The U.S. Oil and Gas Industry Should Be a Leader and Follow the EU's Lead on ESG Disclosure

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I. WHY DOES ESG MATTER?

Markets now wait with baited breath every January for the annual letter by BlackRock founder and chief executive Laurence Fink.[1] Mr. Fink has taken the lead among his ilk in the investor-led push for wider and deeper ESG (Environmental and Social Governance) disclosures from publicly listed energy companies.[2] When the big three institutional investors (BlackRock, Vanguard, and State Street) are not satisfied with the pace and extent of relevant disclosures about the effects of climate risk on these companies' long term business performance, they side with shareholder-led initiative proxy battles, against management, marking a huge shift in the relationship between management and the institutional

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1. Andrew Ross Sorkin, *BlackRock C.E.O. Larry Fink: Climate Crises Will Reshape Finance*, N.Y. TIMES (Feb. 26, 2020), https://www.nytimes.com/2020/01/14/business/dealbook/larry-fink-blackrock-climate-change.html [https://perma.cc/23LH-SG6V].

2. *Id.*

investors.[3] In many aspects, the investment funds have replaced the U.S. Securities and Exchange Commission (SEC) in regulating ESG disclosures, as the SEC has steadfastly refused to alter its materiality definition in Rule 14a-8.[4]

While ESG disclosure demands have been, and continue to be, aimed at numerous industries, certain sectors such as fast fashion, automotive, and tech have been left scrambling to satisfy these demands more intensely.[5] This Article will focus on energy companies, primarily oil and gas companies, in relation to this changing corporate governance landscape. Further, while social governance issues affect all publicly traded companies, the conversation regarding environmental disclosures affecting climate change have been dominated by energy companies.[6]

The push for ESG disclosures examined here is from the response of the financial community to value-oriented shareholders and the upcoming mythical millennial investors.[7] The reasons underlying the financial community's adoption of these values—whether genuine or a sophisticated yet cynical marketing ploy—is also not considered here.[8]

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3. *See e.g.*, Natalie Nowiski, *Rising Above the Storm: Climate Risk Disclosure and its Current and Future Relevance to the Energy Sector*, 39 ENERGY L.J. 1, 36-37 (2018) (examining the actions of BlackRock, State Street Global Advisors, and the Vanguard Group in shareholder proposals for climate change-related disclosures at the 2017 annual meetings of ExxonMobil, Occidental Petroleum, and PPL Corp.; Ross Kerber, *Vanguard Seeks Corporate Disclosure on Risks from Climate Change*, REUTERS (Aug. 14, 2017), https://www.reuters.com/article/us-vanguard-climate/vanguard-seeks-corporate-disclosure-on-risks-from-climate-change-idUSKCN 1AU1KJ [https://perma.cc/L4JQ-82V2] (discussing Vanguard's recent change toward climate-related disclosures).

4. *See* Roberta S. Karmel, *Disclosure Reform-The SEC Is Riding off in Two Directions at Once*, 71 BUS. L. 781, 793 (2016) (analyzing in detail the evolution of materiality by the SEC).

5. Joe McGrath, *Will Investors Call Time on 'Fast Fashion'?*, ESG CLARITY (Feb. 19), 2019, https://esgclarity.com/will-investors-call-time-on-fast-fashion/ [https://perma.cc/W8 KH-3ZS7]; *Lessons from the Automotive Sector*, PRINCIPLES FOR RESPONSIBLE INVESTING (June 11, 2018), https://www.unpri.org/credit-ratings/esg-in-credit-ratings-lessons-from-the-automotive -sector/3258.article [https://perma.cc/THM4-R9RY]; Lei Qiu & Dan Roarty, *Big Tech Faces Big Test on ESG Issues*, CONTEXT AB (Nov. 25, 2019), https://www.alliancebernstein.com/library/ big-tech-faces-big-test-on-ESG-issues.htm [https://perma.cc/J5QL-TYH6].

6. James Chen, ed. Gordon Scott, *Environmental, Social, and Governance (ESG) Criteria*, INVESTOPEDIA, https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp [https://perma.cc/PSN2-3E89] (last visited Apr. 2, 2020) [hereinafter Chen, *ESG Criteria*].

7. Paul Brest, Ronald J. Gilson & Mark A. Wolfson, *Essay: How Investors Can (and Can't) Create Social Value*, 44 J. CORP. L. 205, 206-07 (2018).

8. *Id.* at 208; Eric Rosenbaum, *Activists Thought BlackRock, Vanguard Found Religion on Climate Change. Not Anymore.* CNBC (Oct. 13, 2019), https://www.cnbc.com/2019/10/13/ blackrock-vanguard-found-religion-on-climate-doubts-are-growing.html [https://perma.cc/MFC7 -6MX4].

This Article implicitly agrees that ESG disclosure is necessary for the U.S. energy industry for a multitude of reasons.

This Article begins with a truncated discussion of the competing ESG standards, which presents an issue of what standard to follow, and what framework would satisfy the consistent demand for climate-related disclosures. Following is a short overview of the current disclosure regime in the United States, governed by the SEC, compared to the newly implemented regime in the European Union (EU). Next, the current regimes on sustainable reporting in the United States, the European Union , Hong Kong, Singapore, and the United Kingdom are considered. The final section suggests a singular path forward for public U.S. oil and gas companies that will both satisfy the calls for wider and deeper climate-change disclosure by the financial community, alongside a critique of the EU's recently implemented disclosure regime.

II. WHAT IS ESG?

ESG has become the new buzzword, the sexy way institutional investors try to woo millennial and value-oriented investors.[9] ESG stands for Environmental and Social Governance; it differs from the usual corporate disclosures in that it focuses on seemingly non-financial disclosures.[10] Investopedia defines ESG as "criteria [that] are a set of standards for a company's operations that socially conscious investors use to screen potential investments. Environmental criteria consider how a company performs as a steward of nature."[11] However, financial analysts are increasingly weighing these non-financial factors to avoid companies that may have greater financial weaknesses because of their environmental practices.[12] Although the Trump Administration and conservative think-tank organizations continue to publicly dispute the science behind climate change,[13] the European Union , South Africa, Singapore, Hong Kong, and the United Kingdom, *inter alia*, have instituted specific sustainability reporting regulations.[14] In China, the government has promulgated

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9. Brest, Gilson & Wolfson, *supra* note 7, at 207.
10. *Id.*
11. Chen, *ESG Criteria*, *supra* note 6.
12. *Id.*; Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 733, 734 (2019).
13. *See* Nowiski, *supra* note 3 at 4.
14. Jerry K.C. Koh & Victoria Leong, *The Rise of the Sustainability Reporting Megatrend: A Corporate Governance Perspective*, 18 BUS. L. INT'L 233, 237 (2017).

internal environmental regulations, as well as encouraged alignment with international sustainability commitments.[15]

A. *The Differing Standards of 'E' Disclosure*

Adopted in 2016, the Paris Agreement established an "enhanced transparency framework" that aims to disclose actions taken by its parties to mitigate climate change.[16] This framework consists of reporting and review to track the progress toward implementing and attaining the individual nationally determined contributions (NDCs).[17] After the June 2017 announcement by the Trump Administration of the U.S.'s intent to withdrawal from the Paris Agreement, several oil and gas companies signed a letter in protest, claiming that "[b]y setting clearer long-term objectives, and by improving transparency, the agreement provides greater clarity on policy direction, enabling better long-term planning and investment."[18] This letter was only the latest in a list of actions energy industry leaders have taken supporting access to reliable information on climate change.[19] Yet another is the Oil and Gas Initiative, an industry effort to comply with the Paris Agreement's goal of limiting temperature rise to less than 2°C; ExxonMobil, Chevron, and Occidental have joined in this effort.[20] Given oil and gas companies' willingness to disclose climate-related information regardless of the current U.S. regime in power, the issue remains what standard to choose.[21]

There are at least 230 corporate sustainability standards initiatives in more than 80 sectors.[22] The lack of a consistent reporting standard means

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15. Virgina Harper Ho, *Corporate Social Responsibility in China: Law & the Business Case for Strategic CSR*, 12 S.C. J. INT'L L. & BUS. 1, 20-21 (2015).

16. *See* Gokce Mete, *Transition of Global Governance of Energy and Extractive Sectors: Proliferation of Transparency & Accountability Initiatives,* OGEL (2018), https://www.ogel.org/article.asp?key=3765.

17. *Id.* at 3-4.

18. Paul Rissman & Diana Kearney, *Rise of the Shadow ESG Regulators: Investment Advisors, Sustainability Accounting, and Their Effects on Corporate Social Responsibility*, 49 ENV'T. L. REP. NEWS & ANALYSIS 10155, 10159 n.38 (2019); *Statement by President Trump on the Paris Climate Accord*, WHITEHOUSE.GOV (June 1, 2017) https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/ [https://perma.cc/KP6Q-LFZU].

19. *See* Rissman & Kearney, *supra* note 18.

20. Hana Vizcarra, *Climate-Related Disclosure and Litigation Risk in the Oil & Gas Industry: Will State Attorneys General Investigations Impede the Drive for More Expansive Disclosures?*, 43 VT. L. REV. 733, 744 (2019).

21. *See* Nowiski, *supra* note 3, at 5.

22. *See* Vizcarra, *supra* note 20, at 739-40; Mr. Carney, Governor of the Bank of England, has stated there are nearly "400 initiatives" that suggest or require the disclosure of companies' greenhouse gas emissions or other environmental data. Cynthia A. Williams, *The Global Reporting*

the information disclosed by oil and gas companies are not easily comparable, and thus are of limited usefulness.[23] Oftentimes, the disclosures resemble a public relations brochure rather than a thorough, detailed report.[24] At least one charity drew attention to the growing use of corporate social responsibility as a public relations shield by energy companies, rather than a tool to address climate change.[25] Another impediment for oil and gas companies is the threat of litigation due to inaccurate disclosure of information that would not otherwise need to be disclosed by strict SEC rules.[26] The proliferation of competing ESG reporting mechanisms also gives rise to the possibility of contradictory statements by a company trying to satisfy different frameworks.[27] While the SEC may be best situated to respond both to the financial community's calls for climate-related disclosures and to the need of the oil and gas industry for efficient reporting via a singular standard, its history suggests such a standard is extremely unlikely to be promulgated.[28]

B. The SEC Regression

The Securities Act of 1933 opted for full disclosure as a method of investor protection.[29] This was based on Justice Brandeis's theory that "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[30] Thus, the Act allowed any corporation to make a public offering as long as it made full disclosure of its business and affairs, which was to be defined by the SEC.[31] This was followed by the Securities Exchange Act of 1934, which "required companies that made a Securities Act-registered public offering, as well as companies listed on

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Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents, 1 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 67, 68 (2016).

23. *See* Gary, *supra* note 12, at 767.

24. Andy Green, *Making Capital Markets Work for Workers, Investors, and the Public: ESG Disclosure and Corporate Long-Termism*, 69 CASE W. RSRV. L. REV. 909, 919 (2019).

25. Terry Macalister, *Social Responsibility Is Just a PR Tool for Businesses, Says Report*, THE GUARDIAN (Jan. 21, 2004), https://www.theguardian.com/business/2004/jan/21/sector.society [https://perma.cc/97WY-9PG3].

26. *See* Nowiski, *supra* note 3 at 17.

27. *Id.*

28. *See generally* Karmel, *supra* note 4.

29. Securities Act of 1933, 15 U.S.C § 77aa (2020).

30. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

31. Karmel, *supra* note 4, at 784.

national securities exchanges, to make annual disclosures."[32] The 1934 Act was based on the philosophy that these periodic disclosures would promote responsible investing.[33] The disclosure requirements today are detailed in two documents: Regulation S-K and Regulation S-X.[34]

Regulation S-K generally contains the substantive disclosures that public companies must make about their businesses, operations, and governance structures, while Regulation S-X contains the rules for accounting and financial disclosures.[35] The SEC has entrusted the development of the rules governing Regulation S-X to the Financial Accounting Standards Board (FASB) and declared that the rules and standards initiated by the FASB have "substantial authoritative support."[36] Therefore, "FASB standards are the only generally accepted accounting principles (GAAP) used for SEC reports."[37] Regulation S-K disclosures are non-financial in nature and include a vast array of matters, from descriptions of the company's business and property, to legal proceedings, to industry guides and oil and gas producers.[38] The concept of materiality, as defined in SEC Rule 405, limits these required disclosures and has become a point of debate for ESG disclosure.[39]

SEC Rule 405 defines materiality thusly: "The term *material* when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered."[40] This qualification is key, as unlimited disclosure can be expensive, unimportant, or divulge competitive information.[41] SEC Rule 10b-5 states that it is illegal to "make any untrue statement of a *material* fact or to omit to state a *material* fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . ."[42]

32. *Id.*
33. *See* Rissman & Kearney, *supra* note 18, at 10160.
34. *See* Karmel, *supra* note 4, at 785.
35. 17 C.F.R. § 229.303 (2020); Karmel, *supra* note 4, at 785.
36. Karmel, *supra* note 4, at 785.
37. *Id.*
38. *See id.*
39. 17 C.F.R. § 230.405 (2020).
40. *Id.*
41. *See* Rissman & Kearney, *supra* note 18, at 10161.
42. 17 C.F.R. § 240.10b-5 (2020).

This concept of materiality is precisely where U.S. courts, oil and gas companies, investors, and independent reporting standards differ.[43]

C. *Court Cases on Materiality*

The leading case on the definition of materiality in the United States is *TSC Industries, Inc. v. Northway, Inc.*[44] There, the majority found the earlier test for materiality, in which "all facts which a reasonable shareholder [m]ight consider important," was too lax.[45] In coming to this conclusion, the Court reasoned that some information may be ". . . of such dubious significance that insistence on its disclosure may accomplish more harm than good."[46] However, the Court stressed that ". . . if the standard of materiality is unnecessarily low . . . management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information" that is antithetical to informed decision-making by investors.[47] The Court was attempting to protect investors from an "avalanche" of pointless disclosure that would hide important—"material"—information.[48] However, this did not clarify the materiality standard; the U.S. Court of Appeals for the Second Circuit attempted to expand on this, noting that "a corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact."[49] The SEC's staunch refusal to include, in its definition of materiality, disclosures that reasonable investors may consider relevant in their decision-making is in direct opposition to similar regimes in other countries.[50] In fact, the SEC has gone further than the Supreme Court and has taken a view toward disclosures based only on financial and short-term considerations of materiality, which directly opposes the view of materiality taken by ESG-oriented investors.[51] While

43. *See* Vizcarra, *supra* note 20, at 756-59; *see also* Rissman & Kearney, *supra* note 18, at 10162-69; *see also* Karmel, *Disclosure Reform*, *supra* note 4, at 814-32.

44. *See* Rissman & Kearney, *supra* note 18, at 10161.

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

46 *Id.* at 448-49.

47. *Id.*

48. *See* Rissman & Kearney, *supra* note 18, at 10161.

49. ZVI Trading Corp. Emp.'s Money Purchase Pension Plan & Trust v. Ross (In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993); *see also* Rissman & Kearney, *supra* note 18, at 10161.

50. Contrasting the U.S.'s emphasis on the "mythical responsible investor," Australia, the European Community, and Hong Kong have all implemented securities laws that focus on the actual impact of the information on the market. *See* Rissman & Kearney, *supra* note 18, at 10161.

51. *Id.* at 10162.

the SEC acknowledges that the definition of materiality may change in line with the evolving standards of what investors deem necessary, it still does not consider it to be a "mandatory need."[52] This remains so, despite solid, growing evidence that improved performance on the very standards investors are clamoring for has a limited but positive relationship with a company's financial returns.[53]

In contrast, the EU issued the EU Accounting Directive, 2013/34/EU, in 2013 as a first step toward financial transparency in this area.[54] The Accounting Directive requires large EU companies in the extractive and logging sectors listed on recognized EU exchanges to report payments made to governments; these payments include taxes paid, production entitlements, royalties, bonuses, and other payments over €100,000.[55] EU Accounting Directive 2013/34/EU has now been implemented in national law in all Member States; France was among the first to do so, and Total and Royal Dutch Shell (Shell) published their first reports in line with this Directive in 2016.[56] For comparison, the SEC repealed regulation requiring companies to disclose such payments to foreign governments in 2017 under the dubious charge that foreign competitors do not disclose the same.[57]

D. *Current Issues Under the SEC Regime*

KPMG's annual surveys on companies' stances toward corporate responsibility merge with that of institutional investors, seeing it as an issue impacting core business risks and opportunities.[58] Chevron conceded that the increased attention to climate change could result in governmental, as well as private, litigation against the company.[59] It is also interesting to note that prior to the Deepwater Horizon catastrophe in 2010, British

52. *Id.* at 10163-164.
53. *Id.* at 10164.
54. Council Directive 2013/34, of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, Amending Directive 2006/43 and Repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L. 182) 19, 19.
55. *Id.* at 44-48.
56. *See* Mete, *supra* note 16, at 12.
57. *Id.*; Samuel W. Cooper et al., *Going, Going, Gone: First Law of the Trump Administration Repeals Regulations Implementing Section 1504 Reporting Requirements for Payments to Governments by Oil, Gas, and Mining Companies*, PAUL HASTINGS INSIGHTS, (Feb. 15, 2017), https://www.paulhastings.com/publications-items/details/?id=488deb69-2334-6428-811c-ff00004cbded [https://perma.cc/V2Q2-T357].
58. *See* Williams, *supra* note 22, at 72.
59. *See* Nowiski, *supra* note 3 at 25.

Petroleum (BP) had achieved high scores on certain ESG standards.[60] In 2005, a deadly explosion at BP's Texas City Refinery killed 15 people and injured 180; and in March 2006, a BP pipeline had a massive spill in Prudhoe Bay, Alaska.[61] Although these incidents were disclosed in ESG reports, investors paid them scant attention. It took the Deepwater Horizon disaster for investors to act.[62] Notwithstanding the inefficiencies and shortcomings of competing ESG standards, existing climate- and safety-related disclosures, which should have raised red flags to the same investors now clamoring for more disclosure, did not alter their behavior until a historical calamity occurred and expensive litigation ensued.[63]

Attorney Generals have stepped into the gap left by the SEC on disclosure of climate-related risks by oil and gas companies.[64] Most states have "blue sky" laws that allow them to investigate energy company nondisclosures of climate risks and then to pursue the companies for corporate liability for climate change.[65] In particular, the Martin Act in New York grants the New York Attorney General the authority to investigate and prosecute securities fraud.[66] Thus, New York has taken the lead on state investigations against oil and gas companies regarding climate change disclosure.[67] In 2007, the New York Attorney General subpoenaed five energy companies over their CO_2 disclosures.[68] Settlements were reached with four of the companies, which included an obligation to provide more disclosure of material risk relating to climate change in their annual SEC filings.[69]

ExxonMobil was the next target; in 2015, the New York Attorney General opened an investigation under the Martin Act, seeking documents covering four decades of research conclusions and communications regarding climate change.[70] The Massachusetts Attorney General began a

60. CFA INSTITUTE, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE ISSUES IN INVESTING 37 (2015).

61. *Id.* at 27.

62. *Id.*

63. *See id.*

64. *See* Vizcarra, *supra* note 20, at 760.

65. *Id.* at 766.

66. New York's Martin Act offers the Attorney General a cause of action. N. Y. GENERAL BUSINESS LAW §§ 352-353 (MCKINNEY 1921).

67. *See* Nowiski, *supra* note 3, at 26.

68. *Id.*

69. *Id.*

70. Nicholas Kusnetz, *Exxon's Climate Fraud Trial Opens to a Packed New York Courtroom*, INSIDE CLIMATE NEWS (Oct. 22, 2019), https://insideclimatenews.org/news/22102019/exxon-climate-fraud-trial-starts-new-york-letitia-james-tar-sands [https://perma.cc/FDX2-5RRG].

similar investigation; both center around evidence that ExxonMobil had long been aware of global warming, forecasted its disastrous results, and funded outside groups to spread misinformation about the role of fossil fuels in climate change.[71]

The New York Attorney General's office's central allegation was that ExxonMobil misled investors by fraudulently employing two sets of books to calculate profits and losses on investments and the risks it faced as governments acted to reduce greenhouse gas emissions.[72] The New York Supreme Court found for ExxonMobil, stating that the New York AG failed to establish that any investor was misled. However, the court did note that "nothing in this opinion is intended to absolve ExxonMobil from responsibility for contributing to climate change,"[73] because the company's greenhouse gas emissions were not on trial.[74] Although ExxonMobil may have scored a public relations triumph, the Massachusetts AG followed through on its investigation, filing a complaint that alleged ExxonMobil defrauded investors and violated the state's Consumer Protection Act.[75]

Cities and counties in California, Colorado, and Washington, faced with the likelihood of destructive results of rising sea levels, have filed civil lawsuits against other oil and gas companies.[76] Rhode Island sued fossil fuel companies in state court in 2018, as did the city of Baltimore. These various suits all seek to hold oil and gas companies accountable for the costs and effects of climate change.[77] While these suits do not target the companies' SEC disclosures—they have all been brought in state court—this undoubtedly negatively impacts the reputation of the industry, as well as having to be disclosed under Regulation S-K.[78]

SEC Rule 14a-8 gives shareholders the right for their proposals to be included in a company's proxy statement, then voted on by all

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71. *Id.*

72. *See* Nowiski, *supra* note 3, at 27; *see also* Kusnetz, *supra* note 70, at 3.

73. People v. Exxon Mobil Corp., No. 452044/2018, 2019 WL 6795771, at *2 (N.Y. Sup. Ct. Dec. 10, 2019).

74. Nicholas Kusnetz & David Hasemyer, *Judge Clears Exxon in Investor Fraud Case Over Climate Risk Disclosure*, INSIDE CLIMATE NEWS (Dec. 10, 2019) https://insideclimatenews.org/news/10122019/exxon-ruling-climate-investor-fraud-new-york-case-impact [https://perma.cc/3BRK-YEGC].

75. David Hasemyer, *Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today*, INSIDE CLIMATE NEWS (Jan. 17, 2020), https://insideclimatenews.org/news/04042018/climate-change-fossil-fuel-company-lawsuits-timeline-exxon-children-california-cities-attorney-general [https://perma.cc/92U5-J7AA].

76. *Id.*; *see* Nowiski, *supra* note 3.

77. *See* Hasemeyer, *supra* note 75.

78. *Id.*

shareholders at the annual shareholder meeting.[79] These shareholder resolutions usually do not win the support of the board of directors and management, and therefore do not pass; however, the recent activism of institutional investors has seen major oil and gas companies pass shareholder resolutions on more substantive climate risk disclosure.[80] For example, at ExxonMobil's 2017 annual shareholder meeting, BlackRock expressed its displeasure with the company's refusal to provide significant disclosure on the effects of climate change on its long-term business performance over shareholders' requests for further disclosure by voting against the recommendations of ExxonMobil's Board of Directors.[81] In 2017, both BlackRock and Vanguard voted to require ExxonMobil to produce a report regarding climate change.[82] In the same vein, BlackRock sided with Occidental shareholders, supporting their proposals because "it was concerned about Occidental Petroleum's pace of disclosure to date."[83] However, these headline-grabbing actions do not herald a new shareholder ally in the ESG disclosure battle.[84] During the 2018 proxy seasons, Vanguard only voted for climate proposals in an up-or-down vote 12 percent of the time; BlackRock voted in favor 10 percent of the time.[85] Even more telling is that the institutional investors do not join investor coalitions like Climate Action 100+, but rather the standard-setting organizations, such as Sustainable Accounting Standards Board (SASB), discussed below, and the Task Force on Climate-Related Financial Disclosures (TCFD).[86] BlackRock and Vanguard voted against all of the U.S. shareholder proposals that were supported by Climate Action 100+.[87] While this would seem, on its surface, a positive development for the oil and gas industry, it does little to relieve it of public pressure on climate change disclosure.

One recent development that may assist the oil and gas industry in forging a standard in the vacuum of leadership by the SEC is the SASB.

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79. 17 C.F.R. § 240.14a-8 (2020).

80. *See* Nowiski, *supra* note 3, at 36.

81. *Id.* at 37.

82. *See* Rosenbaum, *supra* note 8.

83. *Id.*; Ross Kerber, *BlackRock Switch Helps Pass 'Historic' Climate Measure at Occidental*, REUTERS (May 12, 2017), https://www.reuters.com/article/us-blackrock-occidental-climate/blackrock-switch-helps-pass-his-toric-climate-measure-at-occidental-idUSKBN1882AA [https://perma.cc/868H-U344].

84. *See* Rosenbaum, *supra* note 8.

85. *Id.*

86. *Id.*

87. *Id.*

The SASB was founded in 2011 and sets standards for sustainability accounting in ESG reporting by publicly listed companies.[88] In doing this, SASB seeks to furnish information "a reasonable investor considers 'material' to his or her decision-making."[89] Although this is yet another drop in the ocean of competing standards, SASB purports to model its materiality standards on the U.S. Supreme Court's definition of materiality in *TSC Industries, Inc. v. Northway, Inc.,* and this concentration on materiality *as it benefits the shareholder* makes it more favorable to many investors over its close competitors.[90]

III. WHERE THE REST OF THE WORLD IS HEADED

The voluntary reporting process gained attention when the G-20's Financial Stability Board (FSB) created the TCFD in September 2015, whose purpose was "to design and deliver a voluntary standard for disclosure by those companies that produce or emit carbon" and appointed Michael Bloomberg to lead.[91] After eighteen months of intensive and widespread consultation and research, TCFD released its Final Report in June 2017.[92] TCFD anticipates its framework becoming the foundation for better reporting of climate-related issues in financial filings.[93] Significantly, and diametrically opposed to the stance of the rump Administration, the TFCD encourages the implementation of scenario analysis, which includes the Paris Agreement's 2°C Scenario, when analyzing the strength of a company's strategy to climate-related risks.[94]

The EU has also gone in the opposite direction of the U.S. by requiring environmental disclosures. Following the issuance of Directive 2013/34/EU in 2013, the European Commission submitted Directive 2014/95/EU, also called the non-financial reporting directive (NFRD).[95] The 2014 Directive applies to public-interest entities (PIEs) with over 500

88. *See* Karmel, *supra*, note 4, at 814.
89. *See* Rissman & Kearney, *supra* note 18, at 10178.
90. *See* Karmel, *supra* note 4, at 815.; *see also* Rissman & Kearney, *supra* note 18, at 10179.
91. *See* Williams, *supra* note 22, at 68; *see also* Nowiski, *supra* note 3, at 12.
92. *See generally* Nowiski, *supra* note 3, at 11-20.
93. *See id.* at 13.
94. *Id.*; TCFD, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (June 29, 2017), https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf [https://perma.cc/J47P-4T4G].
95. *Non-financial Reporting*, EC, (2020) https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en#companies [https://perma.cc/8F4P-QGR9].

employees.[96] This includes listed companies as well as other companies so designated by national authorities as PIEs, affecting more than 6,000 companies across the EU[97] Under this Directive, the companies covered must publish reports disclosing their policies on environmental protection, anti-corruption and bribery, including a description of the business model, policies, due diligence processes, and other non-financial key performance indicators (KPIs).[98]

The EU next passed the 2014 Directive, which then had to be transposed by the Member States into their national law.[99] However, there is no unified standard or framework followed by the Member States; instead, the companies covered by the 2014 Directive choose a framework to follow in complying with the national legislation.[100] The reporting content of the Directive functions as a *de minimis* requirement; Member States can go beyond these provisions, and many have.[101] In particular, "Safe Harbor" provisions excusing companies refusing to report are absent in the national laws of, *inter alia*, Norway (EEA) and Denmark.[102]

For example, France enacted stricter disclosure provisions than required.[103] The Decree Implementing Article 173-VI of the French Law for the Energy Transition established its climate reporting regime.[104] It was the first G20 state to address specific transition risks (the exposure of the companies to changes caused by the transition to a low-carbon economy) in their financial reporting regulations.[105] In Hong Kong and Singapore, the exchanges, as opposed to the government, have led the movement toward sustainable reporting.[106] In Singapore, general securities law and detailed sustainability reporting rules in the SGX Listing Manual govern reporting.[107] Rule 711A of the Manual "requires every listed issuer to prepare an annual sustainability report, which *must describe* the issuer's

96. *Id.*
97. *Id.*
98. *Id.*; William De Catelle, *European Union Directive 2014/95 on Non-Financial Reporting: A Successful Experimentalist Governance Architecture*, 9 KING'S STUDENT L. REV. 53, 58 (2018).
99. *See* De Catelle, *supra* note 98.
100. *Id.* at 57; 2017 O.J. (C 215) 1, 3.
101. *See* De Catelle, *supra* note 98, at 58.
102. Id.
103. Nowiski, *supra* note 3, at 21.
104. *Id.*
105. *Id.*
106. *See* Koh, *supra* note 14, at 245.
107. *Id.* at 242.

sustainability practices with reference to the following primary components on a 'comply or explain' basis"; the main factors are the "material ESG factors" and the motives behind their inclusion; "the issuer's chosen framework" and motive behind the choice; the issuer's ESG targets regarding its material factors disclosed; and its past performance on its chosen factors.[108] The Hong Kong Exchange (HKEx) has a two-tiered ESG disclosure system, consisting of a strict "comply or explain" provision and a "recommended" disclosure provision.[109]

In the UK, the Companies Act 2006 was amended in 2013 by the Strategic Report and Directors' Report; § 172 requires disclosures to shareholders that will help them assess how the directors have fulfilled their fiduciary duty to promote the viability of the company.[110] The UK regulations focus on the interrelationships with the annual report, including a "fair review of the company's business and a description of the principal risks and uncertainties facing" it.[111] Environmental matters also must be disclosed; the focus on the business, as opposed to a laundry list of items disclosed, is much more valuable to the investor.[112]

The Australian Securities and Investment Commission (ASIC) amended its regulations in 2019, stating recognition that climate change is a systemic risk that could impact a company's financial prospects, and thus put pressure on companies to disclose climate-related information in its reports.[113] Furthermore, the Australian Accounting Standards Board and the Auditing Assurance Standards Board advised companies to consider climate-related risks in its materiality assessments.[114]

South Africa established a non-statutory code of principles and practices on sustainability in its King Code of Governance for South Africa 2009 (the "King Code III").[115] This framework employed is "apply or explain," which is more subtle than the "comply or explain"

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108. *Id.* at 244.

109. *Id.* at 239.

110. Companies Act 2006, c. 46 (Eng.), https://www.legislation.gov.uk/ukpga/2006/46/section/172 [https://perma.cc/RPS9-Z5PS]; *see* Koh, *Rise of Sustainability*, *supra* note 14, at 237.

111. See Koh, *Rise of Sustainability*, *supra* note 14, at 237-38.

112. *Id.*

113. *Climate Risk Disclosure by Australia's Listed Companies*, AUSTL. SEC. & INV. SEC. (2018), https://download.asic.gov.au/media/4871341/rep593-published-20-september-2018.pdf [https://perma.cc/EL84-4VVU].

114. *Climate-related and Other Emerging Risks Disclosures: Assessing Financial Statement Materiality Using AASB/IASB Practice Statement 2*, AUSTL. ACCOUNTING STANDARDS BD., (2019), https://www.aasb.gov.au/admin/file/content102/c3/AASB_AUASB_Joint_Bulletin_Finished.pdf [https://perma.cc/P8WG-UWJC].

115. *See* Koh, supra note 14, at 240.

frameworks employed in other states.[116] The rationale for this choice is a recognition of the fact that, oftentimes, the problem faced by corporate boards is not whether to comply, but instead, how to apply the recommendations in a way that achieves the objective and is still in the best interests of the company.[117] Under the King Code III, integrated reporting, combining sustainability disclosures with financial reporting, is required.[118] This reflects an understanding that strategy, risk, performance, and sustainability are intertwined today.[119] The King IV Report in 2017 moved from the "apply or explain" standard to an "apply and explain" approach.[120] This enables investors and other stakeholders to determine whether a company is in compliance with the principles stated within.[121] The approach of South Africa evinces an acknowledgement of the importance of substance over form and the necessity of a "practical-minded, outcomes-based approach."[122]

IV. A SINGULAR PATH FORWARD

Gallons of ink have been spilled by brilliant academics analyzing the actions of the SEC regarding climate change disclosure, exploring the new EU Directives, and the overall impact and meaning of ESG disclosure.[123] The issue remains, for the publicly listed oil and gas companies who support climate-related financial disclosures, what standard to follow? The plethora of standards, even when narrowed down to the most widely employed, still leave investors unable to compare the findings across the industry.[124] Furthermore, some standards are used in a company's stand-alone sustainability report[125], while other standards are meant to assist a company in integrating ESG factors into its annual reports.[126] It is established that U.S. oil and gas companies can no longer hide behind the

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 241.
121. *Id.*
122. *Id.*
123. For in-depth discussions on the SEC regulations, the EU disclosure regime, and the impact of ESG disclosure for investors, explaining the EU regime in detail, *see* Nowiski, *supra* note 3, at 10-25; *see* Karmel, *supra* note 4, at 781-93 (outlining SEC history and current regulation); *see also* Gary, *supra* note 12, at 734-50, 766-79 (discussing impact investing).
124. *See* Rissman & Kearney, *supra* note 18, at 10178.
125. *See* Gary, *supra* note 12, at 774.
126. *Id.* at 772-79.

SEC's restrictive definition of materiality and many wish to align with the goals of the Paris Agreement.[127] Therefore, following the lead of the EU is the best solution.

The first natural step toward disclosing in accordance with the EU 2014 Directive would be to adopt the SASB framework. The SASB already mirrors the FASB, thus making it much easier for investors and analysts to compare climate-related data across companies.[128] Furthermore, because the SASB is built on the premise of integrated reporting, oil and gas companies in the U.S. should follow its lead by integrating the SASB standards into its annual reports.[129] The costs to companies should be minimal, given that the SASB mirrors the definition of materiality as set by the U.S. Supreme Court.[130]

Second, U.S. oil and gas companies should adopt the TCFD recommendations as a stand-alone ESG report to its consumers. The European Commission has already endorsed a majority of the TCFD's guidelines.[131] Additionally, although private groups, such as IHS Markit, have raised possible materiality risks about sustainability disclosures, companies like Eni, Statoil, and Shell already voluntarily disclose such information and could easily disclose according to the TCFD methodology if they so choose.[132] Since many companies are already disclosing such information, there should be little cost to them to organize these disclosures in conformity with the TCFD framework.[133] Like the SASB standard, this will allow investors to compare across companies and have the additional bonus, for both investors and U.S. companies, to be compared with their brethren in the EU[134]

Third, companies should submit the stand-alone ESG report to the GRI website. GRI compiles these reports across industries; submitting a TCFD-aligned report to the GRI site allows for reputational transparency.[135] There is no cost to companies to do this; furthermore, it can only bolster the reputation of the submitting companies.[136] Shell must disclose according to the EU 2014 Directive, as it is listed on the

127. *Id.* at 766.
128. *See* Karmel, *supra* note 4, at 816.
129. *See* Gary, *supra* note 12, at 772-73.
130. *See* Karmel, *supra* note 4, at 815.
131. *See* Nowiski, *supra* note 3, at 24.
132. *Id.* at 16-18.
133. *Id.* at 18.
134. *See* Green, *supra* note 24, at 914.
135. *See* Koh, *supra* note 14, at 236.
136. Sustainability Disclosure Database, GRI (last visited Mar. 29, 2020), https://database.globalreporting.org/register-report [https://perma.cc/7SFL-LRBQ].

Amsterdam Euronext exchange and has more than 500 employees.[137] According to GRI's Sustainability Disclosure Database, Shell met the GRI Standards in its 2019 Sustainability Report; it also disclosed its reports to GRI from 2001-2016.[138] BP achieved GRI Standards in its BP Sustainability Report 2018; it has submitted its reports to GRI from 2003-2017.[139] Interestingly, its Sustainability Review 2010, published in 2011, which therefore covered the Macondo oil spill, still received an A+ rating on the GRI site.[140]

One caveat to the GRI database is that a report prepared according to standards other than GRI will not fulfill its requirement that its standards have been met, although they do include fields to indicate other widely used standards were employed.[141] If an oil and gas company is already preparing a stand-alone report in compliance with the TCFD framework, there may be extra cost involved to ensure the report fulfills the GRI requirements.[142] There are ample third parties who have been preparing and issuing sustainability reports on behalf of companies and who are partners with GRI.[143]

One potential drawback to the U.S. oil and gas industry following EU standards is the skepticism evidenced by the French accounting authority toward the voluntary reporting regime implicitly employed by the 2014 Directive.[144] The main criticism is that these private reporting standards "simply don't have the reach, legitimacy, and resources for the

137. *See* Directive 2014/95 of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L330) 1, 1-9; *see Royal Dutch Shella*, EURONEXT (Dec. 18, 2020, 5:40 PM), https://live.euronext.com/en/product/equities/GB00B03MLX29-XAMS (showing Shell's listing on the Euronext Exchange); *see also Annual Report 2019*, SHELL (last visited Dec. 18, 2020), https://reports.shell.com/annual-report/2019/strategic-report/our-people.php (showing that Shell has 83,000 employees).

138. *See* Sustainability Disclosure Database, *supra* note 136.

139. *Id.*

140. *Id.*

141. *Id.*

142. *See* Vizcarra, *supra* note 20, at 739.

143. Sustainability Disclosure Database, *supra* note 136.

144. Donato Calace, *Is the Era of ESG Reporting Standards Over?*, DATAMARAN (Sept. 3, 2019), https://www.datamaran.com/blog/esg-reporting-standards-french-report/ [https://perma.cc/S6CP-QPK9]; Patrick de Cambourg, *Ensuring the Relevance and Reliability of Non-financial Corporate Information: An Ambition and a Competitive Advantage for a Sustainable Europe*, AUTORITÉ DES NORMES COMPATABLES (May 2019), http://www.anc.gouv.fr/files/live/sites/anc/files/contributed/ANC/4.%20Qui%20sommes-nous/Communique_de_presse/Report-de-Cambourg_extra-financial-informations_May2019_EN.pdf [https://perma.cc/2J36-HAQQ].

next level."[145] The report urges a "standard reporting structure and nomenclature, involving the classification of non-financial information," and it notes that each standard has inherent issues—the most salient being that, quite simply, none of them adequately capture the way companies do business in the real world.[146] This echoes the concerns of the companies themselves; however, until the EU chooses to enact a unitary framework across all its member states, the U.S. oil and gas industry has little to lose from following its current guidelines.[147]

V. CONCLUSION

U.S. companies across industries have been cut adrift by the Trump Administration's vociferous opposition and denial of every aspect of ESG; regarding the environment, it famously pulled the United States from the Paris Agreement. U.S. oil and gas companies have seen the writing on the wall and have therefore begun to engage with the various independent reporting standards to appease the institutional investors. However, a lack of uniformity hampers their efforts at transparency. The time is ripe for the largest public energy companies to lead in the United States by following the EU Directive, disclosing to shareholders according to the TCFD Framework, and integrating the SASB standards into its annual filings with the SEC. Until the United States aligns itself with the rest of the world, and until all exchanges can choose one framework to follow, this method will best meet the demands of the institutional investors and allow the companies to tell the public that, in the absence of clear leadership from the SEC, they have taken the role of the ESG leader for the United States.

145. *See* Calace, *supra* note 144.
146. *Id.*
147. *See* Nowiski, *supra* note 3, at 15 n.59.