Who Wins? Analyzing Global ESG Reporting Through the EU's Corporate Sustainability Reporting Directive and the Evolving U.S. Scheme

Jonathon Artigues*

I. INTRODUCTION

As corporate actors occupy a larger role in society, the global impact of corporate action and decision-making necessarily expands. In response to increased corporate impact on our world, modern considerations of environmental, social, and governance (ESG) factors seek to inform investors and the public of non-financial company strategies while

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supporting positive, sustainable corporate growth. Many commentators view governmental mandates for disclosure of environmental impacts and ESG concerns as an effective way to influence corporate action.[1] While in some respects ESG disclosure continues to grow in popularity, practical implications of reporting qualitative, subjective, and often novel information have turned ESG into a polarizing subject. This Comment examines recent developments in ESG reporting in both the United States and the European Union EU), focusing primarily on the EU's new Corporate Sustainability Reporting Directive (CSRD) and barriers to convergence with the CSRD in the U.S. While the world may not reach one global, harmonized ESG disclosure system soon, examining the nuances and goals of the two systems provides fertile ground for asking where ESG disclosure is practically headed.

II. WHAT IS ESG?

In the twenty-first century, global initiatives to address change and increasing awareness of the importance of social concerns in corporate governance predominate headlines and reform. As governments and regulatory authorities seek top-down, macro solutions to such problems, many individual investors are turning to their own wallets to do their part.[2] In particular, an increasing number of individual investors and investment funds consider, or purport to consider, ESG factors when making investment decisions.[3] The scope of just exactly "What is ESG?" is ever evolving, but the ESG investing mindset has led to changes in business practices.[4] For example, financial markets have experienced the advent of ESG funds—investment funds that consider, either wholly or in part, governance practices of companies, diversity efforts, and impacts on the environment when crafting investment portfolios.[5] The advent of such

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1. *See* Ann M. Lipton, *Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE JOURNAL ON REGULATION, 499, 532 (2020) (recognizing a potential future goal of the sustainability reporting movement as "empowering noninvestor groups to pressure corporations into improving their behavior").

2. Greg Depersio, *3 Trends to Watch in ESG Investing*, INVESTOPEDIA (Jan. 30, 2023) https://www.investopedia.com/articles/investing/030316/3-trends-watch-esg-investing.asp.

3. *Id.*

4. Elizabeth Pollman, *The Making and Meaning of ESG*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE, ECGI Working Paper Series in Law: Working Paper N 659/2022, 21 (Sept. 2022).

5. *See What's ESG Investing?* VANGUARD, https://investor.vanguard.com/investment-products/esg (last visited Apr. 8, 2023). *See also Institute for Sustainable Investing*, MORGAN STANLEY, https://www.morganstanley.com/what-we-do/institute-for-sustainable-investing?cid=ppc-1700000088238974:700000002375621:58700007479779963:p74360806984&gclid=Cj0KC

funds and the ESG-investing mindset has pressured many companies to make voluntary ESG disclosure standard practice.[6] While the Securities and Exchange Commission (SEC) and other regulatory authorities generally favor increased disclosure of material information, many consider increased disclosure of ESG information by companies a double-edged sword.[7] On one hand, investors will know more about ESG initiatives and ESG effects on companies and thus are more informed when making investment decisions. In addition, companies might increase consideration of ESG factors in business planning if they know they will need to disclose such practices, or the lack thereof, to existing and potential investors.[8] However, while the principle-based objectives of ESG disclosure are objectively positive, the present but less obvious pitfalls of vast ESG disclosure regimes are no less important. As mentioned, foremost among potential problems is the seemingly simple but yet largely unanswered question, "What counts as ESG?"[9] Before turning to the United States' definition- or lack thereof- and the EU's CSRD, familiarizing oneself with ESG as a term is an important first step.

There is no universal consensus as to which ESG factor is the most important, yet many opinion polls generally point to environmental concerns as being prioritized ahead of governance and social considerations.[10] Perhaps environmental concerns are prioritized because of pressing climate demands, or perhaps they are simply the most visible

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6. Bockay et al., *The Real Impact of Voluntary ESG Disclosure Standards*, THE CLS BLUE SKY BLOG, (Aug. 15, 2022), https://clsbluesky.law.columbia.edu/2022/08/15/the-real-impact-of-voluntary-esg-disclosure-standards/.

7. *See id.* (noting that in some cases, the advent of ESG disclosure has led to "inconsistent disclosure practices, deceptive green marketing, and a lack of useful information").

8. Zacharias Sautner, *The Effects of Mandatory ESG Disclosure Around the World*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, (May 10, 2021) (noting that the purpose of mandatory ESG disclosure is to increase ESG information in the public sphere) (available at: https://corpgov.law.harvard.edu/2021/05/10/the-effects-of-mandatory-esg-disclosure-around-the-world/).

9. *See* Jennifer Laidlaw, *Lack of Standardized ESG Data May Hide Material Risks, OECD Says*, S&P GLOBAL: MARKET INTELLIGENCE (Oct. 2, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/lack-of-standardized-esg-data-may-hide-material-risks-oecd-says-60541261.

10. *The Crucial ESG Topics to Focus on Right Now*, ANTEA GROUP (Jan. 16, 2022), https://us.anteagroup.com/news-events/blog/important-esg-factors-strategy-environment-social-governance.

and thus provide a consistent, marketable ESG topic for companies.[11] Regardless, environmental considerations now occupy a large portion of company efforts in recording, planning for, and reporting ESG information.[12] In general, environmental criteria examine how and whether a company safeguards or considers the environment, including company policies that address climate change.[13] At least in the European Union, the definition of environmental impacts is broad and not simply related to company policies or environmental impacts on earning potential.[14] Social factors explore company relationships with employees, suppliers, customers, and communities of operation, while "governance" looks at transparency and information regarding company leadership, executive pay, internal control methods, and shareholder rights.[15]

Importantly, the general term "ESG" is used as a concept in several different, more specific contexts. As mentioned, ESG investment funds use consideration of ESG information when compiling financial instruments for consumer investment.[16] In addition, increasingly more investors identify as ESG decision-makers when choosing where to allocate savings and personal funds.[17] This Comment, however, focuses on the ESG regulatory context and the extent to which authorities mandate or influence disclosure of ESG information. In that context, regulatory authorities determine which ESG factors are material for investors to know while mandating that companies disclose certain ESG information, either generally or just to investors.[18] With the varying perspectives on

11. *See Should ESG Just Focus on Climate Change?*, TEBI (July 25, 2022), https://www.evidenceinvestor.com/should-esg-just-focus-on-climate-change/ (noting that "public concern for man-made climate change is not going away").

12. *Understanding the "E" in ESG*, S&P GLOBAL (Oct. 23, 2019) https://www.spglobal.com/en/research-insights/articles/understanding-the-e-in-esg.

13. *What is Environmental, Social and Governance (ESG) Investing?*, INVESTOPEDIA, (Mar. 22, 2023), https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp.

14. *[Draft] European Sustainability Reporting Guidelines 1*, EUROPEAN FINANCIAL REPORTING ADVISORY GROUP, 1, 5 (Jan. 2022), https://www.efrag.org/Assets/Download?assetUrl=/sites/webpublishing/SiteAssets/Appendix%202.6%20-%20WP%20on%20draft%20ESRG%201.pdf (deeming material those topics that impact people or the environment over the short, medium, or long-term).

15. INVESTOPEDIA, *supra* note 13.

16. *See What's ESG Investing?*, *supra* note 5.

17. Depersio, *supra* note 2.

18. The ESG classification systems and disclosure requirements vary greatly between the United States and the European Union but are both expanding, albeit at different rates. In the U.S., investor knowledge drives disclosure obligations whereas EU mandates are also driven by concerns for non-investor public knowledge. The U.S. does not currently employ mandatory disclosure requirements, but the SEC is expected to introduce the first mandatory ESG disclosure

ESG in mind, an analysis of developing ESG disclosure systems in the United States and EU reveals how ESG operates in practice and how global authorities might, or should, progress in the non-financial disclosure space.[19]

III. ESG DISCLOSURE IN THE UNITED STATES

In the United States, the Securities and Exchange SEC's overarching disclosure guidance relies on materiality, but an understanding of materiality that is different than the materiality standard of the European Union.[20] The SEC generally defines materiality as the extent to which a reasonable investor would consider information important while making investment decisions.[21] This definition naturally presents problems for ESG disclosure because it requires asking exactly what reasonable investors consider important when making financial investment decisions—a question lacking a simple answer in the modern era. For example, does the increasing prominence and availability of ESG information now make it material? At least some studies show that availability of positive ESG information might boost a company's stock

regulations in 2023. *Compare* Katz & McIntosh, *SEC Regulation of ESG Disclosures*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, https://corpgov.law.harvard.edu/2021/05/28/sec-regulation-of-esg-disclosures/ (noting that "The SEC disclosure framework was designed to require reporting of information that is financially material to investors, not information that may be important at a societal level.), *with* Pietrancosta & Marraud des Grottes, *ESG Trends—What the Boards of All Companies Should Know About ESG Regulatory Trends in Europe*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, https://corpgov.law.harvard.edu/2022/11/01/esg-trends-what-the-boards-of-all-companies-should-know-about-esg-regulatory-trends-in-europe/ (highlighting enhanced extra-financial reporting under the CSRD).

19. Throughout this Comment, the terms "non-financial," "ESG," or "sustainability reporting" may be used interchangeably and generally refer to the reporting of information by companies of information beyond the scope of financial reports. It is important to note that the EU makes a specific distinction between "sustainability information" and non-financial information in the CSRD, however for purposes of macro-analysis here the terms may be used interchangeably. *See* Directive (EU) 2022/2464 of the European Parliament and of the Council of Dec. 14, 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC, and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, 2022 O.J., (L 322) 15, 40 [hereinafter "CSRD"].

20. *The U.S. Regulatory Framework for ESG Disclosures*, Client Memorandum, PAUL WEISS, 1, 1 (July 31, 2020) (available at https://www.paulweiss.com/insights/esg-thought-leadership/publications/the-us-regulatory-framework-for-esg-disclosures?id=37633); *See* Lipton, *supra* note 1 at 526 (noting that "Materiality has been defined as the 'cornerstone' of the securities disclosure system.").

21. *Id.*; *Basic, Inc. v. Levinson*, 485 U.S. 224, 236 (1988).

price.[22] Subjectively, many investors now value ESG information,[23] yet many others still may not.[24] It is in this framework that the SEC plans to introduce mandatory ESG disclosure requirements in 2023.[25] Such requirements stand to inject mandated disclosure into a market traditionally marked by voluntary action and continual debate over the materiality of ESG disclosure.[26]

A. *Traditional System: Voluntary Disclosure and Focus on Investors*

Traditionally, the United States has not employed a standardized ESG disclosure framework.[27] Due to increasing pressure from investors over the more recent years of the twenty-first century, many companies have begun to publish ESG information through sustainability reports.[28] While seemingly a positive step, many commentators have identified resulting issues due to the lack of standardization for ESG reporting.[29] In this lens, investors have traditionally criticized the SEC's ESG approach as lacking specific guidance regarding activities that constitute ESG.[30] This hole in guidance stands in stark contrast to the developing EU Taxonomy system for sustainable activities, described in detail later.[31]

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22. *See* Roberta Kwok, *Does Positive ESG News Help a Company's Stock Price?*, KELLOG INSIGHT (Aug. 2, 2021), https://insight.kellogg.northwestern.edu/article/esg-news-market-reaction (relying on the research of George Serafeim and Aaron Yoon to show that in some instances positive ESG information caused a company's stock to rise up to 60 basis points on the day of the information's release; "The market is 'acknowledging ESG is a very important investment.'").

23. Depersio, *supra* note 2.

24. *See* Lipton, *supra* note 1, at 532-33.

25. Katz & McIntosh, *supra* note 18.

26. *Id.*; *see* Michael Copley, *Republicans Plan More Attacks on ESG. Investors Still Plan to Focus on Climate Risk*, NPR (Dec. 29, 2022) (illustrating the political debate over ESG in the U.S. House of Representatives).

27. Clarkin et al., *The Rise of Standardized ESG Disclosure Frameworks in the United States*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, https://corpgov.law.harvard.edu/2020/06/22/the-rise-of-standardized-esg-disclosure-frameworks-in-the-united-states/ (noting also that "any implementation by a U.S. company of an ESG disclosure framework remains voluntary at this time").

28. *Id.*

29. *Id.*

30. *See* PAUL WEISS, *supra* note 20 at 3 ("The principal critique of the SEC's ESG approach from the investor community has been that it gives little guidance as to what impacts should be addressed, and how.").

31. *EU Taxonomy for Sustainable Activities*, EUROPEAN COMMISSION, https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en#:~:text=%E2%80%9CEU%20taxonomy%E2%80%9D.-,What%20is%20the%20EU%20taxonomy%3F,implement%20the%20European%20green%20deal (last visited Apr. 8, 2023) (outlining the six environmental goals of the EU taxonomy system).

The taxonomy system in the EU is relatively novel, developing, and continues to present problems for multi-national companies,[32] yet it provides a foundation by which EU authorities might begin to establish clarity on activities constituting ESG.[33] In contrast, no such explicit system exists in the United States, although the SEC indicated that ESG disclosure regulation would be a focus of SEC Chair Gary Gensler's tenure.[34]

Traditionally, the disclosure standard of the SEC employed for ESG disclosure was rooted in the SEC's 2010 guidance on climate-related disclosure.[35] There, the SEC re-emphasized its principles-based approach to mandatory disclosure by reiterating an approach to materiality rooted in the investor mindset for financial materiality in investing.[36] The guidance did indicate several climate-related topics that may be material to investors, such as legislative and regulatory responses, business and market impacts, and physical effects of climate change for certain businesses.[37] However, the SEC notably did not mandate disclosure of information on any of these topics.[38] Thus, companies have traditionally operated in a U.S. disclosure system with minimal guidelines on ESG reporting. In that space, however, many companies did practice ESG disclosure, albeit voluntarily and without uniform structure across companies.[39] So, while introduction of mandatory disclosure requirements increases compliance burdens for companies, such requirements alleviate the burden on investors to sift through non-uniform disclosures and thus reduces information asymmetry.[40] Such an effect seems to be more in line with the investor-minded perspective of materiality the SEC traditionally employs considering the increasing

32. *See* Jennifer Laidlaw, *Investors Grapple with Lack of Taxonomy Alignment as Final Rules Still to Come*, S&P GLOBAL (Aug. 11, 2021), https://www.spglobal.com/esg/insights/investors-grapple-with-lack-of-taxonomy-alignment-as-final-rules-still-to-come.

33. *See EU Taxonomy*, *supra* note 31.

34. Katz & McIntosh, *supra* note 18.

35. Clarkin, et al., *supra* note 27.

36. *Id.*; *see also* PAUL WEISS, *supra* note 21 (identifying the U.S. materiality standard).

37. Clarkin, et al., *supra* note 27.

38. *Id.*

39. *Id.* ("In the last few years, with more companies publishing sustainability reports and other ESG disclosures, some investors have expressed concern that the lack of a standardized ESG disclosure framework . . . reduces the value of such disclosures.")

40. Krueger et al., *The Effects of Mandatory ESG Disclosure Around the World*, Finance Working Paper N. 754/2021, SWISS FINANCE INSTITUTE 1, 9 (Feb. 2021) (available at: http://ssrn.com/abstract_id=3832745).

number of investors that now value ESG material in financial decision-making.[41]

B. Anticipated 2023 Regulations

Accordingly, the SEC recently proposed rule changes that require companies registering to sell securities to disclose certain climate-related information in registration statements and periodic reports.[42] While some news reports suggest that the SEC is still considering the complete scope of this rule, the SEC has indicated that it intends to finalize the rule in April 2023.[43] The initial target date for implementation of the rule was October 2022, however debates regarding aspects of the proposal such as the definition of Scope 3 emissions[44] pushed the date back to 2023.[45] Further pushbacks are not likely, however, as most investors support the core tenets of the disclosure rules.[46] In addition, the proposed rule was supported by three of the four sitting SEC commissioners and notably recognizes that "climate-related risks have present financial consequences that investors in public companies consider in making investment and voting decisions."[47]

The proposed rule's contents are expected to impose new, mandatory disclosure requirements on SEC registrants in three main categories: material climate impacts, greenhouse gas emissions, and disclosure of any climate transition targets or plans.[48] First, the rule requires disclosure of "any climate-related risks that are reasonably likely

41. Depersio, *supra* note 2.

42. Press Release, U.S. Securities and Exchange Commission, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022) (available at: https://www.sec.gov/news/press-release/2022-46).

43. Elizabeth Beardsley, Federal and State Policies Impacting ESG Reporting Could be Issued in 2023, U.S. GREEN BUILDING COUNCIL (March 6, 2023).

44. Bill Flook, *Scope 3 Emissions Disclosure Emerges as Top GOP Target in SEC Climate Risk Rules*, THOMSON REUTERS (Aug. 24, 2022), https://tax.thomsonreuters.com/news/scope-3-emissions-disclosure-emerges-as-top-gop-target-in-sec-climate-risk-rules/.

45. Zach Warren, *Upcoming SEC Climate Disclosure Rules Bring Urgency to ESG Data Strategy Planning*, THOMSON REUTERS (Jan. 30, 2023), https://www.reuters.com/legal/legalindustry/upcoming-sec-climate-disclosure-rules-bring-urgency-esg-data-strategy-planning-2023-01-30/.

46. Flook, *supra* note 44.

47. Romany Webb, *Key Elements of the SEC's Proposed Climate-Related Disclosure Rule*, COLUMBIA CLIMATE SCHOOL SABIN CENTER FOR CLIMATE CHANGE LAW, (Mar. 23, 2022), https://blogs.law.columbia.edu/climatechange/2022/03/23/key-elements-of-the-secs-proposed-climate-related-disclosure-rule/.

48. *Id.*; Corb et al., *Understanding the SEC's Proposed Climate Risk Disclosure Rule*, MCKINSEY & COMPANY, (June 3, 2022), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/understanding-the-secs-proposed-climate-risk-disclosure-rule#/.

to have a material impact on the registrant's business or consolidated financial statements."[49] This section can be understood as requiring disclosure of physical risks of climate change that a business might be particularly susceptible to, and that could materially affect the business's operational or financial performance.[50] When disclosing physical risks, companies should describe the nature of the physical risk and whether the risk is "acute" event-driven, meaning related to a short-term extreme weather event, or a "chronic" risk arising from sustained changes in climate such as increased average temperatures, sea level rise, drought, or increased wildfire rates.[51] Registrants must also identify the specific locations of at-risk properties by zip code.[52] For example, additional disclosure requirements for water-related risks require that where flooding presents a material risk, the registrant must disclose percentage of buildings, plants, or properties located in flood hazard areas.[53]

As stated previously, significant debate over the inclusion of Scope 3 emission[54] reporting delayed the expected effective date of the new rule to 2023.[55] In addition to these fact-intensive disclosures, the new rule requires that companies identify "how any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook."[56] This requirement adds to the burden of companies on two levels. First, it acts as an additional reporting metric that reporting companies must disclose. However, it also forces companies to now record, evaluate, and publish determinations about how climate issues might affect future strategy and outlook, a determination that can hardly be considered concrete. Logically, one might say that companies should just "give it their best shot" and improve at making such determinations as time goes on. However, it is important to remember the significant implications of making false or misleading statements under the securities laws when disclosing information as a public company.[57] Companies might understandably be opposed to new, mandated disclosure requirements that are inherently qualitative and forward-looking as they

49. Webb, *supra* note 47.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. Scope 3 emissions represent refer to GHG emissions from upstream and downstream activities in a company's value chain. Press Release, *supra* note 42.
55. Flook, *supra* note 44.
56. Press Release, *supra* note 42 (emphasis added).
57. Lipton, *supra* note 1, at 567.

can face legal liability for disclosure statements that are ultimately false.[58] Thus, requiring companies to disclose forward-looking information regarding how climate-related risks might affect strategy necessarily invokes concern for fraud liability, not to mention the general difficulty of the novel practice of arriving at such determinations. Despite the concerns of businesses and the potential issues of introducing mandatory disclosure into the U.S. system, the majority of sitting SEC commissioners supported the proposed rule.[59] One commissioner specifically opposed the rule, however, stating ardently that the new proposal will "undermine the existing regulatory framework that for many decades has undergirded consistent, comparable, and reliable company disclosures."[60] Specifically, Commissioner Peirce was wary of a system in which regulators tell businesses how to run their companies and make determinations of materiality with interests other than those of investors in mind.[61] A system like the one chastised by Commissioner Peirce is eerily similar to that of the EU. Thus, the perspective taken by three of the four commissioners in endorsing mandatory disclosure supports the perspective that the United States has departed from the desire to rely only on financial materiality to investors and may choose to follow expanding perspectives on materiality in Europe.

IV. ESG Disclosure in the European Union

Starting in 2024, companies falling within the ambit of the CSRD will need to operate and record information in a manner consistent with the CSRD's expanded disclosure requirements.[62] While the CSRD is a directive promulgated by the EU, effects of its implementation reach beyond EU borders to companies around the world.[63] The directive significantly expands the requirements and scope of the former non-financial reporting directive within the European Union, the Non-

58. *Id.*
59. Webb, *supra* note 47.
60. Statement, Commissioner Hester M. Peirce, *We Are Not the Securities and Environment Commission—At Least Not Yet*, U.S. Securities and Exchange Commission (Mar. 21, 2022).
61. *Id.*
62. Corporate Sustainability Reporting, Finance, European Commission, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en#:~:text=The%20first%20companies%20will%20have,Sustainability%20Reporting%20Standards%20(ESRS). (last visited Apr. 8, 2023).
63. Bryce Ehrhardt, *US Company Impact of EU ESG Reporting Requirements*, KPMG (Dec. 2022), https://frv.kpmg.us/reference-library/2022/european-esg-reporting-directive.html.

Financial Reporting Directive (NFRD).[64] In addition, the CSRD employs a double materiality standard that requires companies to report ESG considerations and effects in business practices as well as the business's impacts on the environment.[65] A focused analysis of the new directive not only highlights the extent of the disclosure provisions but also potential problems that may arise as the CSRD takes effect, both systemically and for companies. The expansive and novel language of the CSRD will likely result in a costly and time-consuming trial-and-error period for compliance under the CSRD, yet the prominence of the EU market in global business makes "figuring it out" an important goal for major companies. While complex in structure, the EU ESG disclosure system is driven by clear, foundational goals to meet stated environmental objectives.[66] Historically, the EU's system for disclosure of non-financial information[67] can be understood as one of progressive development over the past twenty years, gradually resulting in a more intricate and expansive mandatory disclosure regime.[68] Several operative directives and regulations now shape mandatory disclosure requirements for general companies in the EU, most namely EU Taxonomy, the NFRD, and now the CSRD.[69]

A. *Mapping the System*

EU Taxonomy, the colloquial name for the established EU taxonomy for sustainable activities, is an overarching classification system that establishes a list of environmentally sustainable economic activities.[70] For our purposes, EU Taxonomy is a support system for companies seeking to comply with disclosure requirements under the NFRD, CSRD, and other disclosure regimes in the EU. Foundationally, the EU's purpose in enacting EU Taxonomy demonstrates its driving goals. EU Taxonomy employs a perspective uniquely focused on

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64. Corporate Sustainability Reporting, *supra* note 62.

65. Sebastian Dürr, *The Concept of "Double Materiality" in Sustainability Reporting*, NordESG (June 8, 2022), https://nordesg.de/en/the-concept-of-double-materiality-in-sustainability-reporting/. This double materiality standard is commonly referred to as including "outside-in" and "inside-out" ESG considerations and effects.

66. *See EU Taxonomy*, *supra* note 29.

67. As stated, "non-financial information" or reporting of such information refers to company disclosures of actions, effects, and considerations regarding environmental, social, and governance (ESG) business practices.

68. Corporate Sustainability Reporting, *supra* note 62.

69. *SFDR, NFRD, and CSRD: Guidance on EU Taxonomy*, ESG Enterprise, https://www.esgenterprise.com/esg-reporting/eu-taxonomy-sfdr-nfrd-csrd/ (last visited Apr. 8, 2022).

70. *EU Taxonomy*, *supra* note 29.

reaching climate goals, as it was specifically established to meet the EU's climate and energy targets for 2030 and satisfy the objectives of the European Green Deal.[71] Another EU Taxonomy objective is to prevent "greenwashing" by identifying specific practices that qualify as sustainable activities, thus limiting the ability of entities to reap unwarranted marketing benefits in ESG disclosure.[72] The Taxonomy Regulation and its six specific environmental objectives entered into force on July 12, 2020.[73]

Upon its effectiveness date in 2023, the CSRD amended three existing EU directives and one regulation: Directive 2004/109/EC, Directive 2006/43/EC, and Directive 2013/34/EU.[74] The disclosure requirements of the previous regime, the NFRD, will remain in force until the CSRD rolls out its reporting requirements in 2024, but most large companies and those listed on EU exchanges must now shift their attention to compliance with the CSRD.[75] Over the past two decades, the EU gradually increased both the scope and number of mandated disclosure requirements for companies regarding financial and non-financial information.[76] As investors began to realize the importance of reporting non-financial information following the global economic crisis of the early 2000s, regulators implemented recommendations and mandates for non-financial reporting to various degrees.[77]

The oldest directive amended by the CSRD, Directive 2004/109/EC or the Transparency Directive, is a fundamental directive in the corporate disclosure regime of the EU, but the directive's initial text did not require

71. *Id.*; The European Green Deal expressly addresses Europe's goal to be the first "climate-neutral continent." *See The European Green Deal*, EUROPEAN COMMISSION https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en (last visited Apr. 8, 2023) (showing that The European Green Deal expressly addresses Europe's goal to be the first "climate-neutral continent").

72. *What is the SFDR?*, KPMG (Mar. 9, 2021), https://kpmg.com/ie/en/home/insights/2021/03/what-is-the-sfdr-sustainable-futures.html; Greenwashing occurs when companies purport to make environmental considerations or efforts and actually do not, either completely or in the manner they purport to. Carolynn Edwards, *What is Greenwashing?*, BUS. NEWS DAILY (Feb. 21, 2023), https://www.businessnewsdaily.com/10946-greenwashing.html.

73. *EU Taxonomy*, *supra* note 31.

74. CSRD, *supra* note 19, at 15.

75. Press Releases, *New Social and Environmental Reporting Rules for Large Companies*, EUROPEAN PARLIAMENT (June 21, 2022), https://www.europarl.europa.eu/news/en/press-room/20220620IPR33413/new-social-and-environmental-reporting-rules-for-large-companies.

76. Corporate Sustainability Reporting, *supra* note 62.

77. *See* Denis Noonan, *The Evolution of NFRD into CSRD*, GREENOMY, https://greenomy.io/blog/evolution-nfrd-csrd (noting that "we realized the importance of including more than just financial information in annual corporate reporting").

disclosure of ESG information as modernly understood. The directive did establish fertile ground for later inclusions of ESG disclosure requirements, however, because it stated the foundational belief that transparency of publicly traded companies' activities is essential for the proper functioning of capital markets.[78] The directive recognized that investors need timely and reliable information about business performance and the assets of the companies they invest in.[79] While the initial directive interpreted relevant information about business performance to include primarily financial information,[80] a modern reader can see how the EU, in light of its modern goals, might interpret such goals to include ESG information.[81]

In addition, Directive 2006/43/EC ("Audit Directive") of May 17, 2006 sought to ensure that companies provided a true depiction of business assets, liabilities, and financial position by laying down minimum auditing requirements to improve the reliability of companies' financial statements.[82] Among other instructions, the Audit Directive outlined conditions for Member States to comply with when overseeing statutory audit requirements.[83] The directive outlines the steps Member States must take to oversee auditing of company information and sets standards for quality assurance for the carrying-out of such statutory audits.[84] The directive thus provides technical frameworks for ensuring quality in auditing disclosures made by companies.

The most expansive CSRD additions come through Article 1 of the CSRD, which sets forth modern amendments to Directive 2013/43/EC

78. Transparency Requirements for Listed Companies, Finance, European Commission, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/transparency-requirements-listed-companies_en#transparency.

79. *Id.*

80. Such an interpretation is notably in line with the traditionally perspective on financial materiality in the United States, supporting a potentially fair assumption that the United States can be considered "behind" in its development of a uniform ESG disclosure framework and perspective on non-financial disclosure generally.

81. *Id.;* The Transparency Directive initially required companies to publish information including yearly and half-yearly financial reports, major changes in the holding of voting rights, and inside information which could affect prices of securities. Such information was required to be released "in a manner that benefit[ed] all investors equally across Europe."

82. Directive 2006/43 – Statutory Audits of Annual Accounts and Consolidated Accounts, EU Monitor, https://www.eumonitor.eu/9353000/1/j4nvk6yhcbpeywk_j9vvik7m1c3gyxp/vitgbgik3nyw#:~:text=An%20audit%20firm%20wishing%20to,authority%20in%20its%20home%20country.

83. *See id.*

84. *Id.*

("Accounting Directive").[85] The Accounting Directive was originally intended to simplify accounting processes for companies and improve the clarity and comparability of companies' financial statements within the European Union.[86] Such efforts for harmonization addressed the contents of management reports published by companies and the inclusion of a "corporate governance statement" for entities across all of the Accounting Directive's established categories.[87] The amendments add specific definitions for non-financial reporting terms, namely defining "sustainability matters" as environmental, social and human rights, and governance factors, also including sustainability factors defined in previous directives.[88] The CSRD amendment also acknowledges "key intangible resources," defining the term as referring to "resources without physical substance on which the business model of the undertaking fundamentally depends and which are a source of value creation for the undertaking."[89]

In a communication for the EU's Single Market Act titled "Twelve Levers to Boost Growth and Strengthen Confidence—'Working Together to Create New Growth,'" the European Commission identified that transparency within the EU financial industry should be used to support businesses that choose to "pursue objectives of general interest or relating to social, ethical, or environmental development."[90] To ensure a level playing field within the European Union Single Market and meet its goals, the EU Commission identified the need for a legislative proposal on the transparency of social and environmental information provided by companies in all sectors.[91] In April of 2014, through a memo regarding disclosure of non-financial and diversity information by large companies and groups, the European Commission ("EU Commission") recognized

85. CSRD, *supra* note 19, at 41.

86. News, *European Parliament Publishes New Accounting Directive*, DELOITTE (July 1, 2013), https://www.iasplus.com/en/news/2013/07/eu-accounting-transparency-directives.

87. News, *The New EU Accounting Directive and (Non-) Financial Reporting Obligations*, MCGUIRE WOODS (Feb. 18, 2015), https://www.mcguirewoods.com/client-resources/Alerts/2015/2/New-EU-Accounting-Directive#:~:text=In%20short%2C%20the%20main%20purpose,%2C%20for%20so%2Dcalled%20micro%2D. The Accounting Directive established classifications between micro-entities, small undertakings, medium-sized undertakings, and large undertakings.

88. CSRD, *supra* note 19, at 42.

89. *Id.*

90. Communication from the Commission to the European Parliament, the Council, the Economic, the Economic and Social Committee and the Committee of the Regions, *Single Market Act: Twelve Levers to Boost Growth and Signal Confidence* COM/2011/0206 final, at 14 (Apr. 13, 2011), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0206.

91. *Id.*

that existing EU legislation for non-financial disclosure was both unclear and ineffective.[92] It thus amended the then-current directive on non-financial disclosure, the Accounting Directive, with the stated objective to "increase EU companies' transparency and performance on environmental and social matters" and therefore contribute "effectively to long-term economic growth and employment."[93] Notably, the EU disavowed voluntary disclosure of non-financial information at this stage and opted for mandated disclosure, stating clearly that a voluntary approach is ineffective in achieving its goals.[94] A system mandating certain minimum requirements more effectively suited the stated goals of the EU.[95] The EU implemented its mandatory requirements for disclosure of non-financial information through the adoption of Directive 2014/95/EU, the Non-Financial Reporting Directive.[96]

Specifically, the NFRD required only large companies to provide information regarding (1) environmental matters, (2) social matters and treatment of employees, (3) respect for human rights, (4) anti-corruption and bribery, (5) diversity on company boards.[97] Such disclosure requirements applied to large companies, defined as large public-interest companies with more than 500 employees.[98] The disclosure requirements covered approximately 11,700 companies and groups across the EU, notably including listed companies, banks, insurance companies, and other companies designated by national authorities as public interest companies.[99] The NFRD, as stated, will remain in effect for covered companies until their date of necessary disclosure under the CSRD arrives.[100] In hindsight, a non-financial directive covering only large public-interest companies with more than 500 employees is properly viewed as a small step in the development of a comprehensive ESG

92. *Disclosure of Non-Financial and Diversity Information by Large Companies and Groups- Frequently Asked Questions*, EUROPEAN COMMISSION (Apr. 14, 2014), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_301.

93. *Id.*

94. *Id.* (stating that "[o]ver the years, we have seen the limits of a voluntary approach." and noting that under the current voluntary disclosure regime less than 10% of EU large companies disclosure environmental and social information regularly).

95. *Id.*

96. *Overview of the EU Non-Financial Reporting Directive*, News & Insights, DECHERT LLP (June 16, 2020), https://www.dechert.com/knowledge/onpoint/2020/6/overview-of-the-eu-non-financial-reporting-directive.html.

97. Corporate Sustainability Reporting, *supra* note 62. Information regarding diversity on boards addressed characteristics such as age, gender, educational and professional background.

98. *Id.*

99. *Id.*

100. *Id.*

disclosure system in the EU. However, while expansion of disclosure requirements to meet the broad climate goals of the EU seems logical, the breadth of expansion delivered through the CSRD still may shock many companies.

B. Expansion of Reporting Requirements Under the CSRD

The CSRD extensively expands both the substantive scope of required disclosures for companies and the number of entities now required to make them.[101] Its amendments to existing directives on non-financial reporting were highly anticipated and noted by international law firms.[102] Formally, the CSRD was published on December 14, 2022, in the Official Journal of the European Union as Directive (EU) 2022/2464 of the European Parliament and of the Council.[103] It is important to note that the CSRD is itself a directive and not an EU regulation. While EU regulations are directly applicable and binding in their entirety on all Member States, natural and legal persons, directives are binding with respect to the intended result but require subsequent Member State steps for national implementation.[104] Thus, while companies reporting under the CSRD are required to report in compliance with the European Sustainability Reporting Standards (ESRS),[105] Member States will be free to include additional requirements and enforcement mechanisms such as varying levels of civil liability for infractions upon implementing the CSRD within their country.[106] Therefore, because the CSRD is a directive and not a regulation, companies can expect some variance in reporting

101. *Id.*

102. *See EU Corporate Sustainability Reporting Directive Signed into Law—Implications and Near-Term Compliance Steps for U.S.-Based Multinationals*, ROPES & GRAY (Dec. 20, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/december/eu-corporate-sustainability-reporting-directive-signed-into-law; Client Alert, *The EU Corporate Sustainability Reporting Directive—How Companies Need to Prepare*, LATHAM & WATKINS (Jan. 27, 2023) (available at: https://www.lw.com/admin/upload/SiteAttachments/Alert%203059.pdf).

103. CSRD, *supra* note 19 at 15.

104. European Union Research: Secondary Legislation, New York University Law Library, NYU LAW, https://nyulaw.libguides.com/c.php?g=773841&p=5551674#:~:text=Directives%20are%20binding%20with%20respect,and%20method%20for%20national%20implementation ("Directives are binding with respect to the intended result, but each Member State chooses the form and method for national implementation.").

105. The ESRS are a set of draft standards prepared by the European Financial Reporting Advisory Group (EFRAG) that dictate reporting requirements under the CSRD. *See* Ramon Jubels, *Get Ready for European Sustainability Reporting Standards*, KPMG (Nov. 30, 2022), https://kpmg.com/xx/en/home/insights/2022/05/european-sustainability-reporting-standards-eu-esrs.html.

106. Corporate Sustainability Reporting, *supra* note 62.

requirements and potential civil liability for non-compliance across different Member States beyond the base guidelines of the ESRS.

The CSRD amendments are extensive, but three key aspects highlight the novelty of the directive. First, the CSRD expands the scope of sustainability reporting requirements to new subsets of companies. CSRD, in contrast to the NFRD, will affect large companies and small and medium-sized entities, companies listed and not listed on EU exchanges, and both public and private firms.[107] Second, the CSRD employs a double materiality standard for reporting requirements, tasking companies with demonstrating both how they consider ESG matters in business planning, as well as how changing climate conditions might affect future operations and profitability.[108] Finally, the provisions of the CSRD are notably qualitative and likely cost intensive.[109] For large firms, this presents serious questions about how to measure the necessary metrics and employ vast systems for reporting. For smaller firms, it likely raises questions of whether compliance is practical or even feasible.

1. Expansion of Coverage and Public-Minded Disclosure

First, the CSRD builds on the coverage of the NFRD and expands applicability to all large EU companies, which notably includes the EU subsidiaries of non-EU parent companies,[110] exceeding at least two of the following criteria: more than 250 employees, a turnover greater than €40 million or total assets of €20 million.[111] The CSRD doesn't stop there, as it also applies to any company listed on an EU market, irrespective of whether that company is based in the EU or a non-EU country.[112] This requirement, for companies listed on EU exchanges, also covers all small and medium-sized companies with listed securities, excluding certain

107. Stehl et al., *EU Corporate Sustainability Reporting Directive- What Do Companies Need to Know*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Aug. 23, 2022), https://corpgov.law.harvard.edu/2022/08/23/eu-corporate-sustainability-reporting-directive-what-do-companies-need-to-know/#:~:text=CSRD%20will%20apply%20to%20all,assets%20of%20%E2%82%AC20%20million.

108. Dürr, *supra* note 65.

109. *European Union's Corporate Sustainability Reporting Directive—What Non-EU Companies With Operations in the EU Need to Know*, GIBSON DUNN (Nov. 29, 2022), https://www.gibsondunn.com/european-union-corporate-sustainability-reporting-directive-what-non-eu-companies-with-operations-in-the-eu-need-to-know/ ("The CSRD will require reporting of forward-looking, retrospective, qualitative, and quantitative information . . .").

110. *Id.*

111. *Id.*

112. *Id.*

listed micro-enterprises.[113] In addition, non-EU undertakings with annual EU-generated revenues greater than €150 million and that either have a large or listed EU subsidiary or a significant EU branch,[114] must also now report under the CSRD.[115] In such cases, the subsidiary or branch of the non-EU entity will need to publish CSRD-compliant sustainability reports *for the larger non-EU undertaking* beginning in 2029 from 2028 onward.[116] Finally, and maybe most strikingly, the CSRD introduces reporting standards with general public knowledge in mind, not just that of investors. This fact is highlighted first by the requirement that private firms meeting the criteria must also comply with the CSRD.[117] If investors were the only target audience, as in the U.S., reporting of private companies that do not publicly trade would not be necessary. This aspect of the system stands in most contrast with the United States, which historically imposes reporting requirements only with the knowledge and interests of financial investors in mind.[118] The disclosure regime of the EU, however, now notably requires companies to report generally on such information if they fall within the ambit of the CSRD.[119]

2. Double Materiality

Beyond expanding the demographic of companies covered under CSRD requirements, the CSRD leans on a double materiality perspective in determining which information is deemed material for reporting.[120] Materiality in financial reporting is a concept by which regulators or disclosing companies determine what information will be important to investors or the public when making investment decisions.[121] In the United States, for example, the SEC has historically taken the position that material information is information concerning a company's financial condition or operational results.[122] This finance-focused definition of materiality employed by the SEC is notably narrower in scope than the

113. *Id.*
114. *Id.* A "significant EU branch" is defined as one which generates EUR 40 million in revenue.
115. *Id.*
116. *Id.* (emphasis added).
117. *See id.*
118. Clarkin, et al., *supra* note 27.
119. Gibson Dunn, *supra* note 109.
120. CSRD, *supra* note 19, at 24.
121. *See What is Materiality in Accounting and Why Is It Important*, Business Insights, HBS Online (Jan. 5, 2016), https://online.hbs.edu/blog/post/what-is-materiality (describing materiality as a concept).
122. Lipton, *supra* note 1, at 526.

double materiality standard under the CSRD, which requires undertakings to report financially material information as well as both the "impacts of the activities of the undertaking on people and the environment" and "how sustainability matters affect the undertaking."[123] The CSRD recognizes that the two perspectives for materiality are not often well understood or applied,[124] but goes on to explain that companies should disclose information that is material under both perspectives as well as only one perspective.[125] While this explanation might at first be dizzying, the implication is clear—the EU now deems information material that regards both company effects on people and the environment and "outside-in" impacts of environmental change on operations.

3. Qualitative Reporting Metrics

Finally, use of the double materiality standard leads to inclusion of mandatory reporting metrics that are inherently qualitative, thus adding to the burden companies face in reporting under the CSRD.[126] While entities within the scope of the CSRD will be required to comply with detailed sustainability standards,[127] much of the text of the CSRD reads as largely subjective, particularly at a time when no global standards outline the boundaries of ESG material. While continued guidance for compliance with CSRD is expected, companies expecting to report under CSRD, particularly large companies, likely need to begin implementing systems for measuring and recording relevant sustainability matters. Such a task will be company specific, as reporting timelines vary according to classification under the CSRD.[128] Thus, large companies will be subject to high costs in reporting and smaller companies may lack the capabilities

123. CSRD, *supra* note 19, at 24.

124. *Id.*

125. *Id.*

126. Gibson Dunn, *supra* note 109.

127. Stehl, et al., *supra* note 111. The European Financial Reporting Advisory Group (EFRAG) is continually developing such standards, known as the European Sustainability Reporting Standards (ESRS). The EU Commission is required to adopt the first set of standards by June 30, 2023, specifying information for disclosure in sustainability matters and all reporting areas. A second set of standards is expected in June 2024, adding sector-specific guidance.

128. *Id.* ("For financial years starting on or after 1 January 2024, CSRD will apply to companies that are already subject to NFRD, with the first report expected to be produced in 2025. Large companies that are not presently subject to NFRD will have to apply CSRD from financial years starting on or after 1 January 2025 and therefore report in 2026 on 2025 data. For financial years starting on or after 1 January 2026, CSRD will be rolled out to listed SMEs, albeit subject to an opt-out until 2028, with the report in 2027 being based on 2026 data.").

and expertise necessary to figure out compliance with the qualitative and expansive CSRD metrics.

V. Analysis and Potential for Global Convergence

Pursuing global convergence among mandatory ESG disclosure standards is a stated goal of the regulatory authorities of the EU.[129] In addition, members of the SEC recognize the potential benefits of a uniform, global ESG system.[130] The current schemes, however, are shown to be far from uniform, and although the SEC plans to introduce mandatory requirements this year, the U.S. significantly lags behind the EU in the scope and content of ESG it requires companies to disclose. Adding to the troubles for convergence, barriers such as the U.S. political debate[131] and the SEC's traditional focus on investor knowledge and financial materiality keep global convergence in the near-term an aspirational goal at most. If convergence is not probable, a subsequent, important question asks whether one system might be better suited to address modern goals. Even some inside the SEC support the EU's general view that more disclosure is better because of pressing climate concerns and societal issues.[132] Others might prefer to keep corporate securities disclosure "in its lane" and support expanded ESG disclosure only to the extent that it would aid investor decision-making by actually improving the overall mix of information available.[133] The EU's path is obvious, as it has chosen expanded disclosure focused not only on investors but public knowledge as well.[134] Forging a path in the United States, however, is less simple for different reasons. Most importantly, analysis shows that the decisions made concerning mandated ESG disclosure hinge on and are rooted in a respective regulatory authority's

129. CSRD, *supra* note 19, at 29 ("Union sustainability reporting standards should contribute to the process of convergence of sustainability reporting standards at a global level").

130. John Coates, *ESG Disclosure—Keeping Pace with Developments Affecting Investors*, U.S. Securities and Exchange Commission, (Mar. 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121 (recognizing the virtues of achieving a single, global ESG reporting framework because "ESG issues are global issues").

131. *See* Daniel Crowley and Robert Eccles, *Rescuing ESG From the Culture Wars*, Harvard Business Review (Feb. 9, 2023), https://hbr.org/2023/02/rescuing-esg-from-the-culture-wars (highlighting the controversy).

132. Statement, Commissioner Allison Herren Lee, *It's Not Easy Being Green: Bringing Transparency and Accountability to Sustainability Investing*, U.S. Securities and Exchange Commission (May 25, 2022), https://www.sec.gov/news/statement/lee-statement-esg-052522#_ftn2.

133. Commissioner Hester M. Peirce, *supra* note 60.

134. Gibson Dunn, *supra* note 109.

goals.[135] This proposition is obvious in both the United States and the European Union. The European Union's consistent and concerted effort to address climate change drives much of its mandated disclosure policies.[136] Mandating ESG disclosure to the extent found in the CSRD is only possible where concerted sovereign goals regarding climate are established.[137] In contrast, the United States faces continued political upheaval that drags the country in and out of different perspectives on mitigating climate change.[138] The lack of a consistent leadership perspective on ESG and or climate goals has likely aided in the delay of mandatory ESG disclosure in the U.S., causing its policy to lag behind that of the EU.

In addition, examining the benefits of either system requires asking whether securities and ESG disclosures are tangibly effective methods by which to influence corporate action and achieve climate goals. Many, particularly those with conservative perspectives in the United States,[139] would say that mandatory ESG disclosure clearly is not. In sympathy with this perspective, even some empirical studies have failed to consistently show that more ESG disclosure translates into an overall better information environment.[140] However, because of persisting political debate over whether ESG is important, the most effective route forward might be to shift the paradigm of materiality in the United States altogether. If proponents of mandatory ESG disclosure can prove over time that ESG in fact does have financial relevance, the debate over ESG's importance in general might necessarily end. The U.S. has always

135. *Compare EU Taxonomy*, *supra* note 29 *with* Clarkin, et al., *supra* note 27.

136. *The European Green Deal*, *supra* note 71.

137. *See Climate Change: What the EU is Doing*, Policies, EUROPEAN COUNCIL: COUNCIL OF THE EUROPEAN UNION, https://www.consilium.europa.eu/en/policies/climate-change/ (last visited Apr. 15, 2023).

138. *See* Basseches et al., *Climate Policy Conflicts in the U.S. States: A Critical Review and Way Forward*, CLIMATIC CHANGE 1, 4 (2022) 170:32, (Feb. 16, 2022) (available at https://link.springer.com/article/10.1007/s10584-022-03319-w) ("Democratic control of state governments facilitates policy adoption while Republican leadership acts as a veto point for climate legislation . . .").

139. *See* News Releases, State of Florida, Governor Ron DeSantis Announces Legislation to Protect Floridians from the Woke ESG Financial Scam, (Feb. 13, 2023) (chastising ESG as "arbitrary . . . financial metrics that serve no one except the companies that created them").

140. Sautner, *supra* note 8 ("It remains unclear to what extent these effects of ESG disclosure regulation translate into a better overall information environment."). The lack of such clear data evokes the valid concern that an influx of ESG data might actually hinder the overall mix of company information available to investors through info-dumping and cloud truly material financial information. Such an effect would stand contrary to the stated purposes of the U.S. securities laws. *See* Lipton, *supra* note 1, at 549 (identifying the SEC's discouragement of "less readable disclosure documents" due to inclusion of too much information).

viewed matters of financial relevance to investors as material for disclosure.[141] Thus, firmly fitting ESG into such a category of financial relevance could quell debate. The view that ESG information *is* material is championed by the commissioners that supported the 2023 disclosure regulations,[142] and a large body of research has found correlations between ESG and financial performance, with some financial materiality to ESG considerations showing up in investment portfolios.[143] Interestingly, additional data show that ESG disclosure are actually *more* commonly embraced in common law countries rather than civil law systems.[144] This interesting statistic stands in ironic contrast to the fierce opposition of ESG disclosure in the United States as compared to the EU. At the very least, the EU and the practical effects of an expansive ESG disclosure system can serve as a model for the United States to study as it progresses in the mandatory ESG disclosure space. As the second mover in mandatory ESG disclosure, the United States enjoys this unique advantage and should certainly use it. Regardless of the path the SEC chooses, it is important that regulators remain attuned to the needs of the modern world, both with investor needs and global effects in mind.

VI. CONCLUSION

Regardless of one's stance on mandatory ESG disclosure, the role of corporations in the global progression of climate change, or ESG generally, analysis of the CSRD and the evolving U.S. corporate disclosure system prove that regulators are at a turning point. Anticipated climate disaster, transparency in social issues, and the arch of societal development now push markets in developed countries to consider requiring companies to disclose more than just financial information. Whether the United States continues the path of increasing mandatory ESG disclosure requirements is yet to be seen, as opposition to such a system persists both within the SEC and in the political arena. Yet, because political controversy is a staple of the American system, the battle over ESG in the United States will likely only subside if ESG disclosure becomes widely recognized as important, either through a shift in the U.S. perspective on materiality or a cultural acceptance of global climate concerns. In the interim, however, international companies are tasked with compliance in two very different systems. As many still struggle to

141. Lipton, *supra* note 1, at 526.
142. Webb, *supra* note 47.
143. Pollman, *supra* note 4, at 23.
144. Sautner, *supra* note 8.

know exactly what ESG is, both the EU and United States are beginning to impose mandatory requirements for ESG reporting.