency increases the likelihood of potential greenwashing. Investors misled by ESG funds' greenwashing have remedial avenues under existing consumer protection and securities fraud laws. The novel cases against ESG asset managers, however, are backed by thin caselaw—and most greenwashing cases against portfolio companies have been dismissed. Thus, plaintiffs alleging greenwashing of their ESG funds can benefit from a standard ESG framework to help evaluate potential claims. This is especially crucial as exponential ESG information continues to circulate.

Creating an ESG framework is especially important considering the SEC's current rulemaking initiative to mandate ESG disclosures. An effective ESG fund framework should be developed along with those for other specific ESG investments. These frameworks should be part of an overarching guide with additional frameworks for portfolio companies and third-party ESG raters. Even if ESG disclosures for all parties are not mandated, developing a mandatory overarching guide for those wishing to disclose ESG

---

[220] *See The EU's Green-Investing "Taxonomy" Could Go Global*, *supra* note 174 ("[B]ecause of missed deadlines, green-finance firms are being asked to report on their compliance with the taxonomy before companies are required to provide the underlying data, making the job difficult.").

[221] *See* Kuratek et al., *supra* note 56 ("The growing interest in ESG metrics has meant that the number of ESG raters has grown exponentially, making it difficult for many companies to understand how each 'rater' calculates a company's ESG score.").

information is necessary for creating consistent, reliable data. The guide should be developed after studying existing frameworks and considering global standards to account for the increasing demand for ESG investing, the disclosure of ESG data, and the rise of global ESG investments.

Asset managers of ESG funds can benefit from using an ESG framework to determine how they evaluate and incorporate ESG merits into investments they claim as sustainable. Asset managers can then accurately and consistently label, promote, and disclose information about their ESG products. This will ensure consistency among ESG disclosures, allow investors to inform themselves by relying on accurate data, and mitigate greenwashing.