A R T I C L E

MAKING SUSTAINABILITY DISCLOSURE SUSTAINABLE

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The extent to which corporations should incorporate sustainability objectives into their operational decisionmaking is highly contested, as is the relationship between societal impact and economic value.[1] At the same time, issuers are incorporating sustainability considerations into their business operations in response both to investor demands and to the claim that sustainable business practices lead to improved economic performance.[2]

Although the focus on increasing sustainability disclosure is accelerating both in the United States and globally,[3] investors continue to report dissatisfaction with existing disclosures.[4] This Article proposes a solution—mandating a Sustainability Discussion and Analysis (SD&A) as part of an issuer's annual report to shareholders. The SD&A would be modeled after existing Management Discussion and Analysis (MD&A) and Compensation Discussion and Analysis (CD&A) and would reflect a similar principles-based approach to those provisions.[5]

The SD&A would require an issuer to disclose, at a minimum, the three sustainability issues that are most significant for the firm's operations, to explain the basis for that selection, and to explain the impact of those issues on firm performance. Implementing the SD&A would require that the SEC issue guidance by identifying sustainability issues that are likely to be material to investors and articulating the principles that issuers should apply in preparing their SD&As.[6] It would subject sustainability disclosure to SEC oversight through its review of issuer securities filings and, when applicable, liability exposure for fraudulent misrepresentations. To ensure the board's involvement in overseeing both the development of issuers' sustainability practices and the disclosure of those practices, this proposal would require directors to certify the accuracy of the disclosures contained in the SD&A.

I. Background and Existing Sustainability Disclosure Practices

A. The Concept of Sustainability Disclosure

The idea behind corporate sustainability is decisionmaking that incorporates social, political, and ethical concerns in addition to traditional financial performance.[7] Experts use a variety of terms to describe corporate sustainability, including CSR (Corporate Social Responsibility),[8] ESG (Environmental, Social, and Governance),[9] "triple bottom line,"[10]

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1. *See, e.g.*, Robert G. Eccles et al., *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 Mgmt. Sci. 2835, 2836 (2014).
2. *See, e.g.*, KPMG, ESG, Strategy, and the Long View: A Framework for Board Oversight 7 (2017), https://assets.kpmg.com/content/dam/kpmg/lu/pdf/lu-en-esg-strategy-framework-for-board-oversight.pdf; *The UN Global Compact—Accenture Strategy CEO Study*, Accenture (2016), https://www.accenture.com/us-en/insight-un-global-compact-ceo-study [https://perma.cc/39W3-MHMN].
3. Adam Sulkowski & Sandra Waddock, *Beyond Sustainability Reporting: Integrated Reporting Is Practiced, Required and More Would Be Better*, 10 U. St. Thomas L.J. 1060, 1061 (2013).
4. PWC, 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. Bloomberg, Impact Report Update 2015, at 2 (2016), https://data.bloomberglp.com/company/sites/39/2018/03/Impact_Report_2015.pdf.
5. *See, e.g.*, Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10064, Exchange Act Release No. 77599, 81 Fed. Reg. 23916, 23925 (proposed Apr. 22, 2016).
6. *See generally,* Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10064, Exchange Act Release No. 77599, 81 Fed. Reg. 23916, 23924-26 (proposed Apr. 22, 2016).
7. *See* Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10064, Exchange Act Release No. 77599, 81 Fed. Reg. 23916, 23970-71 (proposed Apr. 22, 2016).
8. *See, e.g.*, John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. Corp. L. 1, 1 (2005).
9. *See, e.g.*, NASDAQ, ESG Reporting Guide: A Support Program for Nasdaq Issuers Focus Area: Nordic & Baltic Markets 10 (2017), http://business.nasdaq.com/media/ESG-Reporting-Guide_tcm5044-41395.pdf.
10. *See, e.g.*, John Elkington, Cannibals With Forks: The Triple Bottom Line of 21st Century Business (photo reprint 1999) (1997); *see also About*, DBL Partners, http://www.dblpartners.vc/about/ (last visited Nov. 18, 2018).

and "societal impact."[11] Recently, interest in sustainability disclosure has spread from special-interest investors, such as ethical investment funds, to mainstream investors. Traditional investors use sustainability disclosures to evaluate business risk[12] and have suggested that sustainability disclosure provides insights into a board's level of engagement and oversight.[13]

These analyses identify a potential relationship between sustainability and economic performance. Several studies support the claim that sustainability factors are related to operating performance and share price.[14] However, the SEC has taken the view that sustainability disclosure is ordinarily not material and that mandatory disclosure should be limited to information that is useful to investors.[15]

B. The History of Sustainability Disclosure Under the Federal Securities Laws

With limited exceptions, described below, the SEC has not required issuers to disclose specific categories of sustainability information.[16] Instead, the SEC has taken the position that such information may need to be disclosed only to the extent it relates to an existing disclosure requirement or is necessary to prevent a required disclosure from being misleading.[17] The benchmark is whether the information is material to investors.[18] The SEC's usual position is that the materiality standard should be understood in terms of the information's economic or financial impact.[19]

On several occasions, the SEC has modified its approach to require more comprehensive disclosure with respect to specific sustainability issues. After regularly allowing corporations to exclude shareholder proposals seeking to address executive pay, for example,[20] the SEC changed its position and imposed extensive mandatory disclosure requirements.[21] The SEC's position similarly shifted with respect to climate change disclosure. In 2010, the SEC advised issuers that they were required to disclose material information about their exposure to risks resulting from climate change, explaining that this requirement was based in several existing provisions of Regulation S-K, including the MD&A, the required disclosure of legal proceedings, and the section on risk factors.[22] Climate change disclosure remains limited due in large part to the vagueness of the disclosure obligation and issuers' ability to determine, in their judgment, that a given issue is not material enough to warrant disclosure.[23]

C. Voluntary Sustainability Disclosure

In the absence of a uniform and universal mandatory regime, market forces continue to fuel the growth of voluntary sustainability disclosure.[24] Most sustainability information is disclosed not in issuer financial or securities filings, but in standalone sustainability reports. The dominance of voluntary disclosure has contributed to the proliferation of global standard-setters seeking to promulgate disclosure standards or guidelines or rate issuers on the quality of their disclosure or sustainability practices.

One way that private organizations contribute to the quality and usability of sustainability disclosure is by promulgating disclosure standards. The Global Reporting Initiative (GRI), an international organization founded 20 years ago as a U.S. nonprofit, is one of the best-known private standard-setting organizations. Companies around the world use the GRI's standards for sustainability reporting in whole or in part.[25] Another well-known standard-setting organization is the Sustainability Accounting Standards Board (SASB).[26] In contrast to the GRI, the SASB's focus has been to develop disclosure standards that are incorporated into SEC filings rather than separate sustainability reports. The volume of sustainability information disclosed in accordance with these and other standards complicates

11. *See, e.g.*, Shlomit Azgad-Tromer, *Corporations and the 99%: Team Production Revisited*, 21 Fordham J. Corp. & Fin. L. 163, 184 (2016).
12. *See, e.g.*, Jonas Kron, Senior Vice President, Trillium Asset Mgmt., No-Action Letter on the Middleby Corporation Exchange Act Rule 14a-8 (Mar. 23, 2018), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/trilliumassetetal032318-14a8.pdf (arguing that ESG reporting "allows companies to better integrate and capture value from existing sustainability efforts, identify gaps and opportunities in policies and practices, strengthen risk management programs, stimulate innovation, enhance company-wide communications, and recruit and retain employees").
13. *See, e.g.*, Ronald P. O'Hanley, *Long-Term Value Begins at the Board*, Harv. Law Sch. Forum on Corp. Gov. & Fin. Reg. (Mar. 20, 2017), https://corpgov.law.harvard.edu/2017/03/20/long-term-value-begins-at-the-board/.
14. *See, e.g.*, Savita Subramanian et al., Bank of Am. Merrill Lynch, Equity Strategy Focus Point-ESG Part II: A Deeper Dive 2 (2017), http://www.hubsustentabilidad.com/wp-content/uploads/2017/07/equityStrategyFocusPointADeeperDive.pdf.
15. *Cf.* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197, 1247-63 (1999).
16. Outside of the United States, mandatory disclosure of sustainability information is increasingly required. *See, e.g.*, Wim Bartels et al., KPMG Int'l et al., Carrots & Sticks: Global Trends in Sustainability Reporting Regulation and Policy 9 (2016), https://www.globalreporting.org/resourcelibrary/Carrots%20and%20Sticks-2016.pdf (summarizing growth in sustainability reporting instruments) (documenting the trend toward mandatory disclosure requirements).
17. *See, e.g.*, Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10064, Exchange Act Release No. 77599, 81 Fed. Reg. 23916, 23970 (proposed Apr. 22, 2016).
18. *See id.*
19. Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10064, Exchange Act Release No. 77599, 81 Fed. Reg. 23916, 23971 n.687 (proposed Apr. 22, 2016).
20. *See, e.g.*, Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 Vand. L. Rev. 1129, 1158-59, 1159 n.132 (1993).
21. *See* Executive Compensation Disclosure, Securities Act Release No. 6962, Exchange Act Release No. 31327, 57 Fed. Reg. 48126, 48126-59 (Oct. 21, 1992).
22. Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61,469, 75 Fed. Reg. 6289, 6293-97 (Feb. 8, 2010).
23. *See* ExxonMobil Corp., Annual Report (Form 10-K) (Feb. 28, 2018).
24. *See* Elisse B. Walter, *The Future of Sustainability Disclosure: What Remains Unchanged in an Environment of Regulatory Uncertainty?*, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (Dec. 7, 2016), https://corpgov.law.harvard.edu/2016/12/07/the-future-of-sustainability-disclosure-what-remains-unchanged-in-an-environment-of-regulatory-uncertainty/ [https://perma.cc/QBH9-TWB6].
25. *GRI Standards*, GRI, https://www.globalreporting.org/standards [https://perma.cc/7GXM-QK54] (last visited Sept. 13, 2018); *see also* KMPG, The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting 2017, at 29 (2017), https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf.
26. *Standards Overview*, SASB, https://www.sasb.org/standards-overview/ [https://perma.cc/BEP2-E5R7] (last visited Oct. 25, 2018) (describing the development of the SASB's sustainability standards).

the task of evaluating a particular issuer's sustainability practices.[27] A number of organizations offer sustainability rankings or ratings to assist in this endeavor.[28]

II. Limitations of Existing Sustainability Disclosure

Under the current regime, sustainability disclosures are fragmented, of inconsistent quality, and often unreliable.[29] Issuers are incentivized to focus on the positive aspects of their business practices and to omit unfavorable information in a practice known as greenwashing.[30] This problem is compounded by a lack of standardization that makes it difficult for investors to compare information across issuers, in addition to the limited regulatory oversight of sustainability disclosure. Voluntary disclosure also tends to be vague, general, or boilerplate, rather than providing investors with the specific information that would enable comparison of companies' sustainability practices.[31] Other limitations include the absence of standardized disclosure requirements, which may lead issuers to disclose such a high quantity of information that it results in information overload.[32]Although third-party ratings and rankings attempt to address the comparability issue, they suffer from some of the same defects,[33] including limitations in coverage, differences in the information used, and heavy reliance on issuer-supplied information. In addition, rating agencies do not produce consistent results, presumably due in part to methodological differences.

Finally, sustainability reporting is not reliable. Such reporting mostly occurs in standalone reports that are not integrated with the issuer's securities filings. These reports are often prepared by public relations or marketing personnel and, as a result, contain disclosures that do not meet the standards applied to securities filings. Furthermore, they are not routinely prepared or reviewed by disclosure lawyers, reviewed or certified by the CEO or board of directors, or subject to the oversight of third-party auditors. Sustainability reports also are not filed with and reviewed by the SEC.

These limitations in the existing framework are behind investors' demands for an SEC rule that mandates sustainability reporting. However, the challenge in adopting a disclosure mandate for sustainability within the existing securities disclosure framework is in the implementation. Designing a line-item series of disclosures to address sustainability is likely unworkable, and a principles-based approach appears more appropriate.

III. SD&A: A Proposed Approach for Mandated Sustainability Disclosure

This Article proposes that the SEC implement a new disclosure requirement of sustainability discussion and analysis as part of Regulation S-K, thereby requiring issuers to include SD&A reporting as part of their annual reports.

A. MD&A and CD&A: The Models for an SD&A Requirement

The SD&A requirement is modeled on two existing narrative disclosure frameworks: MD&A and CD&A. The MD&A disclosure requirement—contained in Item 303 of Regulation S-K—was adopted specifically to supplement the line-item disclosures with more flexible and company-specific disclosures.[34] Importantly, Item 303 creates an affirmative and nonspecific duty to disclose material information when management knows of a trend, demand, commitment, or uncertainty.[35] In its 1989 Release, the SEC issued the following guidance: "A disclosure duty exists where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation."[36] The importance of MD&A disclosure continues to grow. As explained in one article, "[T]he MD&A is fast becoming the primary disclosure vehicle for management to relate its unique insider's critique of the registrant's financial performance and operations to help predict future performance."[37] On the other hand, the vague and flexible standard makes compliance difficult for issuers.[38]

The SEC adopted the CD&A, which is modeled on the MD&A, in 2006 as part of its executive compensation disclosure reforms.[39] The CD&A is intended "to provide to investors material information that is necessary to an understanding of the [company's] compensation policies

27. *See, e.g.*, *Rate the Raters: Understanding the Universe of Corporate Sustainability Rankings*, Sustainability, http://sustainability.com/rate-the-raters/(last visited Oct. 25, 2018).
28. *See, e.g.*, Barry B. Burr, *Global Initiative for Sustainability Ratings Launches Website for Comprehensive ESG Data*, Pensions & Invs. (Apr. 2, 2015, 2:49 PM), http://www.pionline.com/article/20150402/ONLINE/150409961/global-initiative-for-sustainability-ratings-launches-website-for-comprehensive-esg-data.
29. *See, e.g.*, Klaus Dingwerth & Margot Eichinger, *Tamed Transparency: How Information Disclosure Under the Global Reporting Initiative Fails to Empower*, 10 Global Envtl. Pol. 74, 88 (2010).
30. *See, e.g.*, Bryant Cannon, *A Plea for Efficiency: The Voluntary Environmental Obligations of International Corporations and the Benefits of Information Standardization*, 19 N.Y.U. Envtl. L.J. 454, 478 (2012).
31. *See, e.g.*, Robyn Bishop, *Investing in the Future: Why the SEC Should Require a Uniform Climate Change Disclosure Framework to Protect Investors and Mitigate U.S. Financial Instability*, 48 Envtl. L. 491, 500-01 (2018).
32. *See, e.g.*, Karen Bradshaw Schulz, *Information Flooding*, 48 Ind. L. Rev. 755, 756 (2015).
33. *See, e.g.*, Frank Partnoy, *What's (Still) Wrong With Credit Ratings?*, 92 Wash. L. Rev. 1407, 1410, 1412 (2017) (discussing the contribution of independent credit ratings to the financial crisis).
34. Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6835, Exchange Act Release No. 26831, Investment Company Act Release No. 16961, 54 Fed. Reg. 22427, 22436 (May 24, 1989).
35. *Id*. at 22429.
36. *Id.*
37. John W. Bagby et al., *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 Va. Envtl. L.J. 225, 299 (1995).
38. *See* Rick E. Hansen, *Climate Change Disclosure by SEC Registrants: Revisiting the SEC's 2010 Interpretive Release*, 6 Brook. J. Corp. Fin. & Com. L. 487, 495 (2012).
39. *See* Executive Compensation and Related Person Disclosure, Securities Act Release No. 8732A, Exchange Act Release No. 54302A, Investment Company Act Release No. 27444A, 71 Fed. Reg. 5358, 5364 (Sept. 8, 2006).

and decisions,"[40] focusing on "the most important factors relevant to analysis of those policies and decisions."[41]

Both the MD&A and CD&A disclosures are primarily principles-based. They offer flexibility that both permits tailoring the disclosures to the issuer's particular circumstances and allows the disclosures to evolve in response to changes in issuer and market conditions. The flexibility of the existing MD&A and CD&A disclosures is a primary reason to use them as the model for an SD&A requirement. At the same time, these disclosures suffer from several disadvantages relative to line-item disclosure requirements.[42] First, the disclosures offer management substantial discretion that is often exercised in favor of failing to disclose. Second, the disclosures are not as readily comparable as quantitative disclosure requirements. As a result, it is worth considering whether, in adopting the MD&A model for sustainability disclosure, that model can be refined to enhance its effectiveness.

B. The SD&A Proposal

The SD&A requirement proposed by this Article would require issuers to identify and explain the three sustainability issues most significant to their operations. The required disclosure would include a discussion of the potential impact of those sustainability issues on the issuer's economic performance and an explanation of the basis for the issuer's determination of significance.[43] Analogous to the MD&A, the SD&A would be framed in terms of known or reasonably knowable sustainability issues that, in the opinion of the board of directors, are material to the issuers' business plan or operations.

By requiring the SD&A to focus on the specific issues that are most important to a particular issuer's operations, the proposal addresses the difficulty of reconciling sustainability disclosure with existing standards of materiality. In addition, a requirement that issuers disclose the three most material issues reduces the potentially burdensome impact associated with a more ambitious disclosure requirement, while providing more objectivity than the generic but uncabined materiality standard currently reflected in the SEC's approach to MD&A disclosure. The SEC's adopting release would identify the range of topics that have been identified within the framework of sustainability, such as "climate change, resource scarcity, corporate social responsibility, and good corporate citizenship,"[44] but would note that the identification of material sustainability issues is industry- and issuer-specific.

The SD&A proposal would modify the guidelines of Item 303 to place responsibility for the determination of what sustainability issues require disclosure in the hands of the board of directors, rather than management.[45] This is consistent with one of the main reasons proffered by investors for requiring sustainability disclosure: that such disclosure provides them with valuable insight into the board's familiarity with and oversight of critical issues such as risk management. The board or a sustainability committee of the board[46] would also be required to sign the SD&A.[47] The certification requirement would encourage issuers to develop systems for collecting and communicating the information necessary for the board to meet this obligation.[48] The rationale for requiring both board responsibility and certification is to ensure that the process of preparing the SD&A enhances the board's role in understanding and overseeing the issuer's sustainability practices.

The SD&A requirement would be enforced through a combination of public and private enforcement. The SEC staff would review and comment on issuers' SD&A disclosures as part of its review of securities filings and would have the authority to bring enforcement actions against issuers and individual directors for failure to comply. In addition, fraudulent misrepresentations and omissions in an issuer's SD&A would be actionable under Rule 10b-5,[49] and shareholders could, in appropriate cases, pursue private litigation.[50]

IV. Advantages and Limitations of SD&A

A. The SD&A Proposal Is a Workable First Step

A key advantage to the SD&A proposal is its workability. One of the challenges in formulating a mandatory sustainability disclosure requirement is that the topic of sustainability is vast and open-ended. Increasing the number of issues addressed, requiring issuers to provide hard sustainability data, and formulating line-item disclosure requirements would potentially increase the informational content of sustainability disclosure, at a substantial cost both to issuers preparing the information and to investors

40. 17 C.F.R. §229.402, Instructions to Item 402(b), ¶ 1 (2018).
41. *Id.* ¶ 3.
42. *See generally* Brief of Professors at Law and Business Schools as Amicus Curiae in Support of Respondents, Leidos, Inc. v. Ind. Pub. Ret. Sys., 137 S. Ct. 1395 (2017) (No. 16-581), 2017 WL 8291737 [hereinafter *Leidos* Amicus Brief].
43. *See, e.g.*, Robert G. Eccles & Tim Youmans, *Materiality in Corporate Governance: The Statement of Significant Audiences and Materiality* 6 (Harvard Bus. Sch., Working Paper No. 16-023, 2015), https://www.hbs.edu/faculty/Publication%20Files/16-023_f29dce5d-cbac-4840-8d5f-32b21e6f644e.pdf.
44. Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10064, Exchange Act Release No. 77599, 81 Fed. Reg. 23916, 23970 (proposed Apr. 22, 2016).
45. *See* Afra Afsharipour, *Corporate Social Responsibility and the Corporate Board: Assessing the Indian Experiment*, *in* Globalisation of Corporate Social Responsibility and Its Impact on Corporate Governance 101-04 (Jean J. du Plessis et al. eds., 2018).
46. *See, e.g.*, Jayne W. Barnard, *At the Intersection of Corporate Governance and Environmental Sustainability*, 2 Wm. & Mary Bus. L. Rev. 207, 207 (2011).
47. This requirement was part of Jeffrey Gordon's proposal for CD&A but was not adopted. *See* Jeffrey N. Gordon, *Executive Compensation: If There's a Problem, What's the Remedy? The Case for "Compensation Discussion and Analysis,"* 30 J. Corp. L. 675, 695 (2005).
48. *See, e.g.*, Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 22 Ga. St. U. L. Rev. 251, 266 (2005); *see also* Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 Geo. L.J. 1843, 1898-1907 (2007).
49. 17 C.F.R. §240.10b-5 (2018).
50. *See generally* Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation*, 2009 Wis. L. Rev. 333.

relying on it. Instead, the SD&A proposal offers a balance between informational value and workability. In particular, the requirement that issuers determine which sustainability issues are most important and explain the basis for their determination might reduce the propensity of issuers to engage in duplicative or boilerplate disclosure that is likely to be uninformative.[51] In addition, a more comprehensive disclosure requirement would force regulators to answer difficult questions about which sustainability issues warrant disclosure to create line-item disclosure requirements and evaluate contested claims about the economic materiality of the required information.

The SD&A requirement creates an explicit, although limited, affirmative reporting obligation rather than simply leaving sustainability issues within the ambiguous materiality assessment applicable to an issuer's overall MD&A and risk-factor disclosure. At the same time, the mandate would have the practical effect of requiring issuers to examine and evaluate the impact of a broader range of sustainability issues than those covered by the three most significant mandated disclosures, because this evaluation would be necessary to determine which issues to disclose.

The SEC's adoption of an SD&A requirement would reverse its prior position distinguishing sustainability issues from financial performance and encourage a norm in which issuers and their boards view sustainability considerations as part of their operational strategy. The SD&A would also manage investor expectations. Although a wide range of sustainability issues may be relevant to investors, formalizing the type and quantity of such disclosure that is required enhances predictability and investor confidence.

B. SD&A Reporting Will Promote Comparability

In addition, the SD&A proposal would promote the comparability of sustainability disclosure. Including sustainability disclosures within an issuer's securities filings and subjecting those disclosures to SEC staff review and comment is likely to have a significant effect on comparability. Although only a small percentage of 10-Ks receive staff comment letters, a variety of industry participants review the letters and report to issuers on trends in SEC policies and concerns with respect to 10-K disclosure.[52] These reports and the SEC reviews themselves lead to revisions and refinements of the narrative disclosures in the MD&A and CD&A.[53] This review process is likely to generate common disclosure policies among issuers, particularly for those in the same or related industries.[54]

C. SD&A Will Improve Sustainability Disclosure Reliability

Finally, SD&A would improve the reliability of sustainability disclosure over the current system. Under this proposal, sustainability disclosures would be prepared by disclosure attorneys rather than marketing personnel and subjected to the same verification requirements as traditional financial disclosures. Furthermore, the SD&A proposal would impose accountability on the board of directors for sustainability disclosures. The board's role in overseeing and certifying the sustainability disclosures would require that it set up reporting systems to receive information regularly about the issues addressed in the SD&A and their impact on operations. In addition, it would enable the board to incorporate sustainability considerations into its analysis of strategic issues and operational risk management.

Even if some firms make high-quality sustainability disclosures under the existing voluntary system, a mandatory system is likely to improve the quality of sustainability disclosure more broadly. An analogous examination of the shift from voluntary to mandatory disclosure of risk factors found that, although those firms facing significant litigation risk made substantial disclosures under a voluntary regime, mandatory disclosure improved the quality of disclosure for other firms.[55]

If the goal of the SD&A is to improve the reliability of sustainability disclosures, it is necessary to give attention not just to the disclosure requirement itself, but to the way it is enforced. An issuer's failure to disclose a known trend in violation of Item 303 can only be enforced by the SEC.[56] On the other hand, the federal courts have universally recognized a private right-of-action for federal securities fraud under Rule 10b-5.[57] Courts have typically held both that Regulation S-K creates an affirmative obligation to disclose and that failure to comply with that requirement can provide the basis for a private securities fraud suit.[58] As a result, inclusion of SD&A within securities filings would subject issuers' sustainability disclosures to SEC oversight and enforcement and clarify that fraudulent misrepresentations and omissions are actionable as securities fraud. Issuers cannot greenwash their SD&As to avoid addressing issues likely to cause the market concern because, to the extent those issues are potentially among the three most signifi-

51. *But see* Inv'r Responsibility Res. Ctr. Inst., The Corporate Risk Factor Disclosure Landscape 3 (2016), https://www.weinberg.udel.edu/IIRCiResearchDocuments/2016/01/FINAL-EY-Risk-Disclosure-Study.pdf (criticizing the narrative format of the risk-factor disclosure requirement).

52. *See, e.g.*, *id.*; Deloitte, SEC Comment Letters—Including Industry Insights: What "Gar" Told Us, at viii (9th ed. 2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-aers-sec-comment-letters-including-industry-insights-what-edgar-told-us-102015.pdf.

53. *See* Elizabeth A. Ising et al., Donnelley Fin. Sols., Executive Compensation Disclosure Handbook: A Practical Guide to the SEC'S Executive Compensation Disclosure Rules 12 (rev. ed. 2016), https://www.gibsondunn.com/wp-content/uploads/documents/publications/Ising-Mueller-Hanvey-Executive-Compensation-Disclosure-Handbook-Donnelley-Financial-Solutions-Oct-2016.pdf.

54. *See generally* Stephen V. Brown et al., *The Spillover Effect of SEC Comment Letters on Qualitative Corporate Disclosure: Evidence From the Risk Factor Disclosure*, 35 Contemp. Acct. Res. 622 (2018).

55. *See generally* Karen K. Nelson & Adam C. Pritchard, *Carrot or Stick? The Shift From Voluntary to Mandatory Disclosure of Risk Factors*, 13 J. Empirical Legal Stud. 266, 287-95 (2016).

56. *Cf.* Oran v. Stafford, 226 F.3d 275, 287 (3d Cir. 2000).

57. *See, e.g.*, Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 Iowa L. Rev. 811, 815 (2009).

58. *See, e.g.*, Ind. Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85, 94 n.7 (2d Cir. 2016) (quoting Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 101 (2d Cir. 2015).

cant, an issuer's decision to omit them would constitute not an omission, but a fraudulent misrepresentation.

This Article contemplates that implementation and enforcement of the SD&A would take place primarily through SEC oversight and, when appropriate, enforcement action. There are advantages to relying on the SEC to undertake most SD&A enforcement. First, the SEC has greater expertise, enabling it to choose more accurately the cases in which enforcement is most consistent with the purposes of federal regulation.[59] Second, public enforcement may be more efficient.[60] Third, public enforcement is unlikely to be affected by the incentives that potentially could produce abusive and excessive litigation.[61] Finally, the government can often send a message by bringing a limited number of high-profile cases. There are problems, however, with limiting enforcement to the SEC. The government has limited resources available to address wrongdoing. In addition, SEC enforcement efforts are vulnerable to both political pressures and shifting administrative priorities.[62] The risk of underenforcement is illustrated by the SEC's track record with respect to MD&A disclosure; it has brought less than 100 enforcement cases alleging violations since Regulation S-K's adoption.[63]

Accordingly, private enforcement is likely to serve as a valuable supplement to public enforcement. Although concerns have been raised about the potential for excessive or burdensome securities fraud litigation, that risk is likely to be especially limited under the SD&A proposal. First, the SD&A requirement is explicit and limited—issuers are only required to disclose the three most significant sustainability issues. As a result, the requirement does not open the door to efforts to characterize additional sustainability issues as fraudulent omissions.

Second, to succeed in a securities fraud lawsuit, private litigants must establish loss causation and damages.[64] As interpreted by the courts, the loss causation requirement requires affirmative proof that the fraud impacted stock price.[65] Thus, only the most economically significant of sustainability disclosure-related failures could trigger private litigation.[66] Third, to bring a securities fraud suit, a private litigant must be a purchaser or seller of the securities.[67] As a result, private litigation could not be used by environmental groups or other non-shareholder stakeholders to promote noneconomic objectives.

Conclusion

In light of the worldwide debate over sustainability practices and investor claims regarding the necessity of quality sustainability disclosures, the SEC should reverse its position that sustainability disclosure is not properly included within financial reporting. The SD&A is a cost-justified and pragmatic first step for mandating sustainability disclosure. SD&A, enhanced by a liability and enforcement structure with direct incentives for board involvement and oversight is well-suited to improve the availability and quality of corporate sustainability information for investors.

59. *See, e.g.*, James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 Cal. L. Rev. 115, 124 (2012); *see also* Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 961, 1023-24 (1994).
60. *See* William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 118 (2011).
61. *See, e.g.*, Jill E. Fisch, *Class Action Reform: Lessons From Securities Litigation*, 39 Ariz. L. Rev. 533, 535-36 (1997).
62. *See* Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 Yale J. Reg. 149, 279 (1990).
63. *Leidos* Amicus Brief, *supra* note 42, at 26-27.
64. Jill E. Fisch, *The Trouble With* Basic*: Price Distortion After* Halliburton, 90 Wash. U. L. Rev. 895, 914-16 (2013).
65. *See id.* at 915.
66. *See, e.g.*, Barbara Novick et al., Blackrock, Exploring ESG: A Practitioner's Perspective 9 (2016), https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-exploring-esg-a-practitioners-perspective-june-2016.pdf.
67. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 735-36 (1975).