ESG DISCLOSURE IN COMPARATIVE PERSPECTIVE: OPTIMIZING PRIVATE ORDERING IN PUBLIC REPORTING

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ABSTRACT

Demand for corporate non-financial "environmental, social, and governance" (ESG) information from investors and governments is on the rise globally, and leading securities regulators and stock exchanges worldwide now encourage or mandate its disclosure by large firms. However, rising demand has been matched by growing dissatisfaction with ESG informational gaps in financial reports, on the one hand, and the dearth of investment-grade information in corporate sustainability reports and other public sources, on the other. These developments raise questions about whether the Securities and Exchange Commission (SEC) and its counterparts in other jurisdictions should continue to defer primarily to private market-based approaches to ESG disclosure, reform the disclosure framework to expressly address non-financial information, or seek to combine elements of both public disclosure regulation and private ordering in new ways.

This Article anticipates these policy choices by assessing the range of approaches to ESG disclosure that have been adopted in the United States and six other influential jurisdictions: South Africa, Brazil, the European Union, the United Kingdom, Hong Kong, and

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Prior versions of this Article were presented at the National Business Law Scholars Conference, the American Society of Comparative Law Workshop on Comparative Business and Financial Law at Fordham Law School, and the Notre Dame Law School Faculty Colloquium. Many thanks to colleagues, friends, and family for their support and encouragement. All errors and omissions are our own.

mainland China. Drawing on this comparative analysis, we find that a public-private hybrid approach to ESG disclosure is ultimately inevitable, and we argue that optimal approaches for improving the quality and utility of non-financial information must draw on the comparative advantages of both public and private forms of disclosure regulation.

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INTRODUCTION

Demand from investors and governments for corporate non-financial "environmental, social, and governance" (ESG) information is on the rise globally.[1] In 2018, institutional investors representing over US$5 trillion in assets under management joined a petition to the Securities and Exchange Commission (SEC) urging it to adopt new rules regarding ESG disclosure by public companies.[2] These trends reflect mainstream investors' growing recognition of the relationship between material ESG factors and financial risk and return, making the term "non-financial" somewhat of a misnomer.[3] Over the past decade, more than 60

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1 The CFA Institute has defined ESG issues as the "environmental, social, and governance issues that [i]nvestors are considering in the context of corporate behavior." CFA INST. CTR. FOR FIN. MKT. INTEGRITY, ENVIRONMENTAL, SOCIAL AND GOVERNANCE FACTORS AT LISTED COMPANIES: A MANUAL FOR INVESTORS 22 (2008). The terms "ESG disclosure" and "non-financial reporting" (and combinations thereof) are therefore used interchangeably in this Article even though "non-financial" information extends beyond ESG factors to all disclosures beyond the financial statements. On this distinction, see Richard Barker & Robert G. Eccles, *Should FASB and IASB be Responsible for Setting Standards for Nonfinancial Information?* 6-8 (Oct. 12, 2018) (unpublished Green Paper), https://ssrn.com/abstract=3272250 [https://perma.cc/NG3J-2YUP].

2 *See* Petition for Rulemaking on environmental, social, and governance (ESG) disclosure from Cynthia A. Williams, Osler Chair in Bus. Law, Osgoode Hall L. Sch. & Jill E. Fisch, Saul A. Fox Distinguished Professor of Bus. Law, U. Pa. L. Sch. to Brent J. Fields, Sec'y, Sec. & Exch. Comm'n (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf [https://perma.cc/WW7Z-WR42].

3 According to surveys of institutional investors, 70 to 80 percent consider ESG information as important or essential to investment analysis. *See, e.g.*, Matthew Nelson, *Is Your Non-financial Performance Revealing the True Value of Your Business to Investors?*, ERNST & YOUNG 6 (Nov. 29, 2017) [hereinafter ERNST & YOUNG 2017], https://www.ey.com/Publication/vwLUAssets/EY_-_Nonfinancial_performance_may_influence_investors/$FILE/ey-nonfinancial-performance-may-influence-investors.pdf [https://perma.cc/RCY3-R9NW] (indicating that over half of the investors surveyed believe current non-financial information provided by companies is inadequate for meaningful comparison); *Sustainability Goes Mainstream: Insights Into Investor Views*, PWC 6–9 (2014), https://www.pwc.com/us/en/pwc-investor-resource-institute/publications/assets/pwc-sustainability-goes-mainstream-investor-views.pdf [https://perma.cc/T4P7-837R] (determining that over three-quarters of surveyed investors consider sustainability issues to mitigate risk); *Tomorrow's Investment Rules 2.0*, ERNST & YOUNG 13 (2015),

governments[4] and international institutions, including the United Nations,[5] the OECD,[6] the G20,[7] the International Organization of Securities Commissions (IOSCO),[8] the Worldwide Federation of

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https://www.ey.com/Publication/vwLUAssets/ey-ccass-institutional-investor-survey-2015/$FILE/ey-ccass-institutional-investor-survey-2015.pdf [https://perma.cc/753Z-YLVL] (citing analysts and investors who consider ESG factors as important to gauging the risk and value of investments); Kiran Vasantham & David Shammai, *2019 Institutional Investor Survey*, MORROW SONDALI 15–16 (2019), https://www.morrowsodali.com/news/institutional-investor-survey-2019, [https://perma.cc/6DCL-A6GK] (finding that 80 percent of institutional investors support integrating ESG factors into mandatory reporting).

4 *See, e.g.*, Wim Bartels et al., *Carrots & Sticks: Global Trends in Sustainability Reporting Regulation and Policy*, KPMG INT'L ET AL. (2016) (surveying various countries and their reporting standards with respect to ESG factors); *Enterprise Risk Management: Applying Enterprise Risk Management to Environmental Social and Governance-related Risks*, COMM. OF SPONSORING ORG. OF THE TREADWAY COMM'N. & WORLD BUS. COUNCIL FOR SUSTAINABLE DEV. 4, note g (Oct. 2018), https://www.coso.org/Documents/COSO-WBCSD-ESGERM-Guidance-Full.pdf [https://perma.cc/YT8X-63LQ] (citing data showing that over 60 governments have adopted such measures); U.N. Conference on Trade and Development, *World Investment Report 2019*: *Special Economic Zones* 116–124 (2019) (highlighting capital market policies and instruments that promote sustainable development).

5 *See About the PRI Initiative*, PRINCIPLES FOR RESPONSIBLE INVESTMENT https://www.unpri.org/about-pri/about-pri/ [https://perma.cc/U6B3-TZW5] (last visited Sept. 27, 2019) (describing the United Nations' voluntary framework for institutional investors who commit to engaging with corporations on non-financial performance).

6 *See* Organisation for Economic Co-operation and Development [OECD], *Investment Governance and the Integration of Environmental, Social, and Governance Factors* (2017), https://www.oecd.org/finance/Investment-Governance-Integration-ESG-Factors.pdf [https://perma.cc/33J3-LC86].

7 *See Task Force on Climate-Related Financial Disclosures | TCFD – About the Task Force*, TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, https://www.fsb-tcfd.org/about/ [https://perma.cc/EF9L-JUYY] (last visited Sept. 27, 2019) (explaining the mandate of the TCFD and its formation by the G20's Financial Stability Board).

8 *See* Press Release, Sustainable Stock Exch. Initiative, IOSCO having active dialogue on sustainability, (July 9, 2018), https://www.sseinitiative.org/home-slider/iosco-having-active-dialogue-on-sustainability/ [https://perma.cc/J7LY-HQPW].

Exchanges,[9] the International Accounting Standards Board (IASB),[10] and the International Organization for Standardization (ISO),[11] have also considered how to promote non-financial reporting in order to facilitate the valuation of corporate environmental and social risks and advance global sustainable development.[12] Both objectives require that investment-grade ESG information be accessible to investors and other financial market participants.

However, non-financial reporting has historically been largely voluntary and driven by various forms of private ordering, including corporate engagement with shareholders and other stakeholders, reliance on private standard-setters and private governance regimes to promote corporate accountability and transparency, and self-regulation by companies, such as voluntary sustainability reporting and corporate social responsibility (CSR)

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9 *See* James Langton, *WFE Launches Sustainability Working Group | Investment Executive,* INV. EXEC. (Mar. 25, 2014), https://www.investmentexecutive.com/news/industry-news/wfe-launches-sustainability-working-group/ [https://perma.cc/752Z-C3N3] (indicating that stock exchanges from around the world have created a working group to promote sustainable investment); Press Release, The World Fed'n of Exch., The World Fed'n. of Exch. Publishes Five Sustainability Principles for Member Exch. (Oct. 4, 2018), https://www.world-exchanges.org/news/articles/world-federation-exchanges-publishes-five-sustainability-principles-member-exchanges [https://perma.cc/Y7D9-KZWC] (affirming its active role in promoting sustainable investment).

10 *See* Hans Hoogervorst, Chair, Int'l. Accounting Standards Bd., *IASB Chair's Speech: The times, they are a-changin',* (Sept. 18, 2017), https://www.ifrs.org/news-and-events/2017/09/iasb-chairmans-speech-the-times-the-are-achangin/ [https://perma.cc/36YJ-8Y2S] (noting the IASB's support for ESG disclosure harmonization efforts).

11 The ISO has established a technical committee to develop standards for "the integrating of sustainability considerations and [ESG] practices into institutional investment decision making and wider finance management." *ISO, ISO/TC322 – Sustainable Finance*, Int'l. Org. for Standardization, https://www.iso.org/committee/7203746.html [https://perma.cc/C2P7-T8TA] (last visited Sept. 27, 2019).

12 *See Commission Interim Report on Financing a Sustainable European Economy*, at 20–22 (July 2017) [hereinafter EU Report on Sustainable Finance], https://ec.europa.eu/info/sites/info/files/170713-sustainable-finance-report_en.pdf [https://perma.cc/TB26-JAFA] (discussing trends in disclosure to promote sustainable investment in the European Union). *See also* U.N. Sustainable Development Goals, About the Sustainable Development Goals, https://www.un.org/sustainabledevelopment/sustainable-development-goals/ [https://perma.cc/AWU7-GXM6] (last visited Sept. 27, 2019) (providing an overview of the United Nations' official platform for sustainable development).

commitments.[13] While private ordering has led companies to provide more ESG information to the public, the proliferation of competing private standards and the lack of alignment between voluntary sustainability reporting and disclosure produced in corporate annual reports and other public filings have reduced the usefulness of ESG information for investment analysis.[14] In sum, rising demand for investment-grade information has been accompanied by growing dissatisfaction with the limited and highly variable ESG information disclosed in financial reports, on the one hand, and the dearth of investment-grade information in corporate sustainability reports and other sources outside corporate annual reports, on the other.[15]

Since non-financial reporting practice depends so heavily on private standards and other forms of private ordering, these developments are prompting new questions about whether the SEC and its counterparts in other jurisdictions should continue to defer primarily to private standards, voluntary frameworks and other market-based approaches to ESG disclosure, or should update current reporting regimes to standardize how non-financial information reaches investors. If reforms are needed, another critical question is whether regulatory responses should displace private ordering or instead seek to combine elements of both public disclosure regulation and private ordering in new ways.

As this Article shows, answers to these fundamental questions are already being explored outside of the United States as regulators throughout the world leverage private sector innovation in order to address gaps in the quality and reliability of non-financial reporting. For example, many governments have incorporated existing private ESG disclosure standards into new rules or guidelines by reference or have drawn on these standards as a starting point in developing

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[13] *See* Iris H-Y Chiu, *Standardization in Corporate Social Responsibility Reporting and a Universalist Concept of CSR? – A Path Paved with Good Intentions*, 22 FLA. J. INT'L L. 361, 362–363 (2010) (contrasting the treatment of financial and non-financial reporting); *see also* Virginia Harper Ho, *Nonfinancial Risk Disclosure & the Costs of Private Ordering*, 55 AM. BUS. L.J. 407 (2018) [hereinafter Harper Ho, *Nonfinancial Risk Disclosure*] (arguing that the current system of voluntary disclosure of non-financial information is inadequate for meaningful comparative analysis and requires standardization and regulation).

[14] *See infra* Section 1.3.

[15] *See infra* Section 1.3.

their own ESG disclosure rules.[16] Beyond standard-setting, regulators have also sought to improve the reliability of non-financial reporting by encouraging firms to obtain third-party assurance of ESG information.[17]

This emphasis on private ordering in ESG disclosure is grounded in extensive research within and outside of the legal literature on the comparative advantages and effectiveness of various forms of private governance, public-private partnerships, and related phenomena often referred to broadly as "private regulation."[18] In particular, the literature on public-private "hybridity" explores how to optimize the interactions between government regulators and private governance regimes acting under their own respectively defined powers in pluralistic legal systems.[19]

Notwithstanding the prominent role of private ordering in corporate transparency, we have argued in prior work that governments have important roles to play in improving the quality and quantity of non-financial reporting.[20] This Article is the first to consider how national financial regulators can draw on private standards, monitoring, and enforcement mechanisms as they pursue these important goals.

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16 *See infra* Section 3.

17 *See infra* Sections 3.2.4 and 3.2.5 (discussing such efforts in the European Union and the United Kingdom, respectively).

18 *See infra* Section 2.2. The term "private ordering" is widely used in corporate law to refer to the use of private contracting and negotiation as an alternative to statutory mandates; similarly, the term "private regulation" is used in the governance literature to refer broadly to alternatives to state regulation. In this Article, we endeavor to bring these two literatures together by using the latter to capture private standards and other private governance regimes and the former as a broader term that also includes private regulation.

19 *See* Gráinne De Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 1, 8 (Gráinne De Búrca & Joanne Scott eds., 2006). *See also* Paul Schiff Berman, *Towards a Jurisprudence of Hybridity*, 1 UTAH L. REV. 11, 12 (2010) (proposing hybridity as a means to govern the interactions of state and non-state lawmaking by multiple communities).

20 *See generally* Harper Ho, *Nonfinancial Risk Disclosure*, *supra* note 13 (advocating for an SEC framework); Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. INT'L L. & BUS. 87 (2014) [hereinafter Park, *Targeted Social Transparency*] (analyzing the rise of mandatory disclosure under securities law of specific human rights impacts).

To inform these policy choices, this Article assesses the range of approaches to ESG disclosure that have been adopted in the United States and six other influential capital markets: South Africa, Brazil, the European Union, the United Kingdom, Hong Kong, and mainland China.[21] Each of these jurisdictions has implemented ESG disclosure through a different balance of public regulation and private ordering. As a group, these countries include many of the largest capital markets, globally or regionally. They also represent variation in terms of market size, level of economic development, geography, and legal system.[22]

Drawing on this comparative analysis, we find that a public-private hybrid approach to ESG disclosure is ultimately inevitable, and we argue that optimal approaches for improving the quality and utility of non-financial information must draw on the respective advantages of public and private forms of regulation. Toward this end, this Article identifies how non-financial reporting reforms in the U.S. context can leverage, harmonize, and legitimize private ordering.

Section 1 of this Article identifies the forces that are driving greater investor demand for ESG information and describes regulatory efforts to improve the comparability, reliability, and quality of ESG information available to the capital markets. Section 2 explores a central tension in non-financial reporting reform between the standard investor-oriented rationales for mandatory disclosure—namely, to promote investor protection, market efficiency, and stability—and the stakeholder-oriented goals of voluntary ESG disclosure and private regulation.[23] Section 2 then presents a typology of how public regulation and private ordering interact that is particularly relevant to ESG disclosure. Section 3

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[21] Because of Hong Kong's special status under the concept of "one country two systems," its financial and legal regimes are distinct from those in mainland China. In this Article, we separately address rules that apply to companies incorporated or listed in Hong Kong and those incorporated or listed in mainland China. *See infra* Sections 3.2.6 and 3.2.7.

[22] For a comparison of these features across the selected jurisdictions, see Appendix I *infra*.

[23] As is standard in the literature, we use the term "mandatory" to refer to reporting requirements imposed by regulators even though in most mandatory reporting regimes, such as those that apply under U.S. federal securities law, not all reporting rules are prescriptive and companies exercise some discretion in determining whether disclosure of particular information is required.

applies this typology to the comparative case studies. This analysis shows how regulators are drawing on and yielding to private disclosure regimes in reforming the reporting rules that apply to companies' annual reports and other public filings. Section 4 draws on observations from the case studies to identify ways in which governments can optimize the roles of public regulation and private ordering in ESG disclosure.

1. UNDERSTANDING ESG DISCLOSURE GAPS

More than 85 percent of the S&P 500 in the United States and more than 90 percent of the largest firms globally now produce sustainability reports that disclose ESG information in some form; some companies also voluntarily include sustainability or other non-financial concepts in their annual reports or proxy statements.[24] However, higher rates of voluntary reporting have not resolved, and indeed may exacerbate, ESG information gaps.[25] In response, private standard setters, auditors, and investors and firms themselves, as well as international organizations and regulators worldwide, are working to understand how best to enhance the accessibility, reliability, and comparability of material non-financial

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[24] *Flash Report: 86% of S&P 500 Index® Companies Publish Sustainability / Responsibility Reports in 2018*, GOVERNANCE & ACCOUNTABILITY INST., INC. (May 16, 2019), https://www.ga-institute.com/press-releases/article/flash-report-86-of-sp-500-indexR-companies-publish-sustainability-responsibility-reports-in-20.html [https://perma.cc/ZV6Q-JN5R]; IRRC INST. & SUSTAINABLE INVS. INST. (SI2), STATE OF INTEGRATED AND SUSTAINABILITY REPORTING 2018 3 (2018) [hereinafter IRRC], https://siinstitute.org/special_report.cgi?id=77 [https://perma.cc/TM7N-HVZR].

[25] *See, e.g.*, IRRC, *supra* note 24, at 26–33 (discussing the varying materiality standards, audiences, and levels of assurance that apply to voluntary reporting); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-398, RETIREMENT PLAN INVESTING: CLEARER INFORMATION ON CONSIDERATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS WOULD BE HELPFUL 18–19 (2018) [hereinafter GAO] (reporting asset managers and retirement plan representatives' concerns that there is insufficient information regarding ESG factor impacts on investment performance); TCFD, FINAL REPORT RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 33 (2017) [hereinafter TCFD FINAL REPORT], https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-TCFD-Report-062817.pdf [https://perma.cc/CWP4-DTS5] (noting non-uniform locations of climate-related disclosures in required financial reporting documents).

information to investors.[26] This effort is particularly challenging because non-financial information that may not be material to investors is also important to other corporate stakeholders.

In the following discussion, we explain the factors behind rising demand for ESG information, and how ESG information reaches the capital markets. We also consider the evidence behind the claims that ESG information asymmetries exist and that they undermine market efficiency.[27] These observations provide important context for the analysis in Section 2 of the relationship between private ordering and traditional public disclosure regulation and, in turn, establish the foundation for this Article's core argument that disclosure regulation both can and should draw on private ordering.

1.1. Factors Driving Demand for ESG Information

Companies around the world are now facing growing demand for ESG information from shareholders,[28] creditors,[29] insurers,[30]

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[26] *See* PRI, GLOBAL GUIDE TO RESPONSIBLE INVESTMENT REGULATION 3 (2016), https://www.unpri.org/download?ac=325 [https://perma.cc/634T-QU2G] (surveying responsible investment policies in the top fifty national economies by GDP and finding that all but Iran have policy initiatives on ESG factors and investment). *See also supra* note 4 and sources cited therein (surveying global policies on ESG disclosure).

[27] *See infra* notes 34–43 and accompanying text. This claim is a central conclusion of the TCFD's global review of climate-related disclosure, and an underpinning of all recent work on the integration of non-financial information into financial reporting. *See, e.g.*, TCFD, PHASE I REPORT OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 13 (2016) [hereinafter TCFD PHASE I], https://www.fsb-tcfd.org/wp-content/uploads/2016/03/Phase_I_Report_v15.pdf [https://perma.cc/X74L-Z9V9]. Testing this claim empirically is beyond the scope of this paper. For a review of the literature, see Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk,* 41 J. CORP. L. 647 (2016) (presenting evidence of the economic relevance to investors of non-financial information on risk).

[28] *See supra* note 3 and sources cited therein.

[29] *See generally* Stephen Kim Park, *Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution*, 54 STAN. J. INT'L L. 1 (2018) [hereinafter Park, *Investors as Regulators*] (discussing the global market for bonds earmarked to finance "green" projects).

[30] *See Climate Risk Disclosure*, NAT'L ASS'N OF INS. COMM'RS (NAIC), https://www.naic.org/cipr_topics/topic_climate_risk_disclosure.htm [https://perma.cc/ZJ76-4FVG] (last visited Sept. 27, 2019).

rating agencies,[31] and financial regulators.[32] In the past, demand for non-financial information focused solely on how corporate operations impacted workers, the environment, or human rights, and pressure for greater transparency came primarily from non-governmental organizations (NGOs), consumers, and other public stakeholders who urged companies to become more socially responsible. In some markets, including the United States, they were joined by investors who sought non-financial information primarily to address ethical or public policy issues associated with their investments.[33] Companies paid far less attention to the business and financial risks associated with these issues or to whether non-financial information might be material to mainstream investors.

Times have changed. According to the London Stock Exchange, ESG-related information "has moved from a 'peripheral' to a 'core' part of investment analysis, across all asset classes."[34] Most institutional investors now expect companies to make materiality determinations about the financial impact of their environmental and social (i.e., employment-related) practices, in addition to increasing transparency around more traditional non-financial factors such as corporate governance.[35] Although the materiality of particular ESG factors to investors varies according to industry

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31 *See, e.g.*, *Environmental, Social and Governance*, FITCH RATINGS, https://www.fitchratings.com/site/esg [https://perma.cc/P9RZ-R9DL] (last visited Sept. 27, 2019) (explaining a new system developed to show how ESG factors may impact individual credit ratings).

32 *See generally* IOSCO, STATEMENT ON DISCLOSURE OF ESG MATTERS BY ISSUERS (2019), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf [https://perma.cc/MD2J-FTEX] (describing the key role that regulators play in encouraging issuers to disclose material ESG factors to investors); TCFD FINAL REPORT, *supra* note 25 (referencing climate-related disclosure requirements and giving recommendations for areas where these requirements could be improved to reduce risk).

33 *See* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 22, 130 (2005); Lloyd Kurtz, *Socially Responsible Investment and Shareholder Activism*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 249, 250–61 (Andrew Crane et al. eds., 2008) (discussing the different forms and rationales of responsible investment).

34 LONDON STOCK EXCHANGE GROUP, YOUR GUIDE TO ESG REPORTING 3 (2018), https://www.lseg.com/sites/default/files/content/images/Green_Finance/ESG/2018/February/LSEG_ESG_report_January_2018.pdf [https://perma.cc/K9T8-6H5D].

35 *See supra* note 3 and sources cited therein.

sector and requires a firm-specific analysis,[36] the financial materiality of a wide range of ESG information is supported by empirical research across asset classes and, over time, has demonstrated the impact of many ESG factors on firm and portfolio-level risk and return, both individually and in the aggregate.[37] Like the governments and other international institutions referenced earlier,[38] IOSCO, the primary governance body of national securities and financial regulators, has affirmed this view, stating "ESG matters, though sometimes characterized as non-financial, may have a material short-term and long-term impact on the business operations of the issuers as well as on risks and returns for investors and their investment and voting decisions."[39]

Mainstream investors are also beginning to view ESG information as material to voting decisions and as a focus of direct engagement with companies.[40] One key reason is that investors also see effective management of environmental and social risk as part of sound corporate governance and as a driver of long-term profitability.[41] In global capital markets, institutional investors, which are signatories to the United Nations Principles for

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[36] On the sector-specific nature of ESG materiality, see GAO, *supra* note 25, at 5–6 (raising the fact that there is large-scale sectoral variation regarding climate risk); TCFD PHASE I, *supra* note 27 (observing similar variation). *See also* Robert G. Eccles et al., *The Need for Sector-Specific Materiality and Sustainability Reporting Standards*, 24 J. APPLIED CORP. FIN. 65 (2012) (advocating sectoral disclosure standards).

[37] *See, e.g.*, Gunnar Friede, Timo Busch & Alexander Bassen, *ESG and Financial Performance: Aggregated Evidence from More Than 2000 Empirical Studies*, 5 J. SUSTAIN. FIN. 210–33 (2015) (analyzing studies and meta-studies since the 1970s); GORDON L. CLARK ET AL., FROM THE STOCKHOLDER TO THE STAKEHOLDER: HOW SUSTAINABILITY CAN DRIVE FINANCIAL OUTPERFORMANCE (2015), https://arabesque.com/research/From_the_stockholder_to_the_stakeholder_web.pdf [https://perma.cc/E6WF-FPV7] (surveying academic studies). *See also* GAO, *supra* note 25, at 8, 23–24 (discussing results of a U.S. Department of Labor review of the literature in 2017 that reached similar conclusions).

[38] *See supra* notes 5–12 and sources cited therein.

[39] IOSCO, *supra* note 32, at 1.

[40] *See generally* GAO, *supra* note 25 (identifying how asset managers incorporate ESG factors into investment management); *Principles and Policies*, VANGUARD, https://about.vanguard.com/investment-stewardship/principles-policies/ [https://perma.cc/TM8K-8QY8] (last visited Sept. 27, 2019) (describing how voting, advocacy, and investment policies integrate ESG factors).

[41] *See* GAO, *supra* note 25, at 23–24 (finding that asset managers who use ESG information do so primarily to achieve "enhanced risk management" and "improved long-term performance").

Responsible Investment (PRI), commit to integrate ESG information into their investment analysis and to use their influence to promote better corporate ESG performance and transparency; these investors now represent over US$80 trillion in total assets under management.[42] Their impact is particularly visible in the United States, where such investors hold one-fifth of all assets under management and where ESG issues are a consistent focus of shareholder activism.[43] As a result of these changes, the perceived divide between financial and non-financial performance is shrinking.

Although they are not the primary beneficiaries of corporate financial reporting, governments and regulators are also beginning to recognize the need for ESG risk disclosure to inform public policy, including financial regulation. Issues where informed policy-making requires reliable non-financial data include questions regarding the role of corporations and financial institutions in promoting sustainable development goals,[44] government responses to global threats, such as climate change and cybersecurity risk,[45] and the development of "sustainable finance" policies that can help capital markets direct capital to more environmentally sustainable uses.[46] Governments are also considering ESG disclosure reform in

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42 IRRC, *supra* note 24, at 12. At its inception in 2006, this figure was US$6.3 trillion. *Id.*

43 GAO, *supra* note 25, at 9. *See infra* Section 3.2.1 (discussing investors' role in pushing for broader ESG disclosure in the United States).

44 *See, e.g.,* SDG Compass, https://sdgcompass.org/ [https://perma.cc/EH7P-XCGD] (aiding companies in promoting the Sustainable Development Goals).

45 *See, e.g.,* EU REPORT ON SUSTAINABLE FINANCE, *supra* note 12 (considering sustainable finance policies and regulation); TCFD FINAL REPORT, *supra* note 25, at iii (recommending disclosure to aid better climate-related public policy).

46 *See generally* TCFD FINAL REPORT, *supra* note 25. *See also* Guiding Opinions on Establishing the Green Financial System (关于构建金融体系的指导意见) (promulgated by the People's Bank of China (PBOC), China Ministry of Fin. (MOF), Nat'l Dev. & Reform Comm'n (NDRC), China Ministry of Envtl. Prot. (MEP), China Banking Reg. Comm'n (CBRC), China Sec. Reg. Comm'n (CSRC), and China Ins. Reg. Comm'n (CIRC), Aug. 31, 2016, effective Aug. 31, 2016) (articulating policy goals and an action plan for "greening" China's financial system).

response to rising public demand for greater corporate accountability and transparency.[47]

1.2. Sources of ESG Information

To be sure, the sheer volume of non-financial information reaching the capital markets has grown exponentially over the past few decades as sustainability and CSR concepts have gained broad acceptance in the market and among corporate boards. Most obviously, public regulatory agencies, such as environmental or labor protection agencies, may impose reporting obligations,[48] but this information is not intended for investors or reported with reference to financial materiality, making it difficult to incorporate in financial analysis.[49] Instead, ESG disclosure has largely been driven by private ordering, as private standard-setters and other market actors have created a vast array of reporting obligations, frameworks, and standards that capture non-financial information in various forms.

Despite the expansion of private disclosure frameworks and the relatively limited extent of non-financial information disclosed in corporations' public filings,[50] investors prefer to obtain ESG information from companies' annual reports, proxy statements, and other mandatory filings because of their perceived reliability.[51] For the same reason, mandatory filings are the primary data source for ESG databases, such as Bloomberg's ESG suite and others widely used by financial analysts.

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47 *See, e.g. Report of the Committee on Legal Affairs on corporate social responsibility: accountable, transparent and responsible business behavior and sustainable growth* (2012/2098(INI)), A7-0017/2013, Jan. 28 2013) [hereinafter *EU Parliament CSR Report*] (noting public demand in Europe for greater corporate accountability); *see also* IRRC, *supra* note 24, at 10–11 (discussing changing public expectations as driving demand for better corporate disclosures).

48 Bartels et al., *supra* note 4, at 14 (aggregating these measures).

49 TCFD PHASE I, *supra* note 27, at 8, 13; TCFD FINAL REPORT, *supra* note 25, at 1–2.

50 On the limitations of non-financial information contained in public filings, see generally *infra* Section 1.3.

51 ERNST & YOUNG 2017, *supra* note 3, at 18.

In over 60 jurisdictions, ESG disclosure in some form is required or encouraged as a matter of financial regulation, corporate law, or stock exchange listing rules.[52] According to a 2018 report from the Investor Responsibility Research Center (IRRC) Institute, 40 percent of S&P 500 companies mention sustainability information in their annual reports or proxy statements (excluding disclosures of risk factors or environmental matters).[53] Globally, nearly 80 percent of the 250 world's largest companies reportedly include some kind of ESG information in their annual reports, a trend linked to the rise in regulatory measures on ESG disclosure.[54] At present, however, most publicly available ESG information is produced outside companies' public filings and is intended for a broad range of stakeholders. These sources include information provided on corporate websites or in corporate sustainability reports whose content and format is determined by each company and that are based on guidelines set more often by private standard setters than by securities regulation. These private standards and other forms of private regulation have proliferated over the past two decades, laying the groundwork for many of the reporting regimes now being developed by governments and international organizations.

Generally, these reporting frameworks are created by private or quasi-private NGOs, at times with support from international organizations or governments, and typically with sustained input from corporations and other stakeholders. The most prominent of these is the Global Reporting Initiative (GRI)'s framework, which covers a comprehensive range of ESG topics.[55] Others focus on environmental and climate-related indicators[56] or apply only to

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[52] More than 70 governments have now adopted sustainability reporting measures; 80 percent are mandatory. Reporting Exchange, https://www.reportingexchange.com [https://perma.cc/56FH-FTLT] (subscription based) (last visited Sept. 27, 2019).

[53] IRRC, *supra* note 24, at 32–33.

[54] *See* KPMG, THE ROAD AHEAD: THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2017, at 21 (2017), https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf [https://perma.cc/RY83-2BKP].

[55] *See* Global Reporting Initiative, GRI Standards, https://www.globalreporting.org/standards [https://perma.cc/H9UQ-BWX8] (last visited Sept. 27, 2019).

[56] *See, e.g.*, CDP, *About Us*, https://www.cdp.net/en/info/about-us [https://perma.cc/N6KP-HZFL] (last visited Sept. 27, 2019).

certain sectors.[57] Many firms also draw on CSR standards, such as the ISO 26000 CSR guidelines,[58] the OECD Guidelines for Multinational Enterprises (OECD Guidelines),[59] or the United Nations Guiding Principles on Business and Human Rights (Guiding Principles),[60] which have been developed by international organizations. Increasingly, these standards include a mix of qualitative and quantitative ESG performance indicators that companies may elect to use. However, only a few, such as the Sustainability Accounting Standards Board (SASB) sector-specific indicators,[61] the International Integrated Reporting Council (IIRC)'s integrated reporting framework,[62] and the Climate Disclosure Project (CDP)'s environmental reporting standards,[63] are designed to help companies integrate ESG information into their annual reports based on existing materiality standards.

In addition to these sources, more than 100 sustainability rating companies regularly distribute ESG questionnaires to companies worldwide in order to generate proprietary, comparable ESG data.[64] These vary widely in terms of the ultimate end-user (investor or

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57 *See, e.g.*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI), https://eiti.org/ [https://perma.cc/RR5S-VP9B] (last visited Sept. 27, 2019).

58 ISO 26000 SOCIAL RESPONSIBILITY, https://www.iso.org/iso-26000-social-responsibility.html [https://perma.cc/XQ9A-QYU2] (last visited Sept. 27, 2019).

59 Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises*, https://www.oecd.org/corporate/mne/1922428.pdf [https://perma.cc/W7R9-4ZUE] (last visited Sept. 27, 2019).

60 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights*, https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf [https://perma.cc/B67B-AY3C] (last visited Sept. 27, 2019).

61 The Sustainability Accounting Standards Board (SASB) has developed sector-specific indicators based on the legal definition of materiality that applies under federal securities law. SASB, *Standard-Setting Process*, https://www.sasb.org/approach/our-process/ [https://perma.cc/5NG5-3DTS] (last visited Sept. 27, 2019).

62 INTEGRATED REPORTING, https://integratedreporting.org [https://perma.cc/5NG5-3DTS] (last visited Sept. 27, 2019).

63 *Who We Are*, CDP, https://www.cdp.net/en/info/about-us [https://perma.cc/N6KP-HZFL] (last visited Sept. 27, 2019).

64 *See generally Generic Surplus About Us*, GISR, https://ratesustainability.org/about/why-gisr/ [https://perma.cc/Z8YQ-2TT4] (introducing its effort to coordinate, harmonize, and render transparent ESG ratings) (last visited Sept. 27, 2019).

consumer), scope and content (particular indicators and ESG issues covered), and in the underlying methodologies that produce the ratings.[65] In addition, companies receive questionnaires and shareholder proposals from their shareholders seeking specific ESG information.[66] This type of uncoordinated approach to disclosure is costly for both companies and investors and is unconnected to disclosures in public filings.[67]

1.3. The State of ESG Disclosure

Despite the amount of ESG information produced by companies, evidence from investor surveys and extensive research by the TCFD, OECD, and the United Nations indicate that although ESG disclosure may have important impacts on corporate behavior, current ESG disclosure practices do not generate the level or quality of ESG information needed for investment analysis and efficient risk pricing and capital allocation.[68] These information asymmetries are due to the voluntary nature of most ESG disclosure and, perhaps ironically, to the very wealth of private disclosure initiatives. The expansion of ESG-oriented investment tools, services, and voluntary frameworks has not only increased the volume of publicly available ESG information, but has made the job of identifying which information is material from a financial standpoint more difficult. To the extent ESG-related information asymmetries persist, they can be expected to reduce market efficiency and perhaps mislead

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[65] *Id.*

[66] *Sustainability Goes Mainstream: Insights Into Investor Views* 7 (2014), https://www.pwc.com/us/en/pwc-investor-resource-institute/publications/assets/pwc-sustainability-goes-mainstream-investor-views.pdf [https://perma.cc/T4P7-837R] (finding that 89 percent of investors surveyed were "very likely" to seek ESG information through questionnaires).

[67] For a more complete discussion on this point, see Harper Ho, *Non-Financial Risk Disclosure, supra* note 13, at 453–55.

[68] *See* TCFD FINAL REPORT, *supra* note 25; at i–ii (concluding that the inadequacies of current disclosure standards and the lack of information on the financial impacts of climate change may impair the accurate pricing of securities). *See also supra* note 3, and sources cited therein (reporting institutional investor views).

investors as to the true nature of their investment risk.[69] Ineffective disclosure also shines a weak light on areas of real risk to corporate stakeholders that companies should be incentivized to address.

The first challenge is that ESG information contained in annual reports and other mandatory filings is quite limited and varies widely, making meaningful comparison difficult.[70] In the United States, fear of litigation leads many companies to limit disclosure of forward-looking information and to provide generic risk disclosures in their annual reports.[71] There is also evidence that the structure of the current federal disclosure system and the courts' approach to securities fraud cases have contributed to the under-reporting of even known material risks.[72]

As noted earlier, many international organizations have begun to actively promote ESG disclosure and are supporting efforts to standardize how companies report on their non-financial performance.[73] Among the most prominent efforts are the voluntary

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69 There is already emerging empirical evidence of ESG information asymmetries. *See* Harrison Hong et al., *Climate Risks and Market Efficiency*, 208 J. ECONOMETRICS 265 (2019) (analyzing cross-sectional data on climate risk from thirty countries).

70 *See* SUSTAINABILITY ACCOUNTING STANDARDS BD. (SASB), THE STATE OF DISCLOSURE REPORT (2016), https://www.sasb.org/wp-content/uploads/2019/08/StateofDisclosure-Report-113016v2-1.pdf?__hstc=105637852.3b9784be80b3bcb8619b39bd91cce44e.1571883159156.1571883159156.1571883159156.1&__hssc=105637852.2.1571883159156 [https://perma.cc/HS7P-GU65] (analyzing over 700 filings, including 597 10-K filers and 116 20-F filers, across 434 disclosure topics).

71 *See id.* at 2 (reporting that the most common form of sustainability disclosure to the SEC—across the majority of industries and topics—was generic boilerplate language); Letter from Davis Polk & Wardwell, to Brent J. Fields, Sec'y, SEC at 10 (July 22, 2016), https://www.sec.gov/comments/s7-06-16/s70616-313.pdf [https://perma.cc/7NCE-R9AL] (stating that companies "generally limit their voluntary forward-looking disclosure to … investor presentations that are 'furnished' with the Commission under Form 8-K rather than in 'filed' periodic or current reports in response to the heightened litigation risk associated with documents that may be included or incorporated into a registration statement or prospectus and therefore subject to Section 11 and Section 12 of the Securities Act.").

72 *See generally* Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe,* 107 GEO. L.J. 967 (2019).

73 *See supra* notes 5–11 and sources cited therein. The IASB, FASB, and many of the private standard setters and international organizations who have focused on ESG disclosure have formed a Corporate Reporting Dialogue which aims to harmonize and standardize existing frameworks. *See* CORPORATE REPORTING DIALOGUE, https://corporatereportingdialogue.com/ [https://perma.cc/YX3J-TCKU] (last visited Sept. 27, 2019).

guidelines developed by the G20's Task Force on Climate-Related Disclosure (TCFD), which were released in 2017.[74] The TCFD Recommendations are expressly intended to promote disclosure of ESG information on the basis of the same materiality standards that apply to financial reporting, to apply to financial institutions as well as companies outside the financial sector, and to encourage the integration of material ESG information into companies' annual reports.[75]

ESG information provided in sustainability reports also lacks consistency in both format and content, and so lacks the comparability required for investment and voting purposes. Private third-party frameworks for sustainability reporting often encourage companies to identify their own key stakeholders, and to define materiality in terms of corporate impacts on stakeholders, rather than in terms of financial impact or relevance to investors.[76] The IRRC's 2018 study found that most companies do not follow a single voluntary reporting framework, but instead adopt their own "style, format, and content," making comparisons across companies extremely difficult.[77] Although many leading reporting frameworks encourage companies to clearly indicate how they have defined materiality in their sustainability reports, many companies do not do so.[78] As a result, the information disclosed in voluntary sustainability reports is not readily comparable over time for the same firm, or across firms, sectors, and reporting frameworks.[79] Voluntary sustainability reporting is also far from universal, as it is less common among smaller public companies.[80]

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74 *See generally* TCFD FINAL REPORT, *supra* note 25 (recommending a framework for climate-related financial disclosures to allow stakeholders to make informed decisions economic and climate-related decisions).

75 *Id.*

76 *See* IRRC, *supra* note 24, at 26–27 (discussing this problem); TCFD FINAL REPORT, *supra* note 25, at iii, 5–11, tbls. 1 & 2 (explaining alternative definitions of materiality in the sustainability context).

77 *See* IRRC, *supra* note 24, at 5, 31–32 (finding that 97 percent of reporting companies chose to customize instead of following one reporting framework, and that 25 percent of reporting companies did not disclose use of a specific framework).

78 *Id.*

79 Harper Ho, *Nonfinancial Risk Disclosure, supra* note 13, at 428–30; Park, *Targeted Social Transparency*, *supra* note 20, at 93.

80 ERNST & YOUNG 2017, *supra* note 3, at 18.

Disclosure made under private frameworks is even more difficult for investors to integrate with periodic reporting, and it is more costly for investors to obtain, since there is no central reporting repository akin to the SEC's EDGAR platform. The information is also less reliable, since companies are not required to obtain independent third-party auditing or assurance, although most frameworks and some governments encourage it.[81]

The plethora of competing private standards and reporting frameworks also reduces the comparability and consistency of disclosure, creating confusion and increased costs for investors, as well as higher liability risk for companies.[82] Ongoing efforts to align financial and non-financial reporting are being confronted by the different needs of investors and stakeholders.[83] All of these limitations are driving regulatory responses to non-financial reporting, different components of which are examined in Parts II and III.

2. PRIVATE STANDARDS AND PUBLIC DISCLOSURE

With the growth of non-financial reporting and the problems posed by the proliferation of different voluntary frameworks and practices, governments considering non-financial reporting reforms must address already existing private ESG disclosure regimes and other forms of private ordering. The following discussion begins by describing mandatory disclosure regimes, typically adopted by securities and financial regulators and stock exchanges, and

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81 *See, e.g.*, GLOB. REPORTING INITIATIVE AND GLOB. SUSTAINABILITY STANDARDS BOARD, GRI 102: GENERAL DISCLOSURES, DISCLOSURE 102–56, 41 (2016), https://www.globalreporting.org/standards/gri-standards-download-center/?g=51c631dd-b541-4a63-ad4b-5f7d38502d78 [https://perma.cc/XMQ5-8DJG] (recommending standards for the use and disclosure of external assurance of reports).

82 *See* IRRC, *supra* note 24, at 16–24 (surveying the "sea of sustainability reporting models"); Harper Ho, *Nonfinancial Risk Disclosure, supra* note 13, at 452–56 (identifying how relying on voluntary reporting raises costs to companies and to investors).

83 *See Better Alignment Project*, CORPORATE REPORTING DIALOGUE (Nov. 7, 2018), https://corporatereportingdialogue.com/wp-content/uploads/2018/11/Corporate-Reporting-Dialogue-Better-Alignment-Project.pdf [https://perma.cc/Y6EJ-Z8SN].

comparing them with voluntary reporting based on private standards. Incorporating theoretical and empirical research in law, business ethics, management studies, public policy, and political science, we identify a range of modes of interaction between public regulation and private standards as a foundation for considering the comparative examples of ESG disclosure reform presented in Section 3.

2.1. Disclosure Rationales

Since most of the world's largest companies already produce some form of voluntary non-financial reporting, the initial question for many governments is whether to continue to allow market-based practices to evolve without regulatory intervention. Answering this question requires revisiting many of the traditional rationales for mandatory disclosure and asking whether voluntary non-financial reporting and private ordering meet those goals. If governments are already considering how to address the non-financial information gaps described above, they must also understand that voluntary non-financial reporting and the disclosure contained in corporate annual reports or proxy statements are based on different materiality standards since they are produced for different audiences. The following discussion outlines these key differences as a preface to the typology of public-private interaction that follows in Section 2.2.

2.1.1. Investor-Oriented Rationales and Goals of Public Mandatory Disclosure

According to IOSCO, the core purpose of mandatory disclosure under the securities laws or stock exchange listing rules is to protect investors from fraud, to promote "fair, efficient and transparent markets," and to reduce systemic risk, all of which require that financial market participants have timely access to reliable information.[84] In the United States, the SEC has also stated its core mission in these terms.[85] By increasing confidence in the integrity of the capital markets, mandatory disclosure also supports market liquidity, stability, and ultimately capital formation.[86] In jurisdictions where shareholders have a central role in corporate governance, disclosure may facilitate more effective corporate governance and reduce agency costs.[87]

For investors, mandatory disclosure provides these benefits more efficiently and fairly than relying on investor self-help, since companies can more readily obtain and report the same information publicly to all investors than investors and analysts can on their own.[88] In the absence of mandatory disclosure, corporate managers also have incentives to under-report, particularly with respect to risks or negative information.[89] Mandatory disclosure also offers benefits to reporting companies. Specifically, they face the same disclosure demands as their competitors, and they are less vulnerable to unpredictable and potentially costly investor demands for information.[90]

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[84] *See* INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (IOSCO), OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION 3 (2017), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf [https://perma.cc/U75H-AG4U].

[85] *See, e.g.*, Business and Financial Disclosure Required by Regulation S-K, 17 CFR Parts 210, 229, 230, 232, 239, 240 & 249 [Release No. 33-10064; 34–77599; File No. S7-06-16], 81 Fed. Reg. 23,916, 23,919 (concept release Apr. 22, 2016) [hereinafter Regulation S-K Concept Release] ("[l]owering information asymmetries between managers of companies and investors may enhance capital formation and the allocative efficiency of the capital markets…[D]isclosure…may lead to more accurate share prices, discourage fraud, heighten monitoring of the managers of companies, and increase liquidity.").

[86] *See id.* (noting the role of mandatory disclosure in capital formation).

[87] *See* Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws,* 93 HARV. L. REV. 322, 336–38 (1979) (highlighting how reducing agency costs protects investors); Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 718–19 (2006) (arguing that "narrowing disclosure duties would in fact hamper the ability of information traders to minimize total management agency costs.").

[88] *See* Park, *Targeted Social Transparency*, *supra* note 20, at 94 (noting that without mandatory disclosure, market participants often cannot obtain information on social concerns).

[89] *See* Langevoort, *supra* note 72, at 975–85 (discussing the incentives for and prevalence of misleading under-disclosure regarding risk).

[90] *See* Harper Ho, *Nonfinancial Risk Disclosure, supra* note 13, at 454–55 (discussing the costs to companies of private ordering).

Nonetheless, all jurisdictions acknowledge that the goal is not to achieve full disclosure—however that may be defined—but rather an optimal level of disclosure that balances the costs to issuers of obtaining, reporting, and auditing information. Disclosure obligations are therefore limited to "material" or "significant" information, as those concepts are defined in each jurisdiction.[91] Although reporting rules may prescribe specific disclosures, companies are often free—even under mandatory reporting statutes—to make their own materiality judgments, and different approaches to "mandatory" disclosure may offer companies greater discretion regarding specific disclosures.[92] For example, some jurisdictions rely heavily on prescriptive, line-item disclosure while others rely more on reporting principles or guidance.

By ensuring that the capital markets have access to reliable information about the financial impacts of certain market-wide ESG risks, such as climate change, mandatory disclosure may also reduce the degree to which global capital markets are exposed to high volatility when large-scale risk events materialize.[93] Concerns about this kind of systemic risk are among the reasons why the G20's Financial Stability Board has encouraged more financial-sector firms and other public companies to measure and disclose material climate-related risk in their annual reports.[94] However, improving transparency around these financial risks may require companies to report not only on the financial effects of ESG risks that are material to them, but also on the external impacts of their operations on their stakeholders. Some of this information may not be material to the firm itself but may contribute to financial risk on a systemic basis,

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91 In the United States, for example, information is defined as material for purposes of securities regulation if there is "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" or "that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information" available to the investor. *See* TSC Industries, Inc. v. Northway, 426 U.S. 438, 449 (1976) (quoted and applied by Basic v. Levinson, 485 U.S. 224, 231 (1988)).

92 In the United States, material information not expressly required to be reported under the federal securities laws must only be disclosed if it is "necessary to make [a] required statement, in light of the circumstances … not misleading." 17 C.F.R. § 230.408; 17 C.F.R. § 240.12b-20.

93 TCFD FINAL REPORT, *supra* note 25, at iii, 1.

94 *Id.*

perhaps due to aggregated or networked effects across whole segments of the market.[95]

2.1.2. Rationales and Goals of Voluntary Disclosure

While mandatory disclosure focuses primarily on the informational needs of investors and the markets as a whole, voluntary ESG disclosure frameworks have developed to promote somewhat different goals either as a form of private regulation of corporate behavior, or as a tool to enforce other private governance regimes, namely, corporations' "voluntary" commitments to responsible business conduct. In both cases, the goal of disclosure is to encourage companies to reduce the negative impacts of their operations on corporate stakeholders. As a result, companies define materiality in terms of stakeholder concerns under these private non-financial reporting frameworks rather than in terms of financial risk and return.

Indeed, the rise of sustainability reporting has been based on widespread recognition that disclosure is in fact "information disclosure regulation"[96] and governments themselves often use disclosure as an alternative to traditional command-and-control public regulation.[97] Sustainability reporting is intended to motivate companies to change practices that cannot hold up under greater transparency. It also facilitates external oversight of corporations from consumers, NGOs, and other stakeholders.[98] Although disclosure is often less effective than direct regulation,[99] this is due

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[95] *See* Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. REV. 461, 510 (2015) (noting that "firm-by-firm disclosures [fail to] fully depict the complexity and interconnectedness of many of today's investment instruments and corporations").

[96] Reinhard Steurer, *Disentangling Governance: A Synoptic View of Regulation by Government, Business and Civil Society*, 46 POL'Y SCIENCES 387, 401 (2013).

[97] *See* California Transparency in Supply Chains Act of 2010, CAL. CIVIL. CODE §1714.43 (2010) (mandating disclosure to encourage companies to monitor suppliers' conduct).

[98] Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENVTL. & ADMIN. LAW 1, 39 (2015); *see also* Park, *Targeted Social Transparency*, *supra* note 20, at 95–96 (describing the disclosure feedback loop).

[99] *See generally* Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599 (2013) (noting that regulators tend to prefer imposing new disclosure rules rather than dealing with the core issues through direct regulation).

to the flexibility it provides companies—typically, the form of the information and the process by which it is disclosed are mandated, but specific conduct is not, leaving firms substantial discretion in determining how to respond.[100]

In addition to voluntary ESG disclosure frameworks, separate corporate non-financial reporting requirements have emerged in support of private governance regimes that promote CSR and address the governance gaps created by the expansion of business activity beyond the jurisdiction of national governments.[101] Private governance is widely recognized as an alternative to traditional government regulation and self-regulation by individual firms.[102] It typically includes codes of conduct, policies, and practices adopted by industry-wide organizations or groups of firms.[103] The most prevalent forms of private governance are principles-based, certification, reporting, and process standards that seek to reduce corporations' environmental, social, or human rights impacts and draw heavily on international treaties and business conduct norms.[104]

In private governance regimes, industry associations, NGOs, and other non-state actors are responsible for developing standards and enforcing them vis-à-vis their members.[105] Disclosure is a

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100 *See* Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance Into Competitive Advantage*, 19 U. PA. J. BUS. L. 285, 319–20 (2017) (defining market-contingent business regulation).

101 *See* Dirk Ulrich Gilbert, Andreas Rasche, & Sandra Waddock, *Accountability in a Global Economy: The Emergence of International Accountability Standards*, 21 BUS. ETHICS Q. 23, 24, 28–29 (2011) (addressing "[m]echanisms that attempt to fill the omnipresent governance voids that the rise of the global economy has created").

102 *See* VOGEL, *supra* note 33, at 9 ("Civil regulation represents an effort to fill the governance gap between the law and the market.").

103 Steurer, *supra* note 96, at 395–96.

104 *See generally* Gilbert, Rasche, & Waddock, *supra* note 101, at 25–30. *See also* Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 148–56 (2013). *See also* Oren Perez, *Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics*, 12 THEORETICAL INQUIRIES L. 543, 550 (2011) (describing different types of industry-based environmental private governance standards). For example, ISO 14001 environmental management systems are based on a private governance standard that establishes a set of procedures and organizational practices to assist a firm in achieving its environmental goals.

105 *See* Matthew Potoski & Aseem Prakash, *Green Clubs and Voluntary Governance: ISO 14001 and Firms' Regulatory Compliance*, 49 AM. J. POL. SCI. 235, 235

critical enforcement tool that enables other companies and external stakeholders to identify shirkers and ensures that participating firms satisfy the standards they have voluntarily adopted as a member or signatory of the regime.[106] For example, companies that sign on to the United Nations Global Compact must produce an annual "communication on progress" to explain their efforts to comply with the Global Compact's ten principles of responsible business practice.[107] In general, firms voluntarily adhere to these private standards due to a combination of civil society pressure from NGOs, market pressure, strategic self-interest, and social norms.[108] Compliance is also enhanced by other private actors through external third-party assessment,[109] or by the threat of expulsion from the private governance regime for non-compliance.[110] All of these private governance mechanisms also depend on information about corporations' business practice, which has fueled the rise of voluntary ESG disclosure and private disclosure frameworks.

The fact that sustainability reporting and non-financial reporting standards have evolved as a soft form of private regulation is not widely appreciated by opponents of ESG disclosure reforms. Although critics of regulatory solutions often prefer shareholder engagement, voluntary sustainability reporting, and private reporting standards as market-driven approaches to ESG

(2005) (examining the creation of private standards by "governance clubs" of industry associations). Civil society organizations also promulgate these private standards. *See also* Steurer, *supra* note 96, at 395–96 (referencing standards developed by Amnesty International and Ceres).

106 *See* Potoski & Prakash, *supra* note 105, 26–29 (identifying disclosure as one of three "swords" voluntary regulatory regimes adopt to preserve the regime's stringency and reputation).

107 *See* UN GLOBAL COMPACT, THE COMMUNICATION ON PROGRESS IN BRIEF, https://www.unglobalcompact.org/participation/report/cop [https://perma.cc/BJ4D-NQST].

108 David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261, 268–69 (2008).

109 *See generally* Margaret M. Blair, Cynthia A. Williams & Li-Wen Lin, *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 337–46 (2008) (describing the growing importance of such assessments).

110 *See* Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENVTL. & ADMIN. L. 291, 314 (2014) [hereinafter McAllister, *Harnessing*] (noting the revocation power of voluntary labeling and certification regimes).

disclosure,[111] private non-financial reporting regimes were in fact designed to advance regulatory goals that extend far beyond those of most governments' frameworks for financial reporting.

2.2. Modes of Interaction Between Public Regulation and Private Ordering in ESG Disclosure

As the case studies in Section 3 illustrate, many governments are introducing new measures to improve how companies disclose material ESG information to investors. At the same time, public debate about the appropriate scope, mode, and purpose of ESG disclosure reflects continued concern about corporate accountability given the growing disjuncture between the scale of business activity and the ability of governments to regulate it.[112] The proliferation of private ESG disclosure frameworks reflects ongoing efforts by non-state actors to fill both of these gaps.[113]

Some governments look to ESG disclosure to advance both investor and market-oriented disclosure reform, and greater corporate accountability. For these regulators, the dichotomy between public disclosure regulation and private non-financial reporting frameworks, while useful for analytical purposes, belies reality. The regulatory literature confirms that private regimes, like the emerging private disclosure standards, work best when backed

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111 *See* Shearman & Sterling LLP, Concept Release on Business and Financial Disclosure Required by Regulation S-K (Aug. 31, 2016), https://www.sec.gov/comments/s7-06-16/s70616-367.pdf [https://perma.cc/44TH-YGYW].

112 *See* Andreas Georg Scherer, Guido Palazzo & Dorotheé Baumann, *Global Rules and Private Actors: Toward A New Role of The Transnational Corporation in Global Governance*, 16 BUS. ETHICS Q. 505, 512 (2006) ("[E]conomic actors undermine the internal sovereignty of nation states, namely the state's ability to independently set rules and limit or regulate domestic private activities within its jurisdiction"). *See also* Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 AM. BUS. L.J. 255, 259–66 (2015) (noting the structural shortcomings of state-based environmental regulation to address climate change).

113 *See* Gilbert, Rasche, & Waddock, *supra* note 101, at 24 (referring to "Mechanisms that attempt to fill the omnipresent governance voids that the rise of the global economy has created . . . because of an increasing imbalance in global rulemaking").

by intelligent regulation,[114] and that many governments have adopted non-coercive regulatory approaches that are functionally similar to private governance regimes like those that govern voluntary ESG disclosure.[115]

Even for governments that focus primarily or exclusively on the core investor protection, market efficiency, and stability goals of securities regulation, public regulators can engage with existing private governance regimes in numerous ways,[116] and when they do so, retain varying levels of authority and control.[117] Accordingly, in order to identify the legal and policy options available to the SEC and other regulators, it is essential to analyze the ways in which public regulation of corporate reporting may interact with private ordering. To that end, we present a typology that distinguishes five types of interactive and iterative relationships between public and private regulation and other forms of private ordering: deference, support, partnership, delegation, mandating, and displacement.

The following figure defines these modes and provides an example of each mode in an applicable reporting context.

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114 *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551 (2000) [hereinafter Freeman, *Private Role*] (declaring that "There is no such thing as a purely private or purely public realm"). *See also* VOGEL, *supra* note 33, at 170 (arguing that "The effectiveness of much civil regulation depends on a strong and well-functioning public sphere").

115 *See* U.S. GOV'T ACCOUNTABILITY OFF., NUMEROUS FEDERAL ACTIVITIES COMPLEMENT U.S. BUSINESS'S GLOBAL CORPORATE SOCIAL RESPONSIBILITY EFFORTS (Aug. 2005), https://www.gao.gov/new.items/d05744.pdf [https://perma.cc/TL3F-TLZQ] (describing CSR initiatives of the U.S. government).

116 *See* McAllister, *Harnessing, supra* note 110, at 317 (describing harnessing as "how public legislators and regulators can intentionally construct regulatory frameworks that rely upon and incorporate private regulation.")

117 *See* Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRY L. 517, 523 (2011) ("Rather than viewing private regulation as either transcendent or technical, a more promising route involves paying attention to its substantive interactions with domestic law, regulation, and other rules.").

Figure 1. Modes of Public-Private Interaction

Deference	*Support*	*Partnership*	*Delegation*	*Mandating*	*Displacement*
Definition					
Public regulation does not directly engage with private standards	Public regulator endorses or facilitates private standards	Public regulator partners with private actors on private standards	Public regulator grants authority to private organization to regulate	Public regulator mandates minimum standards or incorporates private standards	Public regulation seeks to displace or supplant private standards
Example					
U.S. federal securities regulation	Stock exchange ESG disclosure guidance	Public regulators' engagement with GRI	International Financial Reporting Standards (IFRS)	EU conflict minerals reporting integration of OECD guidelines	Statutory or regulatory preemption of private standards or prohibition on shareholder activism

It is important to note, at the outset, that these modes constitute stylized ideal types. For example, nearly all mandatory disclosure regimes for public companies require disclosure of corporate governance matters and material risks, and these rules can elicit some form of non-financial reporting. Likewise, private ordering is ubiquitous and cannot be fully displaced by regulation, even if doing so would be desirable. Conceptualizing public-private interaction as ideal types enables an analysis of the discretionary power and overlap that exists in practice.

Governments may also simultaneously engage through multiple modes with respect to a given issue, such as non-financial reporting. For example, a regulator may simultaneously (i) endorse or facilitate ESG disclosure standards,[118] (ii) mandate when reporting is

118 *See* Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 521–23, 544–45 (2009) (defining directive and facilitative forms of state orchestration).

required with respect to specific ESG information, (iii) partner with a private standard-setting organization to develop ESG disclosure rules, and (iv) delegate responsibility for assurance of ESG disclosure to private third-party providers. Within each mode of interaction are also many potential regulatory strategies.

These modes of interaction are distinguishable in part by their regulatory strength. Public regulators employ different degrees of governmental power in their interactions with private standard-setting organizations and the firms that adopt them. The extent to which regulators expend government resources on command-and-control rulemaking, garnering political support, providing financial incentives, and convening interested parties reflects the willingness and ability of regulators to use their unique powers to influence how well private disclosure regimes work.[119]

Consistent with Jody Freeman's conception of governance, we posit that the interaction between public regulators and private disclosure regimes is the result of negotiated relationships that are dynamic, nonhierarchical, and decentralized.[120] The relationship between public-private interaction and regulatory strength is also inherently bilateral and dynamic.[121] This is because regulatory reform can stimulate changes in private standard setting, and voluntary ESG disclosure standards can also iteratively inform later regulatory reforms.

The following figure shows the spectrum of regulatory strength reflected by each mode of interaction.

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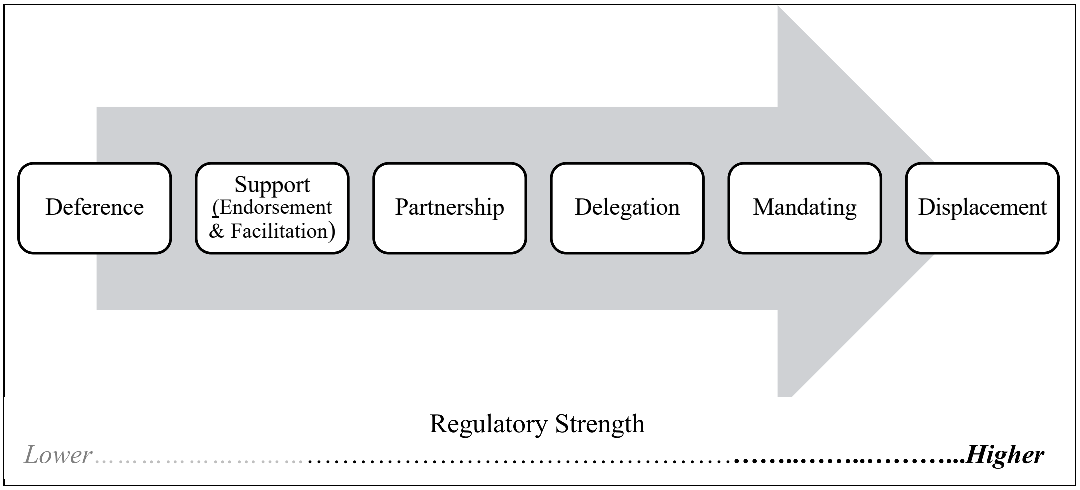
119 *See* JETTE STEEN KNUDSEN & JEREMY MOON, VISIBLE HANDS: GOVERNMENT REGULATION AND INTERNATIONAL BUSINESS RESPONSIBILITY 47–49 (2017). *See also* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 101–32 (1992) (presenting a model of enforced self-regulation).

120 *See* Freeman, *Private Role*, *supra* note 114, at 571–74.

121 *See* Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J. L. & SOC'Y 20, 45 (2011) (noting that the relationship between public regulation and private standards may depend on the identity of private participants, the instruments adopted, and the objectives of the relevant regulatory regimes).

Figure 2. Spectrum of Regulatory Strength



2.2.1. Deference

At the end of the spectrum representing the weakest use of state power, governments may passively or actively defer to private ordering. Some governments may do so passively, simply by not acknowledging or engaging with non-financial reporting issues or with private reporting standards. However, public regulators may also actively defer to market participants and private ordering by employing conscious strategies that advance specific policy goals. For example, financial regulators may choose to forego engaging with ESG private reporting regimes based on a view that the needs and actors served by financial reporting or public regulation are distinct from those served by private standards.[122] This position is evident in the United States where private ESG disclosure is the predominant

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[122] *See* Ronald J. Gilson, Henry Hansmann, & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 480 (2011) (defining regulatory diversification).

source of non-financial information in the United States, due to the SEC's general deference to private ordering.[123]

In contrast, the following four modes of interaction—support, partnership, delegation, and mandating—exhibit various forms of engagement between public regulation and private governance with respect to non-financial reporting. Employing regulatory strategies under these modes enables governments to align or engage with voluntary reporting frameworks and other private governance regimes.

2.2.2. Support

Moving further along the regulatory strength spectrum, governments interested in promoting non-financial reporting may also employ measures short of regulation to support non-financial reporting instead of directly mandating it, steering existing private governance regimes in a desired direction or encouraging the development of regulatory frameworks based on public-private collaboration.[124] Because government regulators are involved, however, their interactions with private governance regimes and firms are in the "shadow of hierarchy" that is defined by legal rules and legal institutions and so the state retains the power to exercise its authority.[125]

2.2.2.1. Endorsement

One way government can support corporate non-financial reporting practices is by endorsing private ESG disclosure

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[123] *See infra* Section 3.2.1.

[124] *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004) (characterizing New Governance as "a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals."); Abbott & Snidal, *supra* note 118, at 507–09 (contrasting New Governance-based regulation with traditional governmental regulation).

[125] *See* Steurer, *supra* note 96, at 399 (describing, in general terms, public regulation "in the shadow of hierarchy").

standards.[126] Endorsement effectively legitimizes specific private reporting regimes that meet pre-specified requirements.[127] Public regulators may also disseminate information about certain reporting regimes, or use labels and logos to signal their support for specific private standards, giving them the explicit backing of the state.[128] Endorsement may also be institutionalized in regulatory guidance, such as through the selection and publication of industry best practices[129] or the selection of a private ESG disclosure standard as a template or model.[130] As discussed below, governments most strongly endorse private standards by delegating their regulatory standard-setting authority to private reporting regimes.[131]

The SEC has endorsed third-party standards in the past. For example, in the context of its specialized disclosure requirements for conflict minerals under Section 1502 of the Dodd-Frank Act, the SEC requires an issuer to use a "nationally or internationally recognized due diligence framework" in exercising due diligence on the source and chain of custody of its conflict minerals,[132] and in its 2012 rulemaking, the SEC expressly recognized the OECD's due diligence guidance as the sole framework to meet this criterion.[133]

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126 *See* Tom Fox et al., *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* 6 (World Bank, Working Paper, Oct. 1, 2002), https://documents.worldbank.org/curated/en/284431468340215496/pdf/346550CSR1CSR1interior.pdf [https://perma.cc/U4AN-8Q8E].

127 *See* Lars H. Gulbrandsen, *Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-State Certification Programs*, 8 REG. & GOVERNANCE 74, 76 (2014) (noting how governments can also limit the authority of a private governance regime by supporting the creation of competing standards).

128 KNUDSEN & MOON, *supra* note 119, at 64–65.

129 *See* David Zaring, *Best Practices,* 81 N.Y.U. L. REV. 294, 302 (2006) (arguing that the cultivation of best practices by public regulators constitutes a form of administrative rulemaking).

130 *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1302 (1999) (proposing that the SEC adopt Ceres' reporting format for mandatory social disclosure under the Exchange Act).

131 *See infra* notes 142–147 and accompanying text.

132 Conflict Minerals Final Rule, 77 Fed. Reg. 56,274, 56,324 (Sept. 12, 2012).

133 *See id.* at 56, 281 ("Presently, it appears that the only nationally or internationally recognized due diligence framework available is the due diligence guidance approved by the [OECD]."). *See also OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (3d ed. 2016), https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf [https://perma.cc/H2EC-ZND5].

2.2.2.2. Facilitation

Public regulators can also directly facilitate the adoption and use of private ESG disclosure standards by market participants.[134] Most notably, governments can assist private reporting regimes by providing them financial or administrative support.[135] This may be undertaken by bringing to bear the state's unique resources, such as providing tax relief or exemptions for companies that use private reporting regimes.[136] Regulators can also enhance the capacity of private governance regimes through benchmarks and guidelines.[137]

2.2.3. Partnership

Beyond supporting voluntary ESG disclosure, public regulators may choose to partner with private actors, for example, to jointly develop rules or incorporate private standards into law or regulations.[138] Public regulators may initiate or convene this kind of collaboration, or may engage with private governance regimes as a co-equal participant.[139] Particularly at the global level, governments routinely participate in ad hoc networks and non-hierarchical governance arrangements with companies, NGOs, and other state and non-state actors.[140] These practices may even be institutionalized as a form of deliberative, experimental learning.[141] For example, as the case studies in Section 3 illustrate, many governments are working to harmonize their reporting standards with the GRI

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134 *See* Fox et al., *supra* note 126, at 5.

135 *See* Gulbrandsen, *supra* note 127, at 77 (conceptualizing the contributions of governments to private certification programs).

136 KNUDSEN & MOON, *supra* note 119, at 65–66.

137 Fox et al., *supra* note 126, at 4–5.

138 *See* Martijn W. Scheltema, *Assessing Effectiveness of International Private Regulation in the CSR Arena*, 13 RICH. J. GLOBAL L. & BUS. 263, 272–73 (2014).

139 *See* KNUDSEN & MOON, *supra* note 119, at 67.

140 Grainne de Búrca, Robert O. Keohane & Charles Sabel, *New Modes of Pluralist Global Governance*, 45 N.Y.U. J. INT'L L. & POL. 723, 733–38 (2013).

141 *See* Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271, 305–09 (2008).

Standards, which the vast majority of the largest firms are already familiar with.

2.2.4. Delegation

In addition, public regulators may choose to delegate regulatory functions, such as standard-setting, oversight, or enforcement, to private disclosure regimes. Governments can formally permit private standards to regulate a given area autonomously, or allow them to do so subject to review and oversight either directly by a regulator or indirectly through a private self-regulatory organization (SRO).[142] Public regulation may serve as a default or fallback option if a private governance regime fails to meet a legally-established minimum threshold.[143]

With respect to financial reporting, for example, the SEC delegates regulatory authority over accounting rules to the Financial Accounting Standards Board (FASB), a private organization which is responsible for establishing Generally Accepted Accounting Principles (GAAP). Similarly, other governments have delegated authority to a private international body, the International Accounting Standards Board (IASB), to harmonize global accounting standards through the production and dissemination of International Financial Reporting Standards (IFRS).[144]

Encouraging or requiring the use of third-party auditors and assurance providers is also a delegation of regulatory monitoring authority to private third-party actors.[145] For example, in

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142 *See* Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation,* 34 BROOK. J. INT'L L. 884, 884 (2009) (referring to the SEC's adoption of SRO-established standards). The criteria or conditions on such delegation are a form of meta-regulation, which represents a regulatory mandate, *see infra* notes 154–156 and accompanying text.

143 *See* David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 549 (2007) (referring to default hybridity).

144 *See* TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 60–98 (2011) (describing the emergence of the IASB).

145 The use of private auditors and assurance providers may also constitute a form of partnership—rather than delegation—depending on the operational

implementing the requirements of Section 404 of the Sarbanes-Oxley Act on management evaluation of internal financial controls, the SEC required companies to base this evaluation on a third-party framework that met certain criteria.[146] Similarly, both U.S. and EU conflict mineral disclosure rules require that reporting companies use independent third-party auditors—again a form of delegation.[147] Finally, granting private rights of action to shareholders or other third parties to enforce disclosure requirements or anti-fraud rules is another common form of delegation.

2.2.5. Mandating

Toward the stronger end of the regulatory strength spectrum, public regulators can of course adopt new mandatory disclosure standards within existing regulatory reporting frameworks.[148] Yet even within traditional rulemaking or legislation, public regulators may use their authority to incorporate private standards into public law; in such cases, mandating also endorses or facilitates private governance.[149] Public regulators may expressly reference existing private ESG disclosure standards in their rulemaking or support the development of private standards that are later incorporated by reference.[150] For example, the SEC referenced the internal control framework created by the Committee of Sponsoring Organizations

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autonomy of the private third parties and the nature of their relationships with governments. *See* Lesley K. McAllister, *Regulation by Third Party Verification*, 53 B.C. L. REV. 1, 12 (2012) [hereinafter McAllister, *Third Party Verification*] (characterizing third-party verification as public-private partnership).

146 Sec. & Exch. Comm'n, Final Rule, Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, 68 Fed. Reg. 36,636, 36,639–41 (June 18, 2003) (to be codified at 17 C.F.R. pt. 210, 228, 229, 240, 249, 270 & 274).

147 *See* 15 U.S.C. § 78m(p)(1)(A)(i) (2010) (requiring companies to hire an independent, private auditor to confirm the chain of custody of certain minerals); Parliament and Council Regulation 2017/821, art. 12 2017 O.J. (L 130) 1, 3 (EU) ("Third-party auditing of an economic operator's supply chain due diligence practices ensures credibility for the benefit of downstream economic operators…").

148 Fox et al., *supra* note 126, at 3.

149 McAllister, *Harnessing*, *supra* note 110, at 319.

150 Nina A. Mendelson, *Private Control over Access to Public Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 750 (2014).

of the Treadway Commission (COSO) in its rules implementing Section 404 of the Sarbanes-Oxley Act and also expressly harmonized the SEC's rules with COSO's framework.[151] Another example of incorporation by reference in ESG disclosure are conflict minerals regulations in the U.S. and the EU, which comprehensively embed the OECD's due diligence guidance in their rules.[152] In addition, a government regulator may effectively incorporate a private ESG disclosure standard by granting it mutual recognition vis-à-vis corresponding public regulatory requirements.[153]

Another form of mandating is the use of "meta-regulation," that is, when governments regulate the private regulators rather than setting the standards themselves, in order to enforce minimum standards.[154] For example, a public regulator may require that a private reporting regime meet certain requirements before it can be used by market participants.[155] When adopting meta-regulation, like traditional regulation, the regulator exercises a higher level of regulatory strength than in the prior modes of interaction, but meta-regulation nonetheless provides autonomy and flexibility to private governance regimes. In contrast to traditional command-and-

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151 *See* Sec. & Exch. Comm'n, Final Rule, Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, 68 Fed. Reg. 36,636, 36,639–41 (June 18, 2003) (to be codified at 17 C.F.R. pt. 210, 228, 229, 240, 249, 270 & 274); COSO, INTERNAL CONTROL-INTEGRATED FRAMEWORK (1992).

152 *See* Parliament and Council Regulation 2017/821, art. 12 2017 O.J. (L 130) 1, 3 (EU) (setting up a European Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas); European Commission, *The EU's new Conflict Minerals Regulation: A quick guide if you're involved in the trade in tin, tungsten, tantalum or gold* 5 (Mar. 2017) (identifying the articles of the EU conflict minerals regulation that correspond to each of the five steps of the OECD's due diligence guidance).

153 *See* Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 LAW & CONTEMP. PROBS. 263, 279 (2005). Mutual recognition permits regulators to recognize another jurisdiction's standards as an adequate substitute. Stephen Kim Park, *Guarding the Guardians: The Case for Regulating State-Owned Financial Entities in Global Finance*, 16 U. PA. J. BUS. L. 739, 785 (2014). Traditionally, mutual recognition has been applied to other state-based regulators. *See* Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT'L L.J. 56 (2011).

154 *See generally* CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY 245–91 (2002).

155 *See* De Búrca & Scott, *supra* note 19, at 7 (referencing baseline hybridity).

control regulation, mandating minimum criteria for private reporting standards enables a private standard-setting organization to choose whether to comply with the minimum standard. Meta-regulation can also deliberately incorporate flexible and open-ended criteria.[156] For example, this may entail requiring private ESG regimes to articulate the objectives and scope of their reporting frameworks to their users, instead of mandating that they include certain reporting criteria.

2.2.6. Displacement

At the far end of the regulatory strength spectrum, governments may theoretically refuse to collaborate with private governance regimes or may reject them altogether.[157] If this is the case, when a private standard becomes a viable alternative to public regulation, the government could seek to displace it[158] or may choose to directly compete with privately developed rules and standards.[159]

In the context of non-financial reporting, the SEC and other public regulators could compete with private disclosure regimes, for example, by establishing mandatory reporting rules under national securities laws or stock exchange listing rules that do not align with, but would supersede, existing private standards for most of the largest firms.[160] Although we are not aware of such a case, public regulation could also theoretically preempt private governance, for example, by requiring companies to report all material ESG

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156 *See* KNUDSEN & MOON, *supra* note 119, at 68.

157 Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRY L. 517, 524–25 (2011).

158 *See* Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE 1, 11–12 (2014) (describing various types of interaction between the standards developed by the government and by private actors including competition and cooptation).

159 *See* Scheltema, *supra* note 138, at 273 (observing that competition may occur between standards set by private actors and those set by the government).

160 *See* Margaret Ryznar & Karen E. Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667, 1673–74 (2015) (discussing disclosure requirements mandated by the Sarbanes-Oxley and Dodd-Frank Acts).

information only in the annual report and not in a free-standing sustainability report.[161]

3. A Comparative Analysis of Government Approaches to ESG Disclosure

Governments seeking to respond to growing demand for non-financial information must consider the modes of public-private interaction outlined in Section 2 because any reforms will be adopted against a backdrop of existing private standards and enforcement mechanisms. The inevitable result is a transition from deference to existing ESG disclosure regimes and other forms of private ordering, to a hybrid model where public regulation and private governance intersect. To understand what this might look like in practice, we examine the experience of countries that have followed this path across different capital markets.

This comparative analysis applies the theories of public-private interaction discussed in Section 2 to different jurisdictional contexts in order to identify regulatory approaches to non-financial reporting. The following discussion begins by describing this Article's comparative methodology and then proceeds by applying it to the United States and six other leading jurisdictions. For the SEC and other regulators considering whether to undertake non-financial reporting reform in the future, our analysis offers a rich source of insight into the specific forms hybrid public-private non-financial reporting systems can take and how to optimize private ordering within existing public disclosure regimes.

3.1. Methodology

We start from the premise that the optimal modes of public-private interaction will likely differ across jurisdictions.[162] As

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[161] *See* Freeman, *Private Role*, *supra* note 114, at 575 (noting reasons why certain functions should remain exclusively under state authority).

[162] *See* Dan Wielsch, *Global Law's Toolbox: Private Regulation by Standards*, 60 AM. J. COMP. L. 1075, 1077 (2012) ("[P]rivate normative orders face diverging

Section 2 shows, the interaction of public regulation and private governance is a dynamic process, in part driven by the policy objectives, administrative capacity, and legal constraints of the public regulator.[163] Further, government strategies are shaped by competitive market pressures, such as support for (or opposition to) government intervention by market participants.[164] Although we cannot examine in this Article all of the critical factors that have influenced these policy choices and may affect their success, we identify how each jurisdiction approaches ESG disclosure from the standpoint of investors.

The scope of our comparative analysis is the United States, along with South Africa, Brazil, the European Union, the United Kingdom, Hong Kong, and mainland China. Because the United States has yet to adopt non-financial reporting requirements for reporting companies, it represents a jurisdiction where public regulation most closely reflects deference to private ordering. We therefore begin our comparative analysis by introducing the U.S. approach to ESG disclosure. The remaining jurisdictions reflect two criteria. First, they constitute the largest capital markets in the world or in their respective regions (e.g., South Africa, Brazil, the European Union, the United Kingdom, Hong Kong, and mainland China) outside the United States. As Appendix I shows, they also reflect a diversity of legal systems. In addition, certain countries—such as South Africa, Brazil, and the United Kingdom—have been early movers in ESG disclosure. Accordingly, these case studies provide insights on how public regulation of non-financial reporting by market leaders has taken account of private ordering.

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conditions for recognition in different states. As a consequence, the success of states in the law market depends on how responsive a particular state law is to instances of private regulation.”).

[163] Gulbrandsen, *supra* note 127, at 86.

[164] *See* CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM 133–34 (2012). *See also* Nikolay A. Dentchev, Elvira Haezendonck & Mitchell van Balen, *The Role of Governments in the Business and Society Debate*, 56 BUS. & SOC'Y 527, 530 (2017) (arguing that “researchers need to . . . focus on the specific mechanisms related to the role of governments . . . within the institutional country setting”).

3.2. Case Studies

The case studies below are presented in order of the degree of regulatory strength the jurisdiction's approach to ESG disclosure reflects—that is, from the most deferential or market-based to the most state-dominated. In each, we identify the modes of public-private interaction from Section 2 that shape the jurisdiction's approach to non-financial reporting. Specifically, we analyze how ESG disclosure is addressed under each jurisdiction's laws and how public regulation in each jurisdiction interacts with private ESG disclosure frameworks. These discussions incorporate aspects of the institutional context and political economy that may affect modes of public-private interaction, which we summarize in Appendix I. To identify the regulatory strength of private disclosure regimes, we identify whether ESG disclosure regulation is mandatory, voluntary, or applies on a comply-or-explain basis.[165] These elements are summarized in Appendix II. We also identify other ESG disclosure policies or incentives that regulators have introduced and what modes of interaction they represent.

3.2.1. United States

Among the jurisdictions included here, the United States best represents a model where public regulation (i.e., U.S. federal disclosure rules) largely defers to private ordering or private regulation with respect to standard-setting, assurance, and enforcement of ESG disclosure. The current U.S. approach to non-financial reporting is a bifurcated disclosure system: private ordering in the form of third-party reporting standards, voluntary disclosure, and shareholder activism drives stakeholder-oriented sustainability reporting, while corporate annual reports and proxy

[165] Comply-or-explain corporate governance or sustainability measures allow companies to comply by either attesting that they have adopted the stated practice or by explaining why they have not. *See* FIN. REPORTING COUNCIL (FRC), WHAT CONSTITUTES AN EXPLANATION UNDER 'COMPLY OR EXPLAIN'? REPORT OF DISCUSSIONS BETWEEN COMPANIES AND INVESTORS 5 (Feb. 2012), https://www.frc.org.uk/getattachment/a39aa822-ae3c-4ddf-b869-db8f2ffe1b61/what-constitutes-an-explanation-under-comply-or-exlpain.pdf [https://perma.cc/P3A7-BSG5].

statements remain subject to the reporting rules established under federal securities laws. State corporate governance rules give directors and officers significant discretion to consider stakeholder interests,[166] but given the strong influence of the shareholder primacy norm among business and legal professionals and the preference of many U.S. companies and their advisors for private ordering over regulatory intervention, non-financial reporting reform faces resistance, and views on the materiality of ESG factors to investors are still evolving.[167] Past efforts to use disclosure as a regulatory tool have also faced strong opposition and legal challenge.[168] Given these limits, U.S. non-financial reporting practice continues to defer heavily to private ordering and private regulation, with limited facilitation and endorsement of voluntary reporting and private ESG disclosure initiatives.

To be sure, the general rules that govern corporate reporting in the United States already require disclosure of material non-financial information.[169] While the scope of such disclosure is subject to companies' own assessments of ESG materiality, some companies provide sustainability—or climate-risk—disclosure in their annual reports.[170] In addition, the SEC has adopted "specialized disclosures" regulations that cover the use of conflict

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[166] *See generally* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005) (observing the wide legal bounds for profit-sacrificing decisionmaking); LYNN STOUT, THE SHAREHOLDER VALUE MYTH 29–31 (2012) (discussing how business judgment rule deference permits deviation from shareholder primacy).

[167] Comments from companies and business groups on the SEC's 2016 Regulation S-K Concept Release reflect mixed views on ESG materiality but strong opposition to disclosure reforms. *See generally* Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform From the Regulation S-K Concept Release*, 65 VILL. L. REV. (forthcoming 2020) (empirically analyzing public comments to the SEC on ESG materiality and other aspects of risk disclosure).

[168] *See* Harper Ho, *Nonfinancial Risk Disclosure*, *supra* note 13, at 471–73 (discussing examples).

[169] *See* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, & 241) [hereinafter SEC Climate Release], https://www.sec.gov/rules/interp/2010/33-9106.pdf [https://perma.cc/KKW3-G6RA] (explaining how current disclosure rules extend to material information on climate-related risks).

[170] *See supra* note 53 and accompanying text; *see also* SASB, *supra* note 70 (reviewing the quality of these disclosures).

minerals in supply chains,[171] certain business activities in Iran,[172] and, for firms in the extractive sector, mine safety.[173] Federal proxy rules also mandate certain disclosures regarding risk management, executive compensation, and board diversity that may also relate to ESG factors and risks.[174]

However, the SEC has not yet indicated a willingness to consider any significant reforms of federal disclosure rules to address non-financial matters.[175] Both the Securities Act of 1933 and the Exchange Act of 1934 authorize the SEC to require disclosure when "necessary or appropriate in the public interest or for the protection of investors."[176] However, these statements of the SEC's statutory

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171 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1502–1504, 124 Stat. 1376, 2213–22 (2010) (codified at 15 U.S.C. § 78m (2012)) [hereinafter Dodd-Frank Consumer Protection Act]; 17 C.F.R. § 229.104 (2012) (prescribing mine safety disclosure); *see also* Conflict Minerals, *supra* note 132. In January 2017, the SEC announced its intention to re-evaluate Section 1502. *See* SEC. & EXCH. COMM'N, ACTING CHAIRMAN MICHAEL S. PIWOWAR, PUB. STATEMENT, RECONSIDERATION OF CONFLICT MINERALS RULE IMPLEMENTATION (Jan. 31, 2017), https://www.sec.gov/news/statement/reconsideration-of-conflict-minerals-rule-implementation.html [https://perma.cc/49B6-TCD5].

172 S*ee* Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112–158, § 219, 126 Stat. 1214, 1235–36 (ITRA). For a detailed examination of ITRA and a comparison to conflict minerals disclosure regulation, see Park, *Targeted Social Transparency*, *supra* note 20, at 108–13.

173 *See* Dodd-Frank Consumer Protection Act, *supra* note 171; 17 C.F.R. § 229.104 (mine safety); *see also* Mine Safety Disclosure, 76 Fed. Reg. 81,762 (2011). The SEC's final rule, Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 34-78167 (Sept. 26, 2016), was repealed Feb. 14, 2017 by H.J. Res. 41, 115th Cong. (2017).

174 *See* Harper Ho, *Nonfinancial Risk Disclosure*, *supra* note 13, at 426–28 (summarizing these rules).

175 In August 2019, the SEC took an initial step toward expanding employment-related (i.e., "social") disclosures by proposing to add "human capital" disclosures under Item 101 of Regulation S–K, which would be subject to companies' own materiality judgment. Modernization of Regulation S–K Items 101, 103, & 105, 84 Fed. Reg. 44,358, 44,369–72 (Aug. 23, 2019) (codified at 17 C.F.R. pts. 229, 239, & 240).

176 Securities Act of 1933, 15 U.S.C. § 77g(a)(1) (2018); *see also id.* § 77s(a); Securities Exchange Act of 1934, 15 U.S.C. §§ 78c(b), 78l, 78m(a), 78n(a), 78o(d), 78w(a) (2018). Accordingly, leading securities law experts have argued that the SEC's authority extends to rulemaking in the public interest and that "publicness" is a defining feature of securities law. *See, e.g.*, Donald C. Langevoort & Robert B. Thompson, "*Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 375–82 (2013) (discussing how federal securities law is grounded in understandings of the "publicness" of listed companies); Hillary A. Sale, *Public Governance,* 81 GEO. WASH. L. REV. 1012, 1017–31 (2013) (same).

mission also link these two elements, requiring that in adopting any disclosure reform to advance the public interest, the SEC must also consider investor protection and "whether the action will promote efficiency, competition[,] and capital formation."[177] Under this interpretation, the goals of disclosure under the federal securities laws are not necessarily aligned with the clear regulatory goals of disclosure under most sustainability reporting frameworks and other private regulatory regimes.

By declining to adopt new rulemaking or guidance on non-financial reporting, the SEC has deferred to private reporting standards and other forms of private ordering, which are central to U.S. non-financial reporting practice, as well as to corporate management's judgment of ESG materiality. As noted in Section 1, voluntary sustainability reporting is common among the largest U.S. public companies, and these reports are often based on frameworks and standards developed by the GRI, the CDP, or the SASB.[178] Under these frameworks, third-party assurance, which is another form of private ordering, is optional.

Similarly, the SEC has chosen to defer to ESG-related shareholder proposals and other forms of direct engagement between investors and companies to drive changes in corporate disclosure practice. In 2019, consistent with past trends, environmental and social proposals accounted for around half of all voted proposals.[179] Some of these proposals generate ESG disclosure by asking the company to produce a report or provide specific ESG information.[180] However, shareholder proposals are

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[177] Regulation S–K Concept Release, *supra* note 85, at 23,917 n.6, 23,921–22 (citing Section 3(f) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(f) (2018), and Section 2(b) of the Securities Act of 1933, 15 U.S.C. § 77b(b) (2018)).

[178] IRRC, *supra* note 24, at 31–33.

[179] ERNST & YOUNG, FIVE TAKEAWAYS FROM THE 2019 PROXY SEASON 7 (July 23, 2019), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/cbm/ey-cbm-2019-proxy-season-preview.pdf [https://perma.cc/SV63-ADMA] (noting that average support for voted proposals has risen to 28 percent on average, and that approximately 40 percent of all environmental and social proposals are withdrawn prior to voting, often reflecting a successful shareholder engagement); *see also* THE CONFERENCE BOARD, PROXY VOTING ANALYTICS (2015–2018) 14–15 (2018) [hereinafter CONFERENCE BOARD], https://law.rutgers.edu/sites/law/files/RR-1674-18-R.pdf [https://perma.cc/EL9C-EZD3].

[180] Thirteen such proposals were filed in 2018. CONFERENCE BOARD, *supra* note 179, at 231.

non-binding, making shareholder engagement a poor tool for standardizing disclosure practices across all firms.

Although the SEC has not yet introduced a comprehensive ESG disclosure framework, it has taken steps to facilitate non-financial reporting, and indirectly, the use of private reporting frameworks. The most obvious example is its 2010 guidance on the materiality of climate-change-related risks, which highlighted where current reporting rules should already elicit such information.[181] The SEC also indirectly facilitates ESG-related shareholder proposals through its no-action review process; by interpreting the relevant rules in a way that permits proposals to go to a vote, the SEC has allowed shareholders to raise the profile of ESG issues and to encourage non-financial reporting.[182]

Other federal agencies have also played a modest facilitating role by removing perceived barriers to the use of ESG information in investment analysis and shareholder engagement. Most notably, the Department of Labor's current guidance for certain pension funds clarifies that ESG factors may be financially material to fund beneficiaries and therefore can be properly incorporated in fund management.[183] While not expressly endorsing any particular private standard, individual SEC commissioners have also periodically endorsed non-financial reporting and ESG concepts generally, and in 2016, the SEC raised the profile of non-financial reporting by seeking public comment on the need for changes to

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181 *See* SEC Climate Release, *supra* note 169.

182 With limited exceptions, these proposals generally do not garner majority support. *See* CONFERENCE BOARD, *supra* note 179, at 14, 90 (listing the limited number of environmental and social issues that have gained majority support).

183 Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65,135, 65,135-136 (Oct. 26, 2015); *cf.* Principles for Responsible Investment & MSCI Inc., *Global Guide to Responsible Investment Regulation* 14–15 (2016), https://www.msci.com/documents/1296102/0/PRI_MSCI_Global-Guide-to-Responsible-Investment-Regulation.pdf/ac76bbbd-1e0a-416e-9e83-9416910a4a4b [https://perma.cc/ZK9Q-JTAG] (noting that the European Commission's Occupational Retirement Provision Directive and the domestic laws of Sweden, Norway, and Germany mandate ESG integration into risk management processes or investment decisions). *But see* EMP. BENEFITS SECURITY ADMIN., U.S. DEP'T OF LABOR, FIELD ASSISTANCE BULLETIN NO. 2018-01 (Apr. 23, 2018) (cautioning plan fiduciaries to "not too readily treat ESG factors as economically relevant" to investing and to carefully consider the potential costs of engagement with portfolio firms on ESG matters).

Regulation S-K to better elicit non-financial information.[184] It also sought input on the private standards that could usefully inform future disclosure rulemaking.[185]

Stock exchanges in the United States have played a limited role in promoting ESG disclosure among listed firms, in contrast to the leading role of stock exchanges in other jurisdictions. However, the Nasdaq OMX and the NYSE are both members of the Worldwide Federation of Exchanges and participate in the United Nations Sustainable Stock Exchanges Initiative (SSEI). Through their membership, these stock exchanges visibly endorse the work of the SSEI and indicate their support for its missions to advance ESG disclosure for listed firms, even though no U.S. exchange has yet adopted ESG disclosure policies or guidance.[186]

In sum, the dominant mode of public-private interaction in the United States is deference to private ordering. Private ordering takes many forms beyond a strong reliance on voluntary corporate reporting within and beyond public filings. These range from the creation of reporting standards and frameworks, to shareholder engagement and other forms of activism, to reliance on third party assurance providers and, to a lesser extent, to shareholder litigation to promote disclosure accuracy and reliability.

3.2.2. South Africa

South Africa represents a model of non-financial reporting that predominantly relies on private regulation but nonetheless contrasts with the U.S's deference to various forms of private ordering. ESG disclosure in South Africa revolves around the King Code on Corporate Governance, initially created in 1994.[187] The King Code is now in its fourth iteration as "King IV," which went into effect in

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184 *See* Regulation S-K Concept Release, *supra* note 85.

185 *Id.* at 23,973.

186 Sustainable Stock Exchs. Initiative, LIST OF PARTNER EXCHANGES, https://www.sseinitiative.org/sse-partner-exchanges/list-of-partner-exchanges/ [https://perma.cc/QD2V-J9G4] (last visited Sept. 27, 2019).

187 Inst. of Dirs. Of Southern Africa, *King Report on Corporate Governance for South Africa* (1994). *See also* ROBERT ECCLES & MICHAEL KRZUS, THE INTEGRATED REPORTING MOVEMENT: MEANING, MOMENTUM, MOTIVES, AND MATERIALITY 5–6 (describing the origins and creation of the King Code).

2017.[188] The King Code was created and has been revised by a committee convened by the Institute of Directors in Southern Africa (IoDSA), which is primarily composed of private and independent members.[189] The IoDSA, a professional body of board directors, is the custodian of the King IV reports.[190] From its outset, the King Code has been based on voluntary principles and leading practices, rather than rules.[191] It is expressly intended to complement and augment statutorily created hard law as part of a hybrid system of corporate governance.[192]

One of the foundations of the King Code is transparency,[193] and compliance is achieved through its disclosure regime.[194] King IV expressly addresses the use of disclosed information by stakeholders.[195] Its disclosure regime is based on two organizing principles: integrated reporting and "apply-and-explain."

Under the IIRC's International <IR> Framework, integrated reporting seeks to integrate ESG disclosure with financial

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188 Inst. of Dirs. in Southern Africa, *King IV: Report on Corporate Governance for South Africa, 2016* 38 (Nov. 1, 2016) [hereinafter King IV Report], https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf [https://perma.cc/4Z69-F79G] ("King IV is effective in respect of the financial years starting on or after 1 April 2017").

189 *See id.* at 119–20 (describing the process and participants in the development process of King IV).

190 Inst. of Dirs. in Southern Africa, *King IV: Questions and Answers*, https://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/16F4503D-86F9-43D5-AEB4-C067B06EB59C/Guide_to_questions_and_answers_on_King_IV.pdf [https://perma.cc/CX4Z-U7C6] (last visited Sept. 27, 2019).

191 *See* Ruth Jebe, *Sustainability Reporting and New Governance: South Africa Marks the Path to Improved Corporate Disclosure*, 23 CARDOZO J. INT'L & COMP. L. 233, 266 (2015).

192 King IV Report, *supra* note 188, at 35.

193 *See id.* at 22 ("encourage transparent and meaningful reporting to stakeholders").

194 Michael van Rensburg & Ashlin Perumall, *JSE Listings Requirements Amended to Align with King IV*, BAKER MCKENZIE (June 19, 2017), https://www.lexology.com/library/detail.aspx?g=e63c908b-31d2-4c81-b1ea-138b942a474a [https://perma.cc/R89Y-VCLM].

195 King IV Report, *supra* note 188, at 48 (providing that "[t]he governing body [of the organization] should ensure that reports issued by the organisation enable stakeholders to make informed assessments of the organisation's performance, and its short, medium and long-term prospects").

information.[196] King III, the predecessor to the current King IV, established integrated reporting in South Africa and served as a foundation for the development of the International <IR> Framework.[197] King IV expressly adopts the "triple context"[198] and the "six capitals" model[199] as organizing concepts for ESG disclosure. The organization's governing body (e.g., a corporation's board of directors) has the discretion to determine where King IV-compliant disclosures are made, either in an integrated report or a "distinguishable, prominent and accessible part of another report," such as a sustainability report or social and ethics committee report.[200] Disclosures may be posted on the organization's website, on other platforms, or through other media.[201]

King IV is based on "apply-and-explain," an evolution of King III's modified version of comply-or-explain.[202] Under King IV's apply-and-explain model, an organization must implement the King Code and also explain how its 17 principles have been implemented and how such measures achieve the principles' contemplated outcomes.[203] South Africa is the first country to implement apply-and-explain as an organizing principle for its non-financial reporting regime.

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196 Adam Sulkowski & Sandra Waddock, *Beyond Sustainability Reporting: Integrated Reporting is Practiced, Required and More Would be Better*, 10 U. ST. THOMAS L.J. 1060, 1064 (2013); *see also* Integrated Reporting SA, FAQ: The Octopus Model, https://integratedreportingsa.org/faq-the-octopus-model/ [https://perma.cc/37NX-MSJ9] (last visited Sept. 27, 2019) (describing the integrated report as the "head of the octopus…connected to a multitude of arms, each of which is a detailed report/information source: for instance, the financial statements, sustainability report, governance report, social and ethics committee report, risk report, remuneration report, or other printed or online information").

197 *See* ROBERT ECCLES & MICHAEL KRZUS, *supra* note 187, at 8–10 (describing King III and the Integrated Reporting Committee of South Africa's Discussion Paper).

198 King IV Report, *supra* note 188, at 24 (referring to the "combined context of the economy, society, and environment in which the organisation operates").

199 *See* King IV Report, *supra* note 188, at 24 (referring to "financial, manufactured, intellectual, human, social and relationship, and natural capitals").

200 King IV Report, *supra* note 188, at 28, 48.

201 King IV Report, *supra* note 188, at 48.

202 King IV Report, *supra* note 188, at 37. *See also* ROBERT ECCLES & MICHAEL KRZUS, *supra* note 187, at 8.

203 *See* King IV Report, *supra* note 188, at 37.

The soft legal authority of King IV is supplemented by the Johannesburg Stock Exchange (JSE). The JSE requires implementation of the King Code as a condition for listing.[204] The JSE is the world's 19th largest stock exchange by market capitalization and the largest in Africa.[205] Referencing the King Code in the JSE listing requirements has the effect of making the King Code mandatory for all JSE-listed companies.[206] The JSE, a privately-owned entity, operates as an SRO supervised by the South African Financial Services Board (FSB).[207] The FSB, which regulates and supervises the non-bank part of the South African financial services industry, is subject to the general authority of the Ministry of Finance.[208]

In sum, the dominant mode of public-private interaction in South Africa is support. Indirect facilitation of private ordering is evident in two inter-related domains, the creation of the King Code by IoDSA and its enforcement by the JSE. Delegation is also evident insofar as the South African government enables the JSE to regulate non-financial reporting through its listing requirements absent an express regulatory mandate.

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204 *See* JSE Limited Listings Requirements, para. 8.63(a) [hereinafter JSE Limited Listings Requirement], https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf [https://perma.cc/4BAV-KWYW] (last visited Sept. 27, 2019); *see also* ROBERT ECCLES & MICHAEL KRZUS, *supra* note 187, at 3 (noting the central role of the JSE and contrasting it to mandatory regulation by a securities regulator).

205 JSE Overview, Who We Are, https://www.jse.co.za/about/history-company-overview [https://perma.cc/E9ES-TLNZ] (last visited Sept. 27, 2019).

206 *Id. See also* JSE Limited Listings Requirements, *supra* note 204, at para. 3.84 ("The effect of incorporating certain practices from the King Code in the Listings Requirements is to make their implementation mandatory, this is notwithstanding the fact that application of the corporate governance practices in the King Code is generally voluntary").

207 INTERNATIONAL MONETARY FUND, SOUTH AFRICA, IOSCO PRINCIPLES—SECURITIES MARKETS: DETAILED ASSESSMENT OF IMPLEMENTATION 5 (Oct. 2010), https://www.imf.org/external/pubs/ft/scr/2010/cr10355.pdf [https://perma.cc/QP5J-5D5U].

208 *Id.*

3.2.3. Brazil

Non-financial reporting in Brazil is primarily governed by private ordering through B3, the country's largest stock exchange.[209] As a stock exchange, B3 operates as an SRO on the basis of authority granted to it by the Securities and Exchange Commission of Brazil (*Comissão de Valores Mobiliários*, or "CVM").[210] B3 is a publicly-traded corporation owned by institutional investors and is itself listed on the New Market (*Novo Mercado)* segment of B3.[211] B3's own annual sustainability report is produced in accordance with the GRI Standards.[212]

B3 established non-financial reporting on a voluntary "report-or-explain" basis for listed companies in 2011.[213] Listed companies were encouraged to disclose whether they published a stand-alone

[209] B3 is the successor to the BM&FBOVESPA and previously, the Sao Paolo Stock Exchange. Gilson, Hansmann, & Pargendler, *supra* note 122, at 485. In its current form, B3 was established in 2017 with the merger of BM&FBOVESPA and CETIP. The following discussion refers to B3 in relation to the BM&FBOVESPA prior to 2017. *See* B3, GUIDE FOR NONRESIDENT INVESTORS 3 [hereinafter B3 Guide], https://www.b3.com.br/data/files/F9/56/04/8D/932106108326F006790D8AA8/GUIA-INR-B3.pdf [https://perma.cc/QS9W-LR46] (last visited Sept. 27, 2019).

[210] The Brazilian securities markets are primarily regulated by the CVM, which in turn is supervised by the National Monetary Council. B3 Guide, *supra* note 209, at 11. *See also* Securities Act, Law No. 6.385/76 (Br.) (Dec. 7, 1976), https://www.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/Law-6.385-ing.pdf [https://perma.cc/7K96-9A8G]. B3 is subject to direct oversight by the CVM. Sustainable Stock Exchanges Initiative, B3, https://sseinitiative.org/data/b3/ [https://perma.cc/RZ25-8ZMX] (last visited Sept. 27, 2019).

[211] Sustainable Stock Exchanges Initiative, B3, https://sseinitiative.org/data/b3/ [https://perma.cc/RZ25-8ZMX] (last visited Sept. 27, 2019); *see also* B3, Ownership Structure, https://ir.bmfbovespa.com.br/static/enu/estrutura-acionaria.asp?idioma=enu [https://perma.cc/Z9SJ-5WU9] (last visited Sept. 27, 2019).

[212] B3, NEW VALUE—CORPORATE SUSTAINABILITY 12 (2016), https://www.b3.com.br/data/files/96/D0/37/3C/0F07751035EA4575790D8AA8/GuiaNovoValor_SustentabilidadeNasEmpresas_EN.PDF [https://perma.cc/TLN9-GQ68].

[213] *See* BM&FBOVESPA, External Communication, Proposal to adopt "Report or Explain" sustainability reporting model for listed companies (Dec. 11, 2011) [hereinafter BM&FBOVESPA 2011 External Communication], http://www.b3.com.br/data/files/9F/12/E6/65/62121510FE0C840592D828A8/EC-017-2011-Proposta-de-adocao-ao-modelo-Relate-ou-Explique-EN-US.pdf [https://perma.cc/NL2F-T4VN].

sustainability report or an integrated report, and indicate where the report was available, or alternatively, explain why they did not publish a report.[214] From the beginning, B3's disclosure regime was integrated into mandatory reporting requirements through the CVM's Reference Form, which the CVM provides to issuers as a template for mandatory periodic reporting.[215] The purpose of this integration was to reduce operational costs on companies associated with the report or explain disclosure regime.[216] The CVM facilitated the establishment of this voluntary initiative by adding a new category to its reporting system for sustainability reporting.[217]

Since 2017, B3's ESG disclosure regime has focused on whether listed companies take into account the United Nations Sustainable Development Goals (SDGs) in their sustainability reporting.[218] This shift was prompted by the CVM's decision to amend its Reference Form to expressly require disclosure on issuers' ESG disclosure policies and practices.[219] The coordination between B3 and the CVM, and the integration of their respective reporting regimes, suggest that the CVM's delegation of authority to B3, with respect to non-financial reporting, is a deliberate and coordinated policy decision to support non-financial reporting in Brazil.

Public-private interaction is also evident in the coordination and assistance of private ESG disclosure regimes with B3. B3's

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[214] B3, Communication to Stakeholders, (Feb. 2018), at 12, https://www.b3.com.br/data/files/5A/D7/71/18/BE1E161010983D16790D8AA8/Communication_to_Stakeholders_B3%20Final.pdf [https://perma.cc/7YWG-SPRH].

[215] CVM, Instruction No. 480 (Dec. 7 2009), https://www.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/CVMInstruction480.pdf [https://perma.cc/DAF4-JUS3]. This disclosure was made in the Reference Form under a residual category (Item. 7.8—Description of the company's relevant long-term relationships not elsewhere described). *See* BM&FBOVESPA 2011 External Communication, *supra* note 213; CVM, Instruction No. 480, *supra* note 215, art. 22 and annex 24.

[216] *See* B3 Guide, supra note 209, at 12.

[217] *See* BM&FBOVESPA 2011 External Communication, *supra* note 213.

[218] B3, External Communication, Proposal for Listed Companies to "Report or Explain for the Sustainable Development Goals" (Apr. 12, 2017) [hereinafter B3 2017 External Communication], http://www.b3.com.br/data/files/7C/D3/22/0B/200FC51097FB2DC5790D8AA8/CE-013-2017-DP-Relate-Explique-ODS_ingles.pdf [https://perma.cc/EYX6-SRHU].

[219] *Id.*

disclosure regime was developed in partnership with the GRI and the IIRC.[220] Further, B3 has partnered with the GRI to offer training to listed companies on ESG disclosure practices.[221] Along the same lines, B3 has partnered with the CVM, the GRI, and the Global Compact to develop guidance on SDGs-related disclosure in the Reference Form.[222]

B3's strategy with respect to non-financial reporting is consistent with its membership in UN-affiliated ESG fora such as the Global Compact, the PRI, and the SSEI.[223] As much as their operational value, B3's partnerships with the GRI and the IIRC serve as signals to foreign investors about Brazil's commitment to ESG.[224]

In sum, the dominant modes of public-private interaction in Brazil are support and partnership. The establishment of Brazil's stock exchange-based non-financial reporting framework was facilitated by legal and operational measures implemented by the CVM, which also constituted an implicit endorsement. In addition, the inter-relationships between B3, the CVM, and global private ESG disclosure regimes (specifically the GRI and the IIRC) exhibit elements of partnership as shown by their collaboration on the establishment, implementation, and modification of B3's disclosure regime.

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220 BM&FBOVESPA 2011 External Communication, *supra* note 213.

221 *See* BM&FBOVESPA 2011 External Communication, *supra* note 213 ("To assist companies not familiar with sustainability reporting, the Exchange will hold training workshops in partnership with Global Reporting Initiative (GRI) in early 2012."); B3 2017 External Communication, *supra* note 218 ("As in the first version of 'Report or Explain,' Global Reporting Initiative (GRI) will partner with us and will interact with companies (through training workshops, for example) to assist them in the process of understanding the SDGs and putting them into practice.").

222 B3, B3, CVM, GRI and Global Compact Launch Document to Facilitate Disclosure of Socio-environmental Information (Dec. 7, 2018), http://www.b3.com.br/en_us/news/socio-environmental-information.htm [https://perma.cc/72WE-CKU5].

223 *See* B3, NEW VALUE – CORPORATE SUSTAINABILITY, *supra* note 212, at 12.

224 *See* CFA INSTITUTE & PRINCIPLES FOR RESPONSIBLE INVESTMENT, ESG INTEGRATION IN THE AMERICAS: MARKETS, PRACTICES, AND DATA 26–27 (2018), https://www.cfainstitute.org/-/media/documents/survey/esg-integration-in-the-americas.ashx [https://perma.cc/5VVX-WB5M] (noting that demand for ESG information and integration in Brazil is primarily from foreign investors).

3.2.4. European Union

The European Union (EU) has adopted one of the most prominent mandatory non-financial reporting regimes in force today, but at the same time one that directly defers to private regulation and supports its further development. At its core is the EU's 2014 Non-Financial Reporting Directive (the "EU Directive"), which requires the disclosure of non-financial information by certain large firms defined as "public interest entities" (PIEs).[225] Its explicit dual purpose is first, to harmonize non-financial reporting practice across the EU and second, to advance public policies in favor of corporate accountability, responsible business practice, and sustainable economic development.[226]

In contrast to the U.S.'s shareholder-centric approach, the EU uses disclosure to improve corporate governance and change business practice in matters like diversity and human rights,[227] and defines materiality in terms of both investors and other stakeholders.[228] The EU Directive builds on priorities set by the EU in 2003 to encourage greater corporate accountability for environmental and social impacts by improving transparency, as well as the EU's view that the role of business includes both

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[225] Council Directive 2014/95, of the European Parliament and of the Council of 22 October 2014, 2014 O.J. (L 330), amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [hereinafter EU Directive]. PIEs are entities that individually or as a corporate group on a consolidated basis have on average more than 500 employees during the fiscal year. *Id.* at arts. 1(1) & 1(3). The EU Directive permits Member States to expand the scope of companies who are subject to the EU Directive's reporting requirements. *Id.* at preamble par. 14, art. 1(d) (exempting small and medium-sized enterprises).

[226] *Id.* at preamble paras. 3 & 6. *See also* European Commission, Communication from the Commission: Guidelines on Non-Financial Reporting (2017/C 215/01), 5 July, 2017, at 5, 7, 13 [hereinafter NFR Guidelines] (stressing the need for disclosure to support sustainable finance and the national implementation of the Guiding Principles, the U.N. Sustainable Development Goals, and the Paris Climate Accord).

[227] *See* EU Directive, *supra* note 225, at preamble, para. 18 (stating its purpose to "put indirect pressure on (companies) to have diversified boards").

[228] *See* EU Directive, *supra* note 225, at para. 4. Such materiality assessments should include the external "impact of [corporate] activities" on third parties, not just material non-financial risks to the firm itself. *See also* NFR Guidelines, *supra* note 226, at 5–6 (disclosure of materiality assessment processes is optional).

generating profits for shareholders and producing "shared value" for society.[229]

The EU Directive offers an excellent example of the dynamic, iterative relationship between private and public regulation. First, the EU Directive was itself influenced by a wide range of prior public-private initiatives—most notably, the IIRC's work on an integrated approach to financial and non-financial reporting.[230] In addition, the comply-or-explain approach to disclosure was pioneered in the United Kingdom, and Danish non-financial reporting rules also influenced the project.[231] Further, the goals of the EU Directive are well-aligned with the regulatory goals of most private reporting regimes.

The EU Directive requires that a PIE provide a non-financial statement in its management report that includes information on the entity's environmental, social and employee-related matters, respect for human rights, anti-bribery matters, and diversity.[232] The statement must also include a description of the entity's policies in each of these areas, the due diligence processes it has implemented to mitigate adverse corporate impacts, and a statement of the outcome of these policies.[233] In addition, the non-financial statement should include a discussion of the principal risks linked to the

229 *See* EU Directive, *supra* note 225, at preamble para. 2 (citing European Commission, "A Renewed EU Strategy 2011-14 for Corporate Social Responsibility," adopted Oct. 25, 2011). *See EU Parliament CSR Report*, *supra* note 47, at paras. 2, 5, & 23 (noting that CSR must be embedded within companies' business, financial, and operational strategies). The concept of "shared value" as a goal for both for-profit and nonprofit entities was first introduced by management scholars Michael Porter and Mark Kramer. *See generally* Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, 89 HARV. BUS. REV. 62 (2011).

230 *See* NFR Guidelines, *supra* note 226, at 3–4 (noting the Commission's review of these standards). *See also EU Parliament CSR Report*, *supra* note 47 (discussing the need to promote the IIRC framework).

231 *See* Stefan Muller et al., *Stakeholder Expectations on CSR Management and Current Regulatory Developments in Europe and Germany,* 12 CORP. OWNERSHIP & CONTROL 505–06 (2015).

232 *See* EU Directive, *supra* note 225, at arts. 1(1), 1(3) (adding new arts. 19(a)(1) and 29(a)(1)).

233 *See* EU Directive, *supra* note 225, at arts. 19(a)(1)(b)–(c), 29(a)(1)(b)–(c).

company's business activity, responses necessary to mitigate those risks, and relevant key performance indicators (KPIs).[234]

EU member states were required to adopt implementing legislation at the national level by the end of 2016,[235] and the EU Directive allows member states to exceed the minimum standards it establishes.[236] The particular legal authorities responsible for regulation and implementation also vary by jurisdiction. In order to improve the comparability of reporting across firms and within sectors, the EU has issued non-binding reporting guidelines to promote greater uniformity across member states with respect to particular non-financial performance indicators.[237]

Despite its mandatory nature, the EU Directive strongly supports and defers to existing private standards for non-financial reporting. As the official guidance for the EU Directive itself observes, the EU Directive "gives companies significant flexibility to disclose relevant information in the way that they consider most useful."[238] In fact, the EU Directive may require no change in some companies' non-financial reporting practice since it allows member states to exempt from any new reporting requirements those entities who already prepare a separate report on the basis of existing national, regional, or international frameworks that satisfy the EU Directive's requirements.[239] Part of its flexibility also comes from the principles-based nature of the EU Directive itself, which requires

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[234] *See* EU Directive, *supra* note 225, at arts. 19(a)(1)(d)–(e), 29(a)(1)(d)–(e). Entities should also disclose the principal risks of their "business relationships, products, or services" that are "likely to cause adverse impacts" where "relevant and proportionate." *Id.* at arts. 19(a)(1)(d), 29(a)(1)(d).

[235] *See* EU Directive, *supra* note 225, at art. 4. *See generally* GRI & CSR EUROPE, MEMBER STATE IMPLEMENTATION OF DIRECTIVE 2014/95/EU (2017), https://www.globalreporting.org/resourcelibrary/NFRpublication%20online_version.pdf [https://perma.cc/5R2L-S3U4] (discussing progress towards implementation).

[236] *See* EU Directive, *supra* note 225, arts. 1(1)(6), 1(3)(6). For example, member states can require companies to obtain third-party assurance of non-financial statements even though the EU Directive only requires an auditor to certify that the non-financial statement has been made. *See id.* art. 19(a)(5).

[237] *See generally* NFR Guidelines, *supra* note 226.

[238] *See* NFR Guidelines, *supra* note 226, at 2.

[239] *See* EU Directive, *supra* note 225, at preamble para. 9, arts. 1(1), 1(3) (adopting art. 19(a)(4)). Entities relying on such frameworks must disclose on which frameworks they rely. *See id.* arts. 1(1), 1(3).

only that the required disclosures are to be made on a comply-or-explain basis.

Finally, the EU Directive does not require third-party assurance, gives companies freedom to largely determine what to disclose, and allows member states to permit firms to publicize the non-financial statement on their website rather than with the entity's management report.[240] The trade-off for this flexibility is that the EU Directive cannot effectively promote standardization and comparability of non-financial information.

The EU Directive and its guidance also offer clear examples of support for private ordering as they reference over twenty of the internationally recognized private reporting standards that were consulted during the drafting process, including the CDP Standards, the GRI, SASB, and ISO 26000.[241] The EU Directive explicitly endorses these national and international reporting frameworks, as well as a number of multilateral public-private standards, including the EMAS, the Global Compact, the Guiding Principles, and the OECD Guidelines.[242] The European Commission's High Level Expert Group (HLEG) on Sustainable Finance has also specifically endorsed the work of the TCFD by urging the integration of the TCFD voluntary disclosure recommendations into EU policy.[243]

Beyond the modes of public-private interaction highlighted above, the adoption of the EU Directive has also facilitated the emergence of new ESG disclosure initiatives and guidance from the private sector. For example, in 2017, Nasdaq issued an ESG Reporting Guide for issuers in the Nordic and Baltic markets that provides specific ESG performance indicators and specifically references the EU Directive, the UN's Sustainable Development

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240 *See* EU Directive, *supra* note 225, at preamble para. 16, art. 1 (adopting art. 19(a)(6)).

241 *See* NFR Guidelines, *supra* note 226, at 3–4 (noting the Commission's review of these standards).

242 *See, e.g.,* NFR Guidelines, *supra* note 226, at 11; EU Directive, *supra* note 225, at para. 11 (urging companies, governments and stakeholders to reference existing frameworks).

243 *See* NFR Guidelines, *supra* note 226, at 6–7, 13. The TCFD framework itself also endorses many of the same voluntary private frameworks. *See generally* TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, IMPLEMENTING THE RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (2017), https://www.fsb-tcfd.org/wp-content/uploads/2017/12/FINAL-TCFD-Annex-Amended-121517.pdf [https://perma.cc/3YX6-J32F].

Goals, and the TCFD's climate reporting framework.[244] Stimulating new reporting initiatives by companies and private organizations in this way is an explicit goal of the EU Directive.[245]

In sum, the dominant modes of public-private interaction in the European Union are deference and support. Although implementation by particular member states varies, the 2014 Non-Financial Reporting Directive largely defers to existing private standard setters and voluntary disclosure practices. The EU has also endorsed and facilitated the development of private standards and reporting guidance.

3.2.5. United Kingdom

The United Kingdom (U.K.) is a global leader in the promotion of non-financial reporting and has over the past decade developed an increasingly mandatory approach. These efforts are led by the Financial Reporting Council (FRC), a private organization that is responsible for audit and accounting oversight, and for establishing corporate governance and investor stewardship standards.

ESG disclosure is required under the U.K.'s Corporate Governance Code,[246] and under the listing rules of the U.K. Listing Authority.[247] Even though the U.K. is generally seen as a strongly shareholder-centric jurisdiction, its non-financial reporting regulation builds on earlier corporate governance reforms that promoted greater corporate accountability for stakeholder impacts. This transition to what has been called an "enlightened shareholder value" model came in 2006, when Section 172 of the Companies Act redefined director fiduciary duties to shareholders to include

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244 *See* NASDAQ, ESG REPORTING GUIDE: A SUPPORT PROGRAM FOR NASDAQ ISSUERS—FOCUS AREA: NORDIC & BALTIC MARKETS (2017), https://business.nasdaq.com/esg-guide/ [https://perma.cc/ELD4-M2X2].

245 *See* NFR Guidelines, *supra* note 226, at 14.

246 *See generally* FIN. REPORTING COUNCIL (FRC), THE U.K. CORPORATE GOV. CODE (July 2018), https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF [https://perma.cc/G9W4-6QA2].

247 The Financial Conduct Authority (FCA), the U.K.'s securities regulator, also regulates listing requirements in the U.K. through the U.K. Listing Authority, but each exchange may also adopt its own listing rules. *See also* LONDON STOCK EXCHANGE GROUP, *supra* note 34.

consideration of corporate stakeholders and the long-term interests of the company.[248]

Before the adoption of the 2006 Companies Act, ESG disclosure was largely voluntary and based on companies' own reporting frameworks or those developed by third-party standard setters. Like the other jurisdictions surveyed in this Article, many of the U.K.'s current approaches to non-financial reporting also build on private and public-private ESG initiatives such as the Guiding Principles.[249] Many U.K. companies not subject to ESG disclosure rules also produce voluntary sustainability reports or have begun to integrate ESG disclosure into their annual reports.[250]

Since 2006, ESG disclosure in some form has been mandated for companies formed or listed in the U.K. under various overlapping regimes. Listed or "quoted" companies are required under the Companies Act 2006 to report certain environmental issues in their directors' reports.[251] Regulations introduced in 2013 under the Companies Act require further that quoted companies disclose greenhouse gas emissions and report on human rights issues, as well as director, management, and employee gender diversity in a strategic report on a comply-or-explain basis.[252] Although the

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248 *See generally* ANDREW KEAY, THE ENLIGHTENED SHAREHOLDER VALUE PRINCIPLE AND CORPORATE GOVERNANCE (2013) (discussing the corporate governance reforms that led to the "enlightened shareholder value" model).

249 *See generally* U.N. *Guiding Principles on Business and Human Rights*, *supra* note 60.

250 *See Environmental, Social and Governance ("ESG"): New UK Mandatory Reporting Rules,* MAYER BROWN (Sept. 2013), https://www.mayerbrown.com/files/Publication/123b4ac7-a050-46f2-9449-0b6740327749/Presentation/PublicationAttachment/57d4f570-4b22-4a0b-8376-1e639889272e/UK_Mandatory_Reporting_Sep13.pdf [https://perma.cc/3BBP-J8SP] (discussing the new 2013 SR Regulations).

251 *See UKLA Technical Note: Risk Factors,* FINANCIAL CONDUCT AUTHORITY (July 2013), https://www.fca.org.uk/publication/other/tn-621.2.pdf [https://perma.cc/9LMP-SDAE] (discussing the Prospectus Directive (PD) and noting the risks associated with the prospectus summary requirement).

252 Under the Companies Act, narrative reporting must be provided in a Strategic Report and a Directors' Report. *See* The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, No. 1970, Part 15, ch. 4A (concerning strategic reports) & Part 15, ch. 5 (concerning directors' reports) (UK), http://www.legislation.gov.uk/ukpga/2006/46/contents [https://perma.cc/Y4A3-C2AD]. *See also* EXPOSURE DRAFT: GUIDANCE ON THE STRATEGIC REPORT, FIN. REPORTING COUNCIL (Aug. 2013),

Financial Conduct Authority (FCA) can enforce violations of the Corporate Governance Code, the adequacy of these disclosures is enforced primarily through private ordering via shareholder engagement rather than by administrative enforcement.[253] Nonetheless, all of these reforms mean that the U.K. reflects a high degree of regulatory strength with respect to non-financial reporting.

The U.K. was also among the first EU member states to implement the EU Directive,[254] and the U.K.'s regulations are among the more stringent. The U.K. regulations require both quoted companies and large companies to report their principal risks, business risks and non-financial KPIs in the company's strategic report, in addition to a diversity statement.[255] Going beyond the EU's baseline, the U.K. requires these ESG disclosures to be audited for consistency and provides that directors may be fined for violations of these requirements.[256] Notwithstanding the mandatory force of these rules, the U.K. regulations also support and endorse the use of "national, EU-based and international reporting framework[s]" so long as the reporting company discloses

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https://www.frc.org.uk/getattachment/e17e5074-7139-4453-a176-3ca1fd229f51/;.aspx [https://perma.cc/2CMC-H7G9]; ENVIRONMENTAL REPORTING GUIDELINES: INCLUDING STREAMLINED ENERGY AND CARBON REPORTING GUIDANCE, DEFRA (June 2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791529/Env-reporting-guidance_inc_SECR_31March.pdf [https://perma.cc/4EWZ-25X7]. Listed companies' annual reports include financial statements and the strategic report, directors' report, corporate governance statement, and directors' remuneration report. *See* MARC MOORE & MARTIN PETRIN, CORPORATE GOVERNANCE: LAW, REGULATION, AND THEORY 199 (2017) (discussing the U.K.'s disclosure framework).

[253] *See* MOORE & PETRIN, *supra* note 252, at 62–64 (discussing enforcement mechanisms).

[254] *See* The Companies Act 2006 (U.K.), http://www.legislation.gov.uk/ukpga/2006/46/contents. *See generally* discussion *supra* Section 3.2.4 (analyzing the EU Non-Financial Reporting Directive).

[255] *See* Companies Act 2006, *supra* note 252, at art. 3 (amending the Companies Act 2006).

[256] *See* GRI & CSR EUROPE, MEMBER STATE IMPLEMENTATION OF DIRECTIVE 2014/95/EU (2017), at 30, https://www.globalreporting.org/resourcelibrary/NFRpublication%20online_version.pdf [https://perma.cc/KYF7-RC2S].

which it has adopted.[257] These revisions took effect in 2016 as a further amendment to the content of the strategic report under the Companies Act 2006.

In sum, the dominant modes of public-private interaction in the United Kingdom are deference and support. The comply-or-explain principles that ground its corporate governance regime also represent a hybrid public-private approach. Similarly, the FRC's role in developing standards for companies and investors represents a form of delegation. The U.K.'s implementation of the EU Non-Financial Reporting Directive, however, represents a more mandatory approach to disclosure, while still continuing to defer to private disclosure frameworks.

3.2.6. Hong Kong

Hong Kong is another jurisdiction that illustrates multiple modes of public-private interaction in the context of ESG disclosure. Like many of the other jurisdictions surveyed here, Hong Kong has transitioned to a mandatory non-financial reporting regime, but one whose content reflects strong deference and delegation to private regulation.[258] However, in contrast to the United States, Hong Kong's non-financial reporting framework engages broadly with existing private standards for ESG disclosure. Like the EU and the U.K., Hong Kong's "mandatory" ESG standards are in fact a "soft mandate," offering a high degree of flexibility while deferring to management judgment and voluntary disclosure standards. Hong

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[257] *See* The Companies, Partnerships and Groups (Accounts and Non-financial Reporting) Regulations 2016, Companies Partnership 2016 No. 1245, 414CB(6) (UK), http://www.legislation.gov.uk/uksi/2016/1245/made/data.pdf [https://perma.cc/8NDZ-6RDC].

[258] *See* HONG KONG STOCK EXCH., ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) REPORTING GUIDE (Jan. 2016) para. 6 & 11(1) [hereinafter HKEX ESG GUIDE], https://en-rules.hkex.com.hk/node/3841 [https://perma.cc/5TAK-MH9R] (defining materiality in terms of stakeholders for environmental and social reporting purposes). The HKEx ESG Guide is incorporated in App. 27 of the Main Board Listing Rules and App. 20 of the GEM listing rules. *See also* HONG KONG STOCK EXCH., ESG REPORTING GUIDE AND FAQS (last updated on May 17, 2019), https://www.hkex.com.hk/Listing/Rules-and-Guidance/Other-Resources/Listed-Issuers/Environmental-Social-and-Governance/ESG-Reporting-Guide-and-FAQs?sc_lang=en [https://perma.cc/EJ3W-HEVY].

Kong's adoption of non-financial reporting rules for listed companies aligns with trends in global capital markets and supports its efforts to develop a reputation as a "green finance" hub.[259]

The Hong Kong Stock Exchange's (HKEx) core listing standards largely defer to issuers' own judgments regarding ESG materiality. For example, issuers must provide a "discussion and analysis of the [company's] performance and the material factors underlying its results and financial position," a requirement that could include material ESG risks or impacts.[260] The listing rules also encourage public companies to provide additional information voluntarily in their annual reports, such as "a discussion of the listed issuer's policies and performance on community, social, ethical and reputational issues."[261] All companies incorporated in Hong Kong are also subject to certain non-financial reporting obligations under the Hong Kong Companies Act that are incorporated into the HKEx listing rules.[262] These measures are enforced by the HKEx, with ultimate oversight by the Securities and Futures Commission (SFC).

The HKEx non-financial reporting requirements, while mandatory, rest largely on private ordering. In 2015, the HKEx amended voluntary ESG disclosure guidance it had adopted in 2011 in order to make certain environmental and social disclosures mandatory for all listed companies on a comply-or-explain basis.[263] The HKEx's ESG Guide requires companies to adopt specific environmental and social policies or to provide "considered

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259 *See* HONG KONG SEC. & FUT. COMM'N, STRATEGIC FRAMEWORK FOR GREEN FINANCE (Sept. 2018), https://www.sfc.hk/web/EN/green-finance.html [https://perma.cc/DU9E-QMED] (establishing environmental disclosure as a core element of its framework).

260 This discussion "should emphasize trends and identify significant events or transactions" during the reporting period. *See* Main Board Listing Rules—App. 16, A16–32, https://en-rules.hkex.com.hk/sites/default/files/net_file_store/new_rulebooks/f/a/FAQs_mb_appx16.pdf [https://perma.cc/A2VH-D56Q].

261 *Id.*

262 *See* Hong Kong Companies' Ordinance (2014), § 390(a)-(d) (stipulating the content of the Director's Report); HKEx Main Board Listing Rules, App. 16–28 (incorporating these requirements).

263 *See* HKEX ESG GUIDE, *supra* note 258, at para. 7 (*superseding* HONG KONG STOCK EXCH., CONSULTATION PAPER ON ESG REPORTING GUIDE (Dec. 2011). Specifically, these standards require all listed companies to include in either their annual report or in a free-standing ESG report a statement that they have complied with the ESG Guide for the fiscal year or an explanation of why they have not).

reasons" for any deviation. It also includes additional KPIs that companies may elect to provide on a voluntary basis.[264]

Although the HKEx's ESG Guide does not explicitly reference or require listed companies to adopt any particular private ESG disclosure standard, it defers further to private reporting standards by allowing listed companies who already produce voluntary sustainability reports to continue to do so, so long as the private reporting standards are consistent with the HKEx's standards and the company explains any deviations from the policies or indicators in the HKEx's ESG Guide. Indirectly setting minimum standards for these private regimes is in essence a form of meta-regulation. However, the HKEx also gives a high degree of deference to issuers regarding where and what to report, the particular entities covered by the report, how materiality is defined, and whether to obtain third-party assurance for reports.

The HKEx also directly supports private international standards by endorsing them and facilitating their use.[265] For example, the HKEx's ESG Guide and related information for issuers directly reference the GRI's ESG disclosure standards, as well as other international reporting standards, and encourage issuers to use them.[266] The HKEx has also partnered with the GRI to prepare a "linkage guide" for listed companies to help them use the GRI Standards to comply with the HKEx's ESG Guide.[267]

In sum, the dominant modes of public-private interaction in Hong Kong are support coupled with a flexible comply-or-explain mandate. Hong Kong offers an example of a gradual transition from voluntary ESG disclosure guidance to a soft mandate that

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[264] *See* SINGAPORE STOCK EXCHANGE (SGX-ST) LISTING RULE 711A & SUSTAINABILITY REPORTING GUIDE (July 20, 2016), http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Mainboard_Practice_Note_7.6_July_20_2016.pdf [https://perma.cc/YE6J-8L3W] (describing a similar stakeholder-oriented, principles-based comply-or-explain approach which was adopted by the Singapore Stock Exchange in 2016 after first introducing its rules as a voluntary reporting framework).

[265] *See* HKEX, EXCHANGE PUBLISHES CONSULTATION PAPER ON PROPOSED CHANGES TO ITS ESG GUIDE (July 17, 2015), https://www.hkex.com.hk [https://perma.cc/9542-Y97J] (discussing the 2015 reforms).

[266] *See* HKEX ESG GUIDE, *supra* note 258, at para. 7.

[267] *See* GRI, LINKING THE GRI STANDARDS AND THE HKEX ESG REPORTING GUIDE, https://www.globalreporting.org/standards/resource-download-center/linking-the-gri-standards-and-hkex-esg-reporting-guide/ [https://perma.cc/T7QA-S3GE].

encourages more prescriptive disclosures. By setting minimum standards for private reporting frameworks, the Hong Kong stock exchange has also utilized meta-regulation to promote greater harmonization and consistency in reporting practice.

3.2.7. China

Given China's centralized political system and the constraints it imposes on private enterprise and civil society, it is not surprising that China has developed a state-led approach to non-financial reporting. What is surprising, however, is the degree to which the Chinese non-financial reporting landscape, like the other jurisdictions surveyed in this Article, relies heavily on private regulation and enforcement, and defers to corporate managers' own judgments on the scope and form of disclosure.

Institutionally, China's approach to non-financial reporting is designed to advance broader public policy and regulatory goals, such as sustainable development, poverty alleviation, and reducing the harmful impacts of corporate activities.[268] Non-financial reporting is further supported by a range of central and sub-national government initiatives to promote CSR and sustainable development, as well as by peer pressure from industry leaders and foreign corporations that have embraced sustainability reporting.[269]

Although most companies are not subject to non-financial reporting mandates, such requirements have been introduced to a growing number of China's largest firms, including those listed on

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268 *See* Shangshi Gongsi Zhili Zhunze (上市公司治理准则) [Code of Corporate Governance of Listed Companies] (promulgated by China Securities Regulatory Commission, Jan. 7, 2002; rev'd by China Securities Regulatory Commission, Sept. 30, 2018) at §§ 1, 2, & ch. VII, respectively [hereinafter CSRC Code], http://www.csrc.gov.cn/pub/csrc_en/laws/rfdm/DepartmentRules/201904/P020190415336431477120.pdf [https://perma.cc/NT8T-YJMV] (noting that examples in corporate governance include protections for minority shareholders, independent director requirements, and, most recently, investor stewardship guidelines); *see also* Guiding Opinions, *supra* note 46 (establishing a policy framework for "greening" the financial system and anticipating the need for reliable information on the financial impacts of environmental risk).

269 *See generally* Virginia Harper Ho, *Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China,* 46 VAND. J. TRANSNAT'L L. 375 (2013) [hereinafter Harper Ho, *Beyond Regulation*] (discussing examples of these policies).

its stock exchanges, over the past decade. China's non-financial reporting rules and policies are administered primarily by the CSRC and mainland Chinese stock exchanges, which are under CSRC oversight.[270] Since 2012, CSR reporting has been mandatory for the largest state-sector firms under policies adopted by the State-owned Assets Supervision and Administration Commission (SASAC).[271] Environmental reporting is also required for companies listed on the Shanghai Stock Exchange (SHSE) and for companies in certain indices on either of China's exchanges.[272] Sustainability reporting has been encouraged by Shenzhen Stock Exchange (SZSE) guidance dating back to 2006.[273] In 2018, the CSRC amended its corporate governance code for listed companies to require disclosure of environmental, poverty alleviation efforts and "other social responsibilities," to the extent that "more specific regulations or departmental rules" clarify the precise content of such disclosures.[274] This code also encourages voluntary disclosure of "information that may impact the decisionmaking of shareholders and other stakeholders, besides disclosing information [required by] mandatory provisions."[275] China's framework for establishing a

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270 These measures are separate from those imposing disclosure obligations under the environmental laws, which are beyond the scope of this Article.

271 *See* SASAC, Notice of the Guiding Opinion Regarding the CSR Implementation of Centrally Managed Enterprises (关于印发《关于中央企业履行社会责任的指导意见》的通知) [SASAC CSR Notice] (promulgated by SASAC, Dec. 29, 2007, effective Jan. 4, 2008), arts. 1–8, 18–19 (noting that the guidelines were made mandatory for central SOEs in 2012). *See also* Harper Ho, *Beyond Regulation*, *supra* note 269, at 409.

272 *See* Notice on Strengthening Listed Companies' Assumption of Social Responsibility and on Issuing the Guidelines on Listed Companies' Environmental Information Disclosure (关于加强公司社会责任承担工作暨发布《上海证券交易所上市公司环境信息披露指引》的通知) (promulgated by Shanghai Stock Exchange, May 14, 2008), arts. 2–3 (encouraging disclosure of information regarding pollution levels and mitigation efforts and mandating disclosure for firms identified as "serious polluters" by the MEE).

273 *See* Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies (Sept. 25, 2006), at art. 9 & art. 36, http://www.szse.cn/English/rules/siteRule/t20070604_559475.html [https://perma.cc/ZPC4-ZM8M] (regarding basic disclosure and voluntary sustainability reporting); Shenzhen Stock Exchange (SZSE) Main Board Guidelines, at ch. 9, https://www.iosco.org/library/pubdocs/pdf/IOSCOPD630.pdf [https://perma.cc/PN5Y-KV5B].

274 *See* CSRC Code, *supra* note 268, at art. 95.

275 *See id.* at art. 91.

green financial system anticipates that all companies listed on China's stock exchanges will be subject to mandatory environmental disclosures on a comply-or-explain basis by 2020, although at the time of this writing this has yet to be implemented.[276] Many mainland financial institutions and other large firms are also cross-listed on the Hong Kong Stock Exchange (so-called "red chip" stocks) and are therefore subject to the HKEx's mandatory ESG disclosure requirements.[277]

Although ESG disclosures under all of these regimes are increasingly prescriptive, their scope is limited. As a result, China's "mandatory" reporting regime, like those of the other jurisdictions surveyed here, defers in practice largely to private standard setters to develop reporting frameworks, and corporations have discretion on what disclosures to provide, which reporting frameworks to use, and how to report non-financial information.

Government CSR policies, state-backed reporting standards, and government-backed awards encouraging sustainability reporting represent a form of partnership, as they all incorporate or draw heavily on private regulation in the form of internationally accepted reporting frameworks and best practices, as well as on international treaties and non-binding standards developed by the United Nations, the OECD, and other bodies.[278] Current non-financial reporting guidelines do not specifically endorse international reporting standards, but the CSRC, the Ministry of Environment and Ecology (MEE), and other central government agencies look to frameworks such as the GRI Standards and the CDP as a point of reference. Although the Chinese central government may at times favor local hybrid standards over private international standards, China does not require firms to follow state-sponsored

[276] *See* IOSCO, SUSTAINABLE FINANCE IN EMERGING MARKETS AND THE ROLE OF SECURITIES REGULATORS (2019), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD630.pdf [https://perma.cc/8V8S-Q526].

[277] *See supra* Section 3.2.6 (discussing of the Hong Kong ESG disclosure framework).

[278] *See* Harper Ho, *Beyond Regulation*, *supra* note 269, at 404–05, 412.

CSR or ESG disclosure standards, and so does not in fact preempt or displace private ordering.[279]

Beyond these kinds of hybrid public-private mandates, there are also other examples of public-private partnership in the Chinese reporting context. For example, the main state-affiliated standard setter for non-financial reporting in China, the Chinese Academy of Social Sciences (CASS), and the GRI have taken steps to harmonize the CASS CSR reporting standards with the GRI Standards.[280]

In sum, the dominant forms of public-private interaction in China are partnership and soft mandates. Although China is a jurisdiction that exhibits a high degree of regulatory strength, its non-financial reporting policies and standards draw heavily on private models. Moreover, like other jurisdictions, its disclosure mandates defer strongly to private ordering and apply only to certain large firms.

4. OPTIMIZING PUBLIC-PRIVATE INTERACTIONS IN ESG DISCLOSURE

The case studies in Section 3 illustrate different forms of interaction between public and private reporting regimes and show how governments have transitioned toward a more regulatory approach to ESG disclosure while accommodating and building on private ordering. These examples further demonstrate the range of potential policy options for public-private interaction in non-financial reporting outlined in Section 2, ranging from regulatory deference to private ordering on one end to mandatory disclosure rules on the other.

From the diverse case studies presented in Section 3, several general observations can be made. Each of these jurisdictions has implemented ESG disclosure through a different balance of public regulation and private ordering. The case studies show that regulators rely heavily on private ordering even when transitioning

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[279] The Chinese central government's backing of sub-national reporting standards as an alternative to international private standards could alternatively be viewed as a form of weak displacement.

[280] *See* GRI, LINKING CASS CSR 3.0 AND GRI'S G4 SUSTAINABILITY REPORTING GUIDELINES, https://www.globalreporting.org/resourcelibrary/Linking-CASS-CSR-3.0-and-GRI%27s-G4-Sustainability%20Reporting-Guidelines.pdf [https://perma.cc/GNC6-9XEM] (last visited Sept. 27, 2019).

to non-financial reporting mandates. They also suggest that governments are hesitant to delegate rulemaking authority to specific private standard setters, and that evolving non-financial reporting rules reflect the view in many jurisdictions that the investor-oriented rationales of mandatory disclosure should align with underlying public policies that support sustainable development or address corporate impacts on stakeholders. There is also considerable variation in the content of disclosure rules, as well as some convergence in the integration of ESG information in corporate annual reports about material financial risks. Notably, none of the jurisdictions surveyed in Section 3 attempts to preempt private ordering.

Our objective in this Article is not to advocate for a particular model of non-financial reporting or for specific ESG disclosure rules. Rather, in light of the market-based origins of ESG disclosure and the important benefits offered by both public regulation and private ordering, we argue that hybrid approaches to non-financial reporting are a more efficient path to developing harmonized reporting rules, even though our case studies show that this potential has yet to be realized in most jurisdictions. Drawing on the observations and arguments in Section 2 and 3, the following discussion shows how optimal hybrid public-private disclosure models can work. We propose that future reforms should continue to draw on or defer to evolving private standards and frameworks where flexibility and innovation are at a premium. However, public regulators and mandatory reporting frameworks are necessary to promote the accessibility, reliability, and comparability of non-financial information. Here, we explore how regulators, such as the SEC, can leverage, harmonize, and legitimize private ordering to achieve these goals through the regulatory strategies presented in this Article.

4.1. Leveraging Private Ordering

As the cases in Section 3 show, governments seeking to foster more robust ESG disclosure have leveraged private reporting standards through support, partnership, delegation, and mandating. These forms of public-private engagement can reduce regulatory costs while increasing regulatory effectiveness.

Leveraging enables governments to benefit from one of private regulation's relative strengths: its flexibility and responsiveness to the perceived needs of investors.[281] Both investors and regulators face a heightened need to respond to rapidly changing market conditions and risks in global financial markets.[282] Public regulators can tailor disclosure requirements to the needs of specific industries and respond to emerging risks more nimbly by drawing on private standards or by collaborating with firms, private standard-setting bodies, or industry associations.[283] Governments are also uniquely positioned to ensure that disclosure rules align with broader public policy goals, ranging from market stability to ensuring that systemic non-financial risks, such as climate risk, are disclosed (and priced) in the market. Depending on the jurisdiction, these policy goals may also include aligning financial regulation with sustainable development goals and related public policies.

Leveraging can be undertaken at various stages in the public-private collaborative relationship. In all of the jurisdictions analyzed in Section 3, government regulators and/or stock exchanges have leveraged existing private standards, as well as international soft law standards, by consulting them in the creation of their non-financial reporting rules,[284] and actively seeking to align their non-financial reporting rules with private ESG disclosure standards.[285] The EU, the U.K., and Hong Kong have leveraged private standards most directly by permitting reporting companies to comply by using accepted private disclosure standards.[286] Leveraging private standards already accepted by trade and industry associations can also free financial and securities regulators

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281 *See* Vogel, *supra* note 108, at 264.

282 *See* Karmel & Kelly, *supra* note 142, at 890 (arguing that soft law has taken root "out of necessity . . . [and] the speed, flexibility, and expertise that international securities regulation requires.").

283 *See* Abbott & Snidal, *supra* note 118, at 526.

284 *See supra* Section 3 (describing commonly referenced standards including GRI Standards, the SASB sector-specific standards, the CDP climate-related disclosure framework and the OECD Guidelines).

285 *See, e.g.*, *supra* Section 3.2.3 (discussing B3's engagement with GRI and the IIRC); *supra* Section 3.2.6 (discussing the HKEx's engagement with GRI).

286 *See, e.g.*, *supra* Section 3.2.4 (discussing the EU Directive's recognition of "national frameworks, [EU]-based frameworks . . . or other recognized international frameworks").

to focus on helping firms connect this information to financial impacts for investors.[287]

One concern with leveraging, however, is that it may call on public regulators to assess the relative value of private regimes and determine which ones to support, endorse, or even incorporate in regulation, which could inhibit private innovation in the formulation, implementation, and enforcement of private standards. However, as the jurisdiction-specific case studies in Section 3.2 show, governments thus far have avoided endorsing any particular private framework and have instead endorsed private disclosure regimes via guidance, while deferring to companies' own choices of reporting standard. Other possibilities regulators can consider include waiting until clear market leaders emerge or designating certain standards as a regulatory safe harbor while allowing competing standards to evolve.

As has been the case with financial reporting, monitoring and enforcing compliance with new non-financial reporting requirements will require the combined efforts of regulatory agencies, shareholders, advocacy organizations, and private intermediaries such as auditors and credit rating agencies. Even greater cost savings may arise from leveraging private actors to engage in gatekeeping, oversight, and enforcement, which can help overcome regulators' lack of resources to provide audit and assurance services or to identify and pursue violations of disclosure mandates.[288] Just as financial reporting leverages the expertise of accountants and auditors, integrating ESG disclosure into corporate annual reports requires reliance on these same professionals and on other experts to assist companies with compliance, provide assurance services, and aid regulators in crafting sensible disclosure rules in areas such as environmental and social risk that may be beyond their traditional areas of expertise.[289]

Of course, regulators may also incur costs associated with leveraging private standards. These costs include oversight of

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[287] *See* EITI, *supra* note 57; ISO 26000 SOCIAL RESPONSIBILITY, *supra* note 58.

[288] Freeman, *Private Role, supra* note 114, at 660.

[289] *See* Walter Mattli & Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 LAW & CONTEMP. PROBS. 225, 230–31 (2005) (noting the relatively higher costs incurred by governments in maintaining specialized regulatory expertise vis-à-vis private actors that can derive positive externalities from such expertise).

assurance providers and other third parties with which governments partner or to whom they delegate.[290] Coordination between private standard setters and public regulators across multiple jurisdictions is necessary as well, and the global scope and distinct methodologies of existing private ESG disclosure frameworks may increase these oversight costs.[291] However, soft law-based global governance regimes that engage regulators with private disclosure regimes, such as IOSCO's recently-established sustainable finance network, offer promise as a means to facilitate this type of coordination.[292]

4.2. Harmonizing Private Ordering

As described in Section 1, the key weakness of private ordering that is driving regulators to introduce new ESG disclosure reforms is the fragmentation and lack of consistency of reporting content, format, timing, and scope. These features have made ESG information reported outside of corporate annual reports costly to obtain, difficult to analyze, and almost impossible to compare with information disclosed in public filings. Public-private engagement can help address this fundamental problem by facilitating the harmonization of private ESG disclosure regimes and their alignment with public disclosure rules, thereby reducing costs for investors and encouraging adoption by market participants. Nonetheless, harmonization requires government intervention since any coordination or integration of public and private regimes must be initiated by the appropriate legislative or regulatory bodies and should align with the materiality standards that already apply to financial reporting in the given jurisdiction.

The regulatory strategies outlined in Section 2 and the models of public-private interaction adopted by the countries surveyed in Section 3 suggest some of the parameters of an optimal framework

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290 McAllister, *Third Party Verification, supra* note 145, at 44.

291 *See, e.g.,* TCFD FINAL REPORT, *supra* note 25, at 33 (noting concerns about the administrative burden of multiple disclosure frameworks and mandatory reporting requirements).

292 IOSCO, *supra* note 32, at 4 (noting IOSCO's establishment of a Sustainable Finance Network of securities regulators).

for non-financial reporting within corporate annual reports and other public filings. Most obviously, regulators can standardize reporting through more prescriptive rules, such as the U.K.'s greenhouse gas emissions disclosure rules, South Africa's apply-or-explain principles, or the specific disclosures required by China's CSRC and by the stock exchanges in mainland China and Hong Kong. Less directly, regulators can facilitate harmonization through meta-regulation—that is, by requiring that private reporting standards satisfy certain criteria with regard to format, reporting period, or the use of particular indicators. By aligning ESG disclosure with existing financial reporting, these efforts also improve comparability. Both the EU Directive and the HKEx's listing standards essentially do this by allowing issuers to rely on separate sustainability reporting that nonetheless meets the minimum standards for non-financial reports. In addition, partnership with third-party intermediaries that collect, organize, process, and disseminate information can promote harmonization by enabling communication with regulators regarding companies' ability to process, analyze, and otherwise use non-financial information mandated by regulators.

Greater harmonization can also be balanced with flexibility. For example, the EU Directive and most of the jurisdictions surveyed in Section 3 use principles-based disclosure and a comply-or-explain approach to promote flexibility. At the same time, they encourage or support more prescriptive disclosures. In all of these jurisdictions, regulators have implemented non-financial reporting reforms only with respect to listed firms or a defined set of "large" firms for whom the reporting requirements may be relatively less novel or burdensome and whose experience might set the standard for smaller companies to follow. While greater deference to private standards within new mandatory regimes may slow the pace of harmonization, this flexibility leaves space for market oversight and private ordering to continue to drive best practices.

4.3. Legitimizing Private Ordering

Beyond the benefits of harmonization, the interaction of public regulation and private ordering in non-financial reporting reform bolsters the legitimacy of existing private disclosure standards. As a specific genus of private governance, these private ESG disclosure regimes are vulnerable to critiques about their legitimacy.[293] First, private reporting frameworks and other private governance regimes often lack the transparency and public participation that is part of the legislative or administrative rulemaking processes.[294] This form of legitimacy, known as input legitimacy, focuses on the participatory qualities of rulemaking. In domestic legal systems, the legitimacy of public regulation is derived from its authorization by a democratically elected legislature.[295] Administrative law is devoted to creating procedures to hold unelected regulators to account through procedural safeguards.[296] In contrast, private governance regimes do not enjoy such democratic legitimacy.[297] Instead, private reporting standards derive their legitimacy from the market, as evidenced by their market share relative to competing standards.

A second form of legitimacy, output legitimacy, focuses on the substantive outcomes of rulemaking,[298] which may be undercut by weak monitoring and enforcement power. This allows "decoupling" or greenwashing—i.e., the superficial ceremonial adoption of compliant policies that are at odds with inconsistent corporate practices.[299] Specifically, voluntary sustainability reporting enables decoupling if firms are permitted to disclose favorable information and hide unfavorable information, fail to adequately contextualize their disclosures, or provide false or

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[293] *See* Park, *Investors as Regulators*, *supra* note 29, at 30–38 (noting legitimacy deficits in privately-governed sustainable finance markets).

[294] Freeman, *Private Role, supra* note 114, at 647.

[295] *See* BRUMMER, *supra* note 164, at 183.

[296] *See* Mendelson, *supra* note 150, at 771–72.

[297] *See* Peer Zumbansen, *The Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy*, *in* NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM 83, 96 (Michael A. Helfand, ed., 2015).

[298] *See* BRUMMER, *supra* note 164, at 179.

[299] Ariel Meyerstein, *Transnational Private Financial Regulation and Sustainable Development: An Empirical Assessment of the Implementation of the Equator Principles*, 45 N.Y.U. J. INT'L L. & POL. 487, 542–43 (2013). *See also* Patricia Bromley & Walter W. Powell, *From Smoke and Mirrors to Walking the Talk: Decoupling in the Contemporary World*, 6 ACAD. MGMT. ANN. 483, 490–97 (2012) (identifying decoupling arising from unimplemented or routinely violated rules as one of two types of decoupling).

deliberately misleading disclosures.[300] ESG disclosure in any form can become ritualistic and cosmetic if the reporting process is detached from the information flows that drive corporate decisionmaking.[301] It may also provide false comfort to corporate management about the company's environmental and social policies, thereby obscuring the need to address how well these corporate policies and practices are working.[302]

Public-private engagement can therefore bolster both the input and output legitimacy of non-state ESG disclosure standards and frameworks. Through endorsement, partnership, and mandating through incorporation into regulation, governments can publicly recognize specific standards and standard-setters as the EU has done in its reporting guidance; these measures give private standards input legitimacy in the eyes of investors and stakeholders.[303] By partnering with private actors and incorporating private standards into disclosure rules, governments can also promote their legitimacy by subjecting private ESG standards to administrative process, legislative oversight, and public accountability.[304] Regulators can also enhance input legitimacy by endorsing or facilitating private ESG regimes that engage shareholders and other stakeholders in the creation of reporting standards.[305] Finally, requiring companies to file sustainability reports with the public regulator, as is required by government

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300 David Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue, and Development*, 18 BUS. ETHICS Q. 447, 462 (2008). *See also* IRRC, *supra* note 24, at 27–37 (noting that current voluntary reporting practice is subject to all of these limitations).

301 Hess, *supra* note 300, at 465.

302 Chiu, *supra* note 13, at 382–86.

303 *See* Gulbrandsen, *supra* note 127, at 86 (referring generally to the legitimating function of incorporation).

304 *See* Mendelson, *supra* note 150, at 767–90 (explaining the importance of these processes).

305 *See* Park, *Investors as Regulators*, *supra* note 29, at 45–46 (proposing regulatory incentives for stakeholder participation in private governance-based sustainable finance regimes). As noted above, many ESG disclosure frameworks, such as the GRI Standards, define materiality in terms of corporate impact on stakeholders and encourage companies to engage with stakeholders to determine what information they deem significant enough to disclose. *See, e.g.* GRI, *supra* note 81, 102–46 & 102–47, at 34–35 (regarding identification of reporting scope and material topics). Stakeholder engagement is essential if the regulatory framework defines materiality in terms of stakeholder impacts.

regulators in Brazil and the U.K. and by the stock exchanges in Hong Kong and mainland China, enhances the output legitimacy of private ESG standards by lowering the cost of accessing this information, both for investors and stakeholders.

5. CONCLUSION

By distilling the theoretical literature on public-private hybridity and drawing on the experience of leading jurisdictions worldwide, this Article shows how regulators and policymakers can work with private actors to develop and implement reporting frameworks to meet investor demand for non-financial information. Since they build on existing disclosure practices, these approaches can also generate cost-savings and other efficiencies for regulators, investors, and firms, and enable the dissemination of ESG information more effectively than either public regulation or private ordering alone.

Far from undermining private ordering, governments' multi-faceted role in non-financial reporting reform can give it force. At the same time, the case studies presented in this Article indicate that the benefits of greater deference to private ordering must be weighed against the need for harmonization and legitimacy that governments are well-positioned to address. Fortunately, as the United States and other governments consider the need for new approaches to ESG disclosure, they can draw useful lessons from the experience of those countries that have already taken these crucial first steps.

Appendix I. Institutional Features of Selected Jurisdictions[306]

U.S.	*South Africa*	*Brazil*	*EU*	*U.K.*	*Hong Kong*	*China (PRC)*
			Region			
N. America	**Africa**	**S. America**	**Europe**	**Europe**	**Asia**	**Asia**
			Developmental Stage			
Mature	**Developing**	**Developing**	**Mature**	**Mature**	**Mature**	**Mature**
			Legal Tradition[307]			
Common law	Mixed civil, common & indigenous law; Common-wealth	Civil law	Civil law	Common law; Common-wealth	Common law; Common-wealth	Civil law, socialist and common law elements
			Corporate Governance			
Board-centric; share-holder-oriented	Board-centric; stakeholder-oriented	Board-centric; stakeholder-oriented	Board-centric; stake-holder-oriented	Share-holder-centric; "enlightened shareholder value"	Share-holder-centric; share-holder-oriented	State-centric & board-centric; stakeholder-oriented

[306] Source: Authors' compilation (various).

[307] These categories reflect the dominant foundation of the legal system, but we acknowledge that lines between these traditions have blurred with the rise of the regulatory state in many of these systems, and with the advent of globalization. *See* Mary Ann Glendon, *Sources of Law in a Changing Legal Order*, 17 CREIGHTON L. REV. 663, 665–84 (1987) (discussing the convergence of common and civil law systems).

Appendix I (cont.). Institutional Features of Selected Jurisdictions

U.S.	*South Africa*	*Brazil*	*EU*	*U.K.*	*Hong Kong*	*China (PRC)*
Source of ESG Disclosure Regulation						
Regulator (SEC) & stock exchanges	Financial Reporting Standard Council (FRSC) & stock exchange (JSE)	Regulator (CVM) & stock exchange (B3)	Member state financial regulators & stock exchanges	Regulators (FRC, FCA) & stock exchanges	Regulator (SFC) & stock exchange (HKEx)	Regulator (CSRC) & stock exchanges (SHSE, SZSE)
Basis for ESG Disclosure in Annual Reports						
Prescrip-tive and principles / material-ity-based, and necessary to render disclosure not mis-leading	Integrated reporting (apply or explain)	Principles-based	Principles-based	Principles-/ materiality-based, and necessary to understanding of the business	Principles-/ materiality-based	Principles-/ materiality-based

Appendix II. ESG Disclosure Measures in Selected Jurisdictions[308]

Measure	*Institution*	*Mandatory Voluntary Comply or Explain*	*ESG Scope*	*Covered Entities*	*Disclosure Placement*	*Assurance*
U.S.						
Dominant Mode of Interaction: Deference						
Regulation S-K	Securities regulator (SEC)	Mixed	Multi-dimensional	Public	Annual report	Optional
2010 Climate Guidance	Securities regulator (SEC)	Mixed	Multi-dimensional	Public	Annual report	Optional
South Africa						
Dominant Modes of Interaction: Support/ Delegation						
King IV	Institute of Directors in S. Africa (private)	C or E	Multi-dimensional	All (opt.)	Integrated report	Optional
JSE Listing Standards	Stock exchange	C or E (King Code)	Multi-dimensional	Listed	Integrated report	Optional
Brazil						
Dominant Modes of Interaction: Support/ Delegation/ Partnership						
CVM Rules 358 & 489	Securities regulator	Annual report (M); sustainability report (V)	Multi-dimensional	Listed	Annual report (M)	Optional
B3	Stock exchange	Voluntary	Non-financial factors	Listed	Annual report (V)	Optional

[308] The jurisdictions are organized by mode of interaction in order of regulatory strength—i.e., from market-based/deferential to most state-dominated. Sources are as referenced in footnotes, *supra* Section 3.2.

Appendix II (cont.). ESG Disclosure Measures in Selected Jurisdictions

Measure	*Institution*	*Mandatory Voluntary Comply or Explain*	*ESG Scope*	*Covered Entities*	*Disclosure Placement*	*Assurance*
EU						
Dominant Modes of Interaction: Deference/ Support/ Delegation						
2014 Non-finan. Disclosure Directive	Varies by Member State	C or E	Multi-dimen-sional	Large firms ("public interest entities")	Annual report; sustain-ability report (V)	Optional
U.K.						
Dominant Modes of Interaction: Deference/ Support/ Mandate						
Companies Act 2006, Regulations (2013), Part XV & XVI	Business regulator (U.K. Dept. for Bus., Innov. & Skills)	C or E	Envt'l, human rights, diversity	Large firms; add'l for listed	Annual report	Audit required
U.K. Corporate Governance Code 2018	Financial Reporting Council (private)	Mandatory	Risk mgmt.	Listed	Annual report	Audit required
London Stock Exchange ESG Listing Guide	FCA (U.K. Listing Authority)	Voluntary	Multi-dimen-sional	Listed	Annual report, sustain-ability report, or integrated report	Optional
Hong Kong						
Dominant Modes of Interaction: Support/ Mandate						
Corporate Governance Code (2014)	Stock exchange (HKEx)	C or E; mandatory	Risk mgmt.		Summary financial reports; annual reports	Audited financials
HKEx Listing Rules App. 16 (ESG Disclosure)	Stock exchange (HKEx)	C or E	Envt'l/ Social	Listed	ESG t or sustain-ability report	Optional

Appendix II (cont.). ESG Disclosure Measures in Selected Jurisdictions

Measure	*Institution*	*Mandatory Voluntary Comply or Explain*	*ESG Scope*	*Covered Entities*	*Disclosure Placement*	*Assurance*
China (PRC)						
Dominant Modes of Interaction: Partnership/ Mandate						
Corporate Governance Code	Securities regulator (CSRC)	Voluntary	Multi-dimen-sional	Listed	N/A	N/A
Shanghai Stock Exchange Listing Rules	Stock exchange	Envt'l report (M); Sustain-ability report (V)	Multi-dimen-sional	Certain SOEs; listed	Envt'l report	Optional
Shenzhen Stock Exchange CSR Guidance	Stock exchange	Sustain-ability report (V)	Multi-dimen-sional	Listed	Sustain-ability report	Optional
SASAC 2008 CSR Guidelines	SOE regulator	Sustain-ability report (V)	Multi-dimen-sional	Central SOEs	Sustain-ability report	Optional