# DON'T FORGET THE "G" IN ESG: THE SEC AND CORPORATE GOVERNANCE DISCLOSURE

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*For years, many shareholders—both institutional and individual investors—have pressured the Securities and Exchange Commission ("SEC") to require public companies to disclose more information about the environmental, social, and governance ("ESG") risks facing the company. However, the SEC has generally refused calls to require public corporations to disclose, for example, how they are addressing climate change or workforce diversity challenges. With a new president in the White House and a new administration at the SEC, the SEC will soon propose new ESG disclosure rules, requiring more information about the "E" and the "S" in ESG. But the SEC has forgotten the "G" in ESG. This is a mistake.*

*In this Article, I highlight the overlooked relationship between governance, on the one hand, and environmental and social risks, on the other, and I show how this connection should inform the SEC's forthcoming ESG-disclosure initiative. First, I demonstrate that the disclosure of governance information and the disclosure of environmental and social information are crucially linked. I argue that requiring public companies to disclose information about the environmental and social risks facing the company is not enough to protect investors. To ensure that shareholders are fully informed about ESG, the SEC must also require public companies to provide additional information about their corporate governance practices to establish that the board is able to manage those risks. Second, I argue that new rules requiring mandatory disclosure of additional governance information, particularly information relating to shareholder rights, will cause public companies to adopt better corporate governance practices. This will, in turn, strengthen the ability of shareholders to hold boards accountable if they fail to address the environmental and social risks that face public corporations today. Finally, I propose that the new mandatory information should be included in a new "Summary Corporate Governance Table." This table should be made part of the proxy statement and should also be required to be posted as a standalone document on the company website for easy investor access. If the SEC does not recognize that the "G" is*

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*connected to the "E" and "S," the SEC's ESG-disclosure initiative will not be successful.*

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## INTRODUCTION

For years, many shareholders—both institutional and individual investors—have pressured the Securities and Exchange Commission ("SEC") to require public companies to disclose more information about the environmental, social, and governance ("ESG") risks facing the company. However, the SEC has generally refused calls to require public corporations to disclose, for example, how they are addressing climate change or workforce diversity challenges. With a new president in the White House and a new administration at the SEC, the SEC will soon propose new ESG disclosure rules, requiring more information about the "E" and the "S" in ESG. But the SEC has forgotten the "G" in ESG. This is a mistake.

In this Article, I highlight the overlooked relationship between governance, on the one hand, and environmental and social risks, on the other, and I show how this connection should inform the SEC's forthcoming ESG-disclosure initiative. First, I demonstrate that the disclosure of governance information and the disclosure of environmental and social information are crucially linked. I argue that requiring public companies to disclose information about the environmental and social risks facing the company is not enough to protect investors. To ensure that shareholders are fully informed about ESG, the SEC must also require public companies to provide additional information about their corporate governance practices to establish that the board is able to manage those risks. Second, I argue that new rules requiring mandatory disclosure of additional governance information, particularly information relating to shareholder rights, will cause public companies to adopt better corporate governance practices. This will, in turn, strengthen the ability of shareholders to hold boards accountable if they fail to address the environmental and social risks that face public corporations today. Finally, I propose that the new mandatory information should be included in a new "Summary Corporate Governance Table." This table should be made part of the proxy statement and should also be required to be posted as a standalone document on the company website for easy investor access. If the SEC does not recognize that the "G" is connected to the "E" and "S," the SEC's ESG-disclosure initiative will not be successful.

The Article begins by providing an overview of ESG. ESG is grounded on the insight that environmental, social, and governance factors present short- and long-term risks to the health of public companies. Therefore, many of the world's largest institutional investors use ESG criteria (together with traditional financial metrics) to evaluate their investments in public companies. In addition, boards of public companies have increasingly focused on ESG in managing their businesses—

either because directors have become convinced that environmental, social, and governance risks could fundamentally impact company performance or because institutional investors have demanded that boards manage these risks. Part I continues with a brief introduction to corporate governance, describing the kinds of corporate governance practices that public companies adopt to ensure that the board is able to carry out its oversight responsibilities and can be held accountable to company shareholders.

I then explore the special role played by corporate governance in ESG. I show that not only is governance a standalone metric important to investment decisions, but that governance is also crucial to the management of environmental and social risks. In short, I show that, without good governance practices, it is unlikely that the board will be successful in addressing the environmental and social risks facing the company.

In Part II, I describe the SEC's approach to ESG disclosure. I begin with the SEC's current approach, showing that the SEC does not require companies to provide investors with environmental and social information, but it does require companies to provide extensive information on governance. I demonstrate, however, that this mandatory disclosure is largely limited to one type of corporate governance: practices relating to the board of directors. By contrast, public companies are required to disclose very little information about governance practices relating to shareholders. Specifically, the SEC does not require companies to disclose even the most basic information about shareholder voting rights, such as whether the full board stands for election each year, whether shareholders have access to the company's proxy statement, or whether shareholders have the power to call special meetings or act by written consent without a meeting. Moreover, the SEC does not generally require companies to disclose information on governance practices relating to opportunities for shareholders to communicate and engage with the board of directors.

Part II then continues and discusses the SEC's recent ESG-disclosure initiative. I show that this disclosure initiative focuses exclusively on environmental and social information, overlooking the need for additional governance information.

In Part III, I argue that as the SEC works to adopt new rules requiring disclosure of environmental and social information, the SEC must not forget the "G" in ESG. First, additional mandatory disclosure of governance information is a necessary component of the SEC's ESG-disclosure initiative. Presumably, the SEC will adopt new rules requiring companies to disclose more information about the environmental and social risks facing the company. However, to be fully informed about the company's exposure to environmental and social risks, investors also need to know how the company will respond to these risks and whether those responses will be effective. For example, is the board qualified to address these risks? Are shareholders able to communicate their concerns about environmental and social risks to the board? Can shareholders hold the board accountable if they fail to address the risks? These are all governance issues. Because the company's success in managing environmental and social risks turns on whether it has adopted sound corporate governance practices, investors need more information about the company's governance structure.

Second, requiring additional disclosure of governance will encourage boards to adopt corporate governance practices that will lead to improved board management of ESG risks. The foundation of ESG is that good corporate governance practices are necessary for the successful management of environmental and social risks. Mandatory disclosure of corporate governance—particularly of shareholder rights—will lead companies to adopt sound corporate governance practices that will lead to greater board accountability. Boards that are responsive to shareholders will be more likely to address environmental and social risks.

In Part IV, I recommend that the SEC should promulgate rules requiring public companies to disclose basic information about shareholder voting rights and practices relating to opportunities for shareholders to communicate and engage with the board of directors. I propose the types of specific line-item disclosure requirements that should be added to the federal securities laws. I also recommend that this newly mandated shareholder rights information—together with certain other fundamental corporate governance information—should be presented in a new "Summary Corporate Governance Table" that will be required to appear in the proxy statement. The tabular presentation will make it easier for investors to understand the corporate governance of public companies. Finally, given the increasing importance of company websites as information portals for investors, I recommend that public companies should be required to post the Summary Corporate Governance Table on company websites. This Article then briefly concludes.

## I. ESG

This Part provides an overview of ESG. After defining the term and providing examples of ESG, I show the extraordinary impact ESG has had on investing decisions, particularly those made by the world's largest institutional investors. I then briefly introduce corporate governance and demonstrate how the "G" fits into "ESG." I demonstrate that, unless a company has adopted good governance practices, a board will be unlikely to successfully address the environmental and social risks facing the company.

### *A. The Meaning of ESG*

The term "ESG" is used in many different ways.[1] It is often used interchangeably with the terms "sustainability" and "corporate social responsibility." While all three terms address environmental and social issues, there is an important difference. Properly used, ESG refers to an investment strategy. It was founded on the insight that environmental, social, and governance factors present short- and long-term risks to the financial health of public companies.[2] In other words, a commitment to environmental sustainability and social responsibility isn't just best for society; it's best for business. Therefore, many of the world's

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1. *E.g.*, Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1822 (2021) (noting that "[t]he acronym 'ESG' is used as shorthand for a dizzyingly broad array of 'environmental,' 'social,' and 'governance' topics affecting business").

2. *See infra* Section I.B.

largest institutional investors have increasingly turned to ESG criteria to evaluate their investments in public companies.[3]

Although ESG criteria relevant to investment decisions will vary depending on the particular company and industry, the following criteria are often identified as potentially impacting company performance[4]:

| **Environmental** | **Social** | **Governance** |
|---|---|---|
| Climate change | Diversity and inclusion | Director independence |
| Carbon emissions | Workplace health and safety | Board diversity |
| Pollution | Human rights | Board experience |
| Waste management | Supply chain labor standards | Board leadership structure |
| Resource depletion | Product quality and safety | Executive compensation |
| Deforestation | Community relations | Shareholder rights |

In determining whether to invest in a public company, ESG investors will evaluate these nonfinancial metrics along with more traditional financial metrics, such as profits and losses.[5] ESG investors may want information on, for example, how the company is addressing the effect of climate change on company operations, what steps the company is taking to improve working conditions for employees, and whether the company's board has adopted an effective leadership structure.

### *B. The Genesis of ESG*

The term ESG can be traced to the United Nations Global Compact Leaders Summit held in 2004.[6] In 1999, then-UN Secretary-General Kofi Annan delivered a powerful speech at the World Economic Forum in Davos, Switzerland.[7] He asked the participants to "individually through your firms and collectively through your

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3. *See infra* Section I.C.

4. *E.g.*, *What Is Responsible Investment?*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/an-introduction-to-responsible-investment/what-is-responsible-investment/4780.article [https://perma.cc/PLP8-PGTQ] (last visited Mar. 10, 2022); *see also* U.S GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 5 (2020).

5. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 4, at 5 ("The use of ESG factors has emerged as a way for investors to capture information on potential risks and opportunities that otherwise may not be taken into account in financial analysis.").

6. Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=2f410ce41695 [https://perma.cc/9DZL-RK94].

7. Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release SG/M/6881 (Feb. 1, 1999).

business associations . . . embrace, support and enact a core set of values in the areas of human rights, labour standards, and environmental practices."[8] The following year, the UN adopted the "Global Compact," which formally called upon the private sector to commit to a series of socially responsible principles.[9]

However, large public companies did not rush to sign on to the Global Compact, and some public companies that joined were later criticized as not following through on their commitments.[10] Partly in response, in 2004, then-UN Secretary Annan convened the Global Compact Leaders Summit, a one-day conference on corporate social responsibility held at the United Nations Headquarters in New York City.[11] Hundreds of CEOs from the world's largest corporations attended the event.[12]

To encourage greater participation by public companies in the voluntary Global Compact, the conveners of the Leaders Summit recognized that they needed to find a way to make the Global Compact principles more "business relevant."[13] They turned to a group of invited financial institutions. At the conclusion of the

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8. *Id.*

9. The Global Compact is comprised of the following ten principles:

**Human Rights**

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: make sure that they are not complicit in human rights abuses.

**Labour**

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

**Environment**

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies.

**Anti-Corruption**

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

*The Ten Principles of the UN Global Compact*, U.N. GLOB. COMPACT, https://unglobalcompact.org/what-is-gc/mission/principles (last visited Mar. 10, 2022). The first nine principles were part of the initial Global Compact. The tenth principle was added to the Global Compact in 2004. *Id.*

10. *See generally* Jo Confino, *Cleaning Up the Global Compact: Dealing with Corporate Free Riders*, GUARDIAN (Mar. 26, 2012), https://www.theguardian.com/sustainable-business/cleaning-up-un-global-compact-green-wash [https://perma.cc/WY8M-UFNE].

11. Press Release, Global Compact Leaders Summit at Headquarters to Set Stage for Expansion of Good Corporate Citizenship, U.N. Press Release ECO/64 (June 9, 2004).

12. *Id.*

13. THE GLOBAL COMPACT LEADERS SUMMIT FINAL REPORT, U.N. GLOB. COMPACT 8 (June 24, 2004), https://d306pr3pise04h.cloudfront.net/docs/news_events%2F8.1%2Fsummit_rep_fin.pdf [https://perma.cc/UC7T-RR2E].

Leaders Summit, 20 major financial institutions and institutional investors, including Goldman Sachs and Morgan Stanley, pledged to integrate the Global Compact's core values into their investment analysis and decisions.[14]

Later that year, these 20 firms issued the influential "Who Cares Wins" report,[15] which sets forth a series of recommendations "to better integrate *environmental, social and governance issues* in analysis, asset management and securities brokerage."[16] And with that statement, the term "ESG" was born.

The Who Cares Wins report laid out the case for ESG investing, concluding:

> The institutions endorsing this report are convinced that in a more globalised, interconnected and competitive world the way that environmental, social and corporate governance issues are managed is part of companies' overall management quality needed to compete successfully. Companies that perform better with regard to these issues can increase shareholder value by, for example, properly managing risks, anticipating regulatory action or accessing new markets, while at the same time contributing to the sustainable development of the societies in which they operate. Moreover, these issues can have a strong impact on reputation and brands, an increasingly important part of company value.[17]

By linking ESG criteria to financial results, these investors concluded that environmental, social, and governance factors were important to their investment decisions. Moreover, because these financial institutions had significant ownership stakes in most large public companies, ESG immediately became "business relevant" to boards.

### *C. The Impact of ESG*

Over the past 15 years, ESG investing has taken off as more and more institutional investors have accepted the idea that ESG is not about values; it is about value.[18] More than 3,000 institutional investors are signatories[19] to the UN-

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14. *Id.* at 17.

15. *See generally* WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD, U.N. GLOB. COMPACT (Dec. 2004), https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FFinancial_markets%2Fwho_cares_who_wins.pdf [https://perma.cc/5P75-G53A] [hereinafter, WHO CARES WINS].

16. *Id.* at i (emphasis added).

17. *Id.*

18. State Street Global Advisors, the world's third largest asset manager, often uses the phrase that addressing ESG is a "matter of value, not values." *See, e.g.*, Letter from Cyrus Taraporevala, President & CEO, State St. Glob. Advisors, to Board Members (Jan. 28, 2020), https://www.ssga.com/library-content/pdfs/insights/CEOs-letter-on-SSGA-2020-proxy-voting-agenda.pdf [https://perma.cc/RET4-DNZM].

19. *See About the PRI*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/pri/about-the-pri [https://perma.cc/2FK8-87VV] (last visited Mar. 10, 2022).

sponsored Principles for Responsible Investment,[20] a voluntary commitment to "incorporate ESG issues into investment analysis and decision-making processes."[21] By recent estimates, ESG investing represents 33% of the $51.4 trillion of U.S. assets under management.[22] Flows into ESG funds in the United States hit all-time highs in 2020.[23]

To support this increased interest in ESG and associated demand for ESG information, the market for ESG services has flourished. The number of "stewardship" positions and other ESG positions at asset management firms has increased dramatically, doubling in the last three years.[24] Consultants provide advice on ESG and ESG disclosures to public companies.[25] Third-party companies, such as Sustainalytics and MSCI, provide ESG ratings and rankings of public companies,[26] and other organizations, such as Morningstar, provide similar rankings for ESG funds.[27]

Powerful financial institutions and institutional investors have been extremely vocal about their commitment to ESG. This is particularly true of the three largest asset managers—BlackRock, Inc., State Street Global Advisors, and

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20. The Principles for Responsible Investment grew out of the work of the 2004 Global Compact Leaders Summit and Who Cares Wins report. They were rolled out to great fanfare at the NYSE in 2006. *See* Press Release, Secretary-General, Secretary-General Launches 'Principles for Responsible Investment' Backed by World's Largest Investors, U.N. Press Release SG/2111-ECO/106 (Apr. 27, 2006). Simultaneously, an organization—the PRI—was organized to help implement the Principles.

21. This is the first of the six Principles for Responsible Investment. *See What Are the Principles for Responsible Investment?*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment [https://perma.cc/64HD-VDRC] (last visited Mar. 10, 2022).

22. Debbie Carlson, *ESG Investing Accounts for One-Third of Total U.S. Assets Under Management*, MARKETWATCH (Nov. 17, 2020), https://www.marketwatch.com/story/esg-investing-now-accounts-for-one-third-of-total-u-s-assets-under-management-1160562 6611 [https://perma.cc/7ZMZ-YB99] (citing US SIF Foundation's Report on US Sustainable and Impact Investing Trends 2020).

23. Alyssa Stankiewicz, *Sustainable Fund Flows Reach New Heights in 2021's First Quarter*, MORNINGSTAR (Apr. 30, 2021), https://www.morningstar.com/articles/1035554/sustainable-fund-flows-reach-new-heights-in-2021s-first-quarter [https://perma.cc/5QDV-6ABJ] (stating results of report of sustainable funds investing by Morningstar research).

24. Attracta Mooney, *Jobs Bonanza in Stewardship and Sustainable Investing Teams*, FIN. TIMES (Mar. 8, 2020), https://www.ft.com/content/2714da14-c12d-46b2-8ecf-9aba3f665fdf [https://perma.cc/38AZ-MZTS].

25. For example, the Big Four accounting firms have started to include ESG advice as part of their consulting services. Andrew Edgecliffe-Johnson & Michael O'Dwyer, *PwC to Boost Headcount by 100,000 Over Five Years*, FIN. TIMES (June 15, 2020), https://www.ft.com/content/2714da14-c12d-46b2-8ecf-9aba3f665fdf [https://perma.cc/87D6-67RU] ("[T]he Big Four accounting firms expect ESG advice to become a core part of all of their business lines . . . .").

26. JOHN HILL, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTING: A BALANCED ANALYSIS OF THE THEORY AND PRACTICE OF A SUSTAINABLE PORTFOLIO 177–79 (2020).

27. *Id.* at 113.

Vanguard—which collectively own 20% of the stock of S&P 500 companies.[28] For example, in January 2020, BlackRock, the world's largest asset manager, sent out its now-famous[29] investor letter, boldly stating that "sustainability should be our new standard for investing."[30] The same month, State Street Global Advisors, the world's third largest asset manager, issued an open letter to public company boards, warning them that they would take "appropriate voting action" against directors if they did not adequately address ESG issues in their long-term strategies.[31] In addition, other institutional investors such as Goldman Sachs and Fidelity Investments have issued proxy-voting guidelines[32] that show their strong commitments to ESG.[33]

Proxy advisory companies have also signaled strong support for ESG in their proxy-voting guidelines. For example, Institutional Shareholder Services ("ISS"), the largest and most influential proxy advisor, recently issued an update to its proxy voting guidelines to make clear that "poor risk oversight of environmental and social issues, including climate change" is an example of a "material failure" by the board that could result in ISS recommending that shareholders vote against the board.[34]

### *D. What Is "Governance"?*

The meaning of the "E" and the "S" in ESG are clear: environmental and social issues. But the meaning of governance may not be as well understood. Corporate governance refers to the policies and practices adopted by corporations to address the agency problem that is inherent in all public corporations.[35] The agency problem occurs because the directors and officers—who manage the corporation—

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28. Lucien Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019) (noting that BlackRock, State Street Global Advisors, and Vanguard "collectively own an average stake of more than 20% of S&P 500 companies").

29. *See, e.g.*, Rob Kaplan, *What Larry Fink Got Right (and Wrong) in His 2020 Investor Letter*, FORBES (Jan. 24, 2020), https://www.forbes.com/sites/robkaplan/2020/01/24/what-larry-fink-got-right-and-wrong-in-his-2020-investor-letter/?sh=61e362820559 (describing the letter as "represent[ing] a seismic shift in the way mainstream finance is starting to think about climate change and investing").

30. Letter from BlackRock's Glob. Exec. Comm. to Clients, *Net Zero: A Fiduciary Approach* (Jan. 2020), https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter [https://perma.cc/54KQ-XMRZ].

31. Letter from Cyrus Taraporevala, *supra* note 18.

32. "Proxy voting guidelines" disclose how an institutional investor will vote their proxies on a variety of issues, including director elections, bylaw amendments, and ESG proposals.

33. Rani Doyle, *ESG Initiatives Rapidly Advance in 2020; Institutional Investors Issue Updated Proxy Voting Policies*, A.B.A.: BUS. L. TODAY (Feb. 2020), https://businesslawtoday.org/month-in-brief/february-brief-securities-law-2020/ [https://perma.cc/RH3K-VQY8] (highlighting recent pro-ESG disclosure measures taken by institutional investors).

34. PROXY VOTING GUIDELINES: UPDATES FOR 2021, INST. S'HOLDER SERVS. 3 (Nov. 12, 2020), https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf [https://perma.cc/S5QN-YN5Q].

35. DAVID LARCKER & BRIAN TAYAN, CORPORATE GOVERNANCE MATTERS 4 (2d ed. 2015) ("To lessen agency costs, some type of control or monitoring system is put in place in the organization. That system of checks and balances is called corporate governance.").

are not necessarily the owners of the corporation. Agency theory recognizes that agents and principals have different interests that may lead an agent to prefer itself at the expense of its principal.[36] In the corporate context, this means that the board and the officers may put themselves ahead of the corporation's shareholders. Good corporate governance practices seek to ensure that the board effectively carries out its oversight responsibilities and is accountable to the company's shareholders. Good governance practices can be divided into two main categories: governance practices relating to the board and governance practices relating to shareholders.

*1. Good Governance Practices Relating to the Board*

Good corporate governance seeks to ensure that the board of a public company is effectively overseeing the company's business. Therefore, the composition of the board is extremely important. Corporate Governance 101 teaches that boards should be comprised of qualified, independent, informed, diverse, and engaged directors.[37] A well-comprised board will be better able to effectively exercise its oversight responsibilities.

Even a board comprised of qualified, independent, informed, diverse, and engaged directors can fail in its oversight responsibilities if the board has weak leadership. History has shown again and again that a domineering CEO can interfere with the board's monitoring and oversight functions—especially if the CEO also serves as Chairman of the Board.[38] To strengthen board leadership, some companies separate the Chairman and CEO positions.[39] If the positions are not separated, best practices suggest that a strong Lead Independent Director should be appointed to organize the independent directors.[40]

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36. Michael C. Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

37. BOB TRICKER, CORPORATE GOVERNANCE: PRINCIPLES, POLICIES, AND PRACTICES 319–23 (3d ed. 2015).

38. *See* A.B.A., *Report of the Task Force of the ABA Section of Business Law Corporate Governance Committee on Delineation of Governance Roles and Responsibilities*, 65 BUS. LAW. 107, 128 (2009).

39. Mengqi Sun, *More U.S. Companies Separating Chief Executive and Chairman Roles*, WALL ST. J. (Jan. 23, 2019), https://www.wsj.com/articles/more-u-s-companies-separating-chief-executive-and-chairman-roles-11548288502 [https://perma.cc/A7AQ-7EYB].

40. For example, the Council of Institutional Investors—an influential non-profit association representing large pension funds—has adopted "Corporate Governance Policies," which include the following provision:

> 2.4 Independent Chair/Lead Director: The board should be chaired by an independent director. The CEO and chair roles should only be combined in very limited circumstances; in these situations, the board should provide a written statement in the proxy materials discussing why the combined role is in the best interests of shareowners, and it should name a lead independent director who should have approval over information flow to the board, meeting agendas and meeting schedules to ensure a structure that provides an appropriate balance between the powers of the CEO and those of the independent directors.

*Corporate Governance Policies*, COUNCIL OF INST. INVS. §2.4 (Mar. 7, 2022), https://www.cii.org/files/03_07_22_corp_gov_policies.pdf [https://perma.cc/9W6B-AUGM].

Overseeing the complexities of a public company is time-consuming and difficult work. To assist boards, directors delegate large parts of the board's work to board committees.[41] In addition to the three standing committees that all public companies are required to have[42]—the audit committee, the nominating/corporate governance committee, and the compensation committee—boards often establish other committees—such as a risk committee or technology committee—to supervise areas particularly important to that public company. Because so much of the board's oversight responsibilities are delegated to smaller subgroups of directors, the composition and use of committees are an important part of a public company's corporate governance.

Finally, good corporate governance focuses on executive composition. One of the board's most significant responsibilities is to set the pay packages of the CEO and the other senior members of the management team. Good corporate governance instructs that the compensation plans should align the interests of the CEO with the interests of company shareholders.[43] Therefore, corporate governance experts recommend that boards adopt compensation plans largely comprised of "pay for performance" incentives that have both short- and long-term profitability goals.[44]

*2. Good Governance Practices Relating to Shareholders*

**a. Practices Relating to Shareholder Voting Rights**

To help ensure that the board works effectively and on behalf of the shareholders, the board must be accountable to the shareholders. The primary way for shareholders to hold the board accountable is through the shareholder's statutory right to elect the board of directors. Presumably, board members who fail to work on behalf of shareholders will not be re-elected to the board. The implied threat of shareholders casting a large number of "withhold" votes, or of taking even more drastic actions, such as seeking access to the company's proxy or engaging in a proxy fight, will presumably make the board more responsive to shareholders. Strong shareholder voting rights, therefore, are an especially important part of good governance.

Robust shareholder voting rights begin with the nomination process; public company boards will be more accountable to shareholders if shareholders have a meaningful opportunity to nominate directors. Moreover, the likelihood that candidates identified by shareholders will be elected to the board increases if shareholders have reasonable access to the company's proxy.

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41. TRICKER, *supra* note 37, at 179–82.

42. The New York Stock Exchange requires all listed companies to have a nomination/corporate governance committee, a compensation committee, and an audit committee. NYSE LISTED COMPANY MANUAL §§ 303A.04–303A.6 (Nov. 6, 2018).

43. For example, ISS's Proxy Voting Guidelines provide that executive compensation should "[m]aintain appropriate pay-for-performance alignment, with emphasis on long-term shareholder value" and should "be designed to attract, retain, and appropriately motivate the key employees who drive shareholder value over the long term." U.S. PROXY VOTING GUIDELINES, INST. S'HOLDER SERVS. 42 (Dec. 13, 2021), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/2676-T6UL].

44. *Id.*

In addition, directors will also be more accountable to shareholders if the entire board sits for re-election at each annual meeting and if a majority, rather than plurality, vote is required for election to the board.[45] Finally, if the company has more than two classes of common stock, directors will be more accountable to shareholders if all shareholders have equal voting power.[46]

Boards will also be more responsive to shareholders if shareholders are able to initiate and adopt bylaws to strengthen their voting rights. The statutory right of shareholders to adopt, amend, or repeal bylaws is a particularly important shareholder right. This is because bylaws are binding on the board, and shareholders can adopt, amend, or repeal bylaws without board approval. This permits shareholders to initiate and take unilateral action to promote shareholder rights, such as by amending the company's bylaws to require that directors must be elected by majority vote or by adding a proxy access bylaw. Although corporate law provides shareholders with the power to adopt, amend, and repeal bylaws,[47] that power is diminished if shareholders can only exercise it once a year at the annual meeting. On the other hand, if shareholders have the right to call special meetings or to act by written consent without a meeting, they will be able to obtain higher levels of board accountability.[48]

The power of shareholders to adopt, amend, and repeal bylaws is also diminished if the company's organizational documents unreasonably restrict the ability of shareholders to amend the bylaws. For example, supermajority voting requirements—which might require shareholders to obtain 67% or 75% approval to amend bylaws—make it more difficult for shareholders to assert their power.[49] To promote board accountability, the required vote to amend bylaws should be a majority vote, rather than a supermajority vote.

**b. Practices Relating to Shareholder Opportunities to Communicate and Engage with the Board of Directors**

Boards can be responsive to shareholders only if shareholders have meaningful opportunities to communicate their interests and concerns to the board. One way for shareholders to communicate their viewpoints is to speak directly with the board. That may occur through company outreach. In fact, the boards of many

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45. J. ROBERT BROWN, JR. & LISA L. CASEY, CORPORATE GOVERNANCE: CASES AND MATERIALS 456–547 (2d ed. 2016).

46. Lucien Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 597–99 (2017) (describing opposition to dual-class voting due to concerns for shareholder democracy and board accountability).

47. DEL. CODE ANN. tit. 8, § 109 (West 2015).

48. The default rule under Delaware corporate law is that only directors have the right to call special meetings. *Id.* § 211(d). However, shareholders can be given the right to call special meetings if provided by the company's bylaws or certificate of incorporation. *Id.* Under Delaware law, shareholders do have the right to act by written consent without a meeting, but that right can be taken away by a provision in the company's certificate of incorporation. *Id.* § 228.

49. The default rule under Delaware corporate law is that the required vote for shareholder action is a majority of shares present in person or by proxy at a shareholder meeting. *Id.* § 216(2). The company's certificate of incorporation or bylaws can change the default rule by requiring a higher percentage of affirmative votes. *Id.* § 216.

public companies have already recognized the benefits of establishing a line of communication with their shareholders and have therefore adopted and implemented "shareholder engagement" policies.[50]

Shareholders can also initiate communication with the board, but the efficacy of that communication varies widely. Large institutional investors can ask for, and are generally granted, private meetings with company management, including members of the board of directors.[51] On the other hand, most individual investors do not enjoy the privileged status of institutional investors. Therefore, these shareholders can share their views with the board through written correspondence or, if they are able to attend the annual meeting, by speaking to company management at the "Q&A" session[52] of the shareholder meeting.[53] Good corporate governance practices seek to make these communication channels as effective as possible. For example, to maximize shareholder communication opportunity, companies should encourage all members of their board of directors to attend the annual meeting, and companies should allot a reasonable amount of time to the Q&A part of the annual meeting.

Shareholders also communicate with the board through advisory votes on executive compensation. The federal securities laws require public companies to provide their shareholders with an advisory vote on executive compensation.[54] This "say-on-pay" vote is an important opportunity for shareholders to signal any

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50. *See* Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 821 (noting the benefits of shareholder engagement).

51. Matteo Tonello & Matteo Gatti, *Board-Shareholder Engagement Practices: Findings from a Survey of SEC-Registered Companies*, DIRECTOR NOTES 5 (Dec. 13, 2019), https://ssrn.com/abstract=3503657 [https://perma.cc/B93E-4VCQ] ("[L]arge passive asset managers are the type of shareholders with which corporate directors have been engaging the most.").

52. Although not legally required, many public companies provide a brief opportunity for shareholders to speak to management after the conclusion of the formal part of the meeting. MAYER BROWN, MAYER BROWN LEGAL UPDATE, PREPARING FOR THE ANNUAL SHAREHOLDERS MEETING: FIVE PRACTICAL MATTERS US PUBLIC COMPANIES SHOULD CONSIDER NOW 3–4 (Jan. 28, 2016), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2016/01/preparing-for-the-annual-shareholders-meeting-five/files/get-the-full-report/fileattachment/160128-update-cs.pdf [https://perma.cc/3NBB-VK7F]. During the Q&A session, shareholders can ask management questions or express their viewpoints. *Id.* Because the company does not necessarily know ahead of time which shareholders will participate during the Q&A or what questions will be asked, the Q&A can be an unsettling experience for company management.

53. It is unclear whether the increasing use of virtual meetings impacts the ability of shareholders to express their viewpoints to the board. On the one hand, virtual meetings allow all shareholders, and not just those able to travel to the meeting, to participate in the meeting. On the other hand, virtual meetings may be used to "shield" the board and management from shareholder interaction, particularly during the Q&A session. RUTGERS CTR. FOR CORP. L. & GOVERNANCE, REPORT OF THE 2020 MULTI-STAKEHOLDER WORKING GROUP ON PRACTICES FOR VIRTUAL SHAREHOLDER MEETINGS 6 (Dec. 10, 2020), https://cclg.rutgers.edu/wp-content/uploads/VSM-Working-Group-Report-12_10_2020.pdf [https://perma.cc/4H7M-PHHL] ("[C]ompanies had much tighter control over the substance and flow of the Q&A sessions than at in-person meetings.").

54. 17 C.F.R. § 240.14a-21 (2021).

concerns about the amount of compensation awarded to executives or with the performance goals underlying executive-compensation awards. By law, companies can elect to have say-on-pay votes occur every year, every other year, or every third year.[55] To maximize board responsiveness to shareholders, these say-on-pay votes should occur as often as possible, i.e., at every annual meeting. In addition, a board following good corporate governance should have a policy explaining how it will respond to a failed say-on-pay vote.

Finally, the shareholder proposal[56] process permits shareholders to indicate their views on important shareholder issues at the annual shareholder's meeting. Most shareholder proposals are merely requests or recommendations for the board to take action. That means that even if a proposal receives majority support from company shareholders, the board is free to ignore it. However, if a significant number of shares vote in favor of a shareholder proposal, a strong shareholder message has been communicated to the board. Therefore, a board following good corporate governance should have a policy explaining how it will respond to a shareholder proposal that receives majority support. In addition, to help ensure that shareholders have a legitimate opportunity to communicate their views through the shareholder proposal process, proxy voting should be confidential.[57]

***E. How the "G" Fits Into ESG***

Because the genesis of ESG can be traced to the goals of protecting the environment and improving society, the "environmental" and "social" criteria of ESG are generally straightforward. But how does governance fit into ESG? Is it a standalone risk, similar to the standalone environmental and social risks? Or is governance related to environmental and social risks? Or both?

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55. The federal securities laws require public companies to provide their shareholders with an advisory vote on the frequency of the say-on-pay advisory votes. Because it is an advisory vote, public companies are free to set the frequency of the vote. *Id.*

56. Shareholder proposals are recommendations made by shareholders to the board that must be included in the public company's proxy materials so that public company shareholders can vote on them. The federal proxy rules provide the shareholders of a public company with the opportunity to vote on proposals made by other company shareholders. *See id.* § 240.14a-8.

57. If proxy voting is not confidential, companies will receive interim reports on voting results before the vote is closed. This allows public companies to communicate with and pressure shareholders to change their votes, particularly votes relating to contested shareholder proposals. *See, e.g.*, Carol Goforth, *Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late*, 43 AM. U. L. REV. 379, 460–63 (1994) (noting the danger).

It is both. As history has shown, poor governance can expose public companies to reputational damage,[58] crushing financial liabilities,[59] and even bankruptcy.[60] In short, poor corporate governance can lead to substantial economic risks. Thus, under ESG, governance is an important nonfinancial metric that investors should consider, independent of whether or how it relates to managing environmental and social risks.

But governance is also closely related to environmental and social risks. Good corporate governance practices are essential to ensure that public companies are appropriately managing their environmental and social risks. The Who Cares Wins report makes the point succinctly:

> Sound corporate governance and risk management systems are crucial pre-requisites to successfully implementing policies and measures to address environmental and social challenges. That is why we have chosen to use the term "environmental, social and governance issues" throughout this report, as a way of highlighting the fact that these three areas are closely inter-linked.[61]

In other words, without the "G," companies could not manage the "E" and the "S."

The vital connection between governance and the management of environmental and social risks is easily demonstrated. First, the board is responsible for managing company risks, including environmental and social risks. If directors do not have the appropriate experience and skills, they will not be able to manage the company's environmental and social risks. If directors are too closely connected to managers who do not share a concern for environmental and social risks, the board may not be effective in overseeing these risks. If directors do not sufficiently understand the company's business and its exposure to environmental and social risks, or are deprived of that information by management, the board will not be able to effectively manage these risks. If the board is comprised of directors who share

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58. For example, poor corporate governance at Wells Fargo, Inc. was a contributing factor causing bank employees to open up fake and unauthorized bank accounts. The bank's reputation was significantly impacted, and, even after more than five years, its reputation still has not recovered from the 2016 scandal. *See* Rey Mashayekhi, *Can Anyone Fix Wells Fargo?*, FORTUNE (Feb. 3, 2021), https://fortune.com/longform/fixing-wells-fargo-charles-scharf-ceo-regulatory-issues-privacy-fake-account-fraud-scandal-covid/ [https://perma.cc/RP69-VLKE].

59. The scandal also caused Wells Fargo to pay out billions of dollars in fines, penalties, and settlements, as well as receive an unprecedented sanction imposed by the Federal Reserve that placed an asset cap on Wells Fargo's assets. *See* Matt Egan, *US Government Fines Wells Fargo $3 Billion for Its "Staggering" Fake Accounts Scandal*, CNN (Feb. 24, 2020), https://www.cnn.com/2020/02/21/business/wells-fargo-settlement-doj-sec/index.html [https://perma.cc/XJ54-RH83].

60. Enron, Inc. is probably the most infamous example of poor governance leading to the bankruptcy of a public company. *See* Reed Abelson, *Enron's Collapse: The Directors; One Enron Inquiry Suggests Board Played Important Role*, N.Y. TIMES (Jan. 19, 2002), https://www.nytimes.com/2002/01/19/business/enron-s-collapse-directors-one-enron-inquiry-suggests-board-played-important.html [https://perma.cc/7CBD-VATS].

61. WHO CARES WINS, *supra* note 15, at 2.

the same nondiverse backgrounds, they may overlook or fail to appreciate the significance of environmental and social risks. And if directors are too busy to dedicate sufficient time to their board duties, they will not be able to effectively manage environmental and social risks. Thus, board composition is a key factor in determining whether the company will be able to manage its environmental and social risks.

Board committees also play important roles in managing environmental and social risks. While the full board is responsible for overseeing the company's comprehensive exposure to risk, boards of public companies have increasingly delegated some aspects of risk oversight to committees. At many companies, oversight of ESG risks is assigned to already-existing standing committees, with the compensation committee often responsible for social risks, especially those relating to human capital,[62] and the corporate governance/nominating committee often responsible for environmental risks.[63] At other companies, a specialized committee, such as a risk committee or a sustainability committee, is made responsible for overseeing the company's environmental and social risks.[64] Thus, the board needs to determine whether to delegate these issues to a specialized committee, and if so, what committee. This governance decision will impact the board's ultimate ability to effectively manage environmental and social risks.

To successfully address environmental and social risks, the board also needs to consider whether the company's executive-compensation plans provide adequate incentives for the CEO and other members of the senior management team.[65] Without appropriate incentives, senior management will presumably not sufficiently prioritize the management of environmental and social risks.

Just as importantly, because boards might resist accepting the connection between environmental and social responsibility on the one hand, and increased shareholder value on the other, governance practices that promote board accountability are crucial to ensuring effective management of environmental and social risks.[66] The threat—express or implied—that shareholders will vote directors out of office if they fail to manage social and environmental risks presumably leads to more effective management of these risks. This threat was highlighted in a recent BlackRock newsletter, which included the following statement:

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62. *See* Jamie Smith, *Four ESG Highlights from the 2020 Proxy Season*, EY CTR. FOR BD. MATTERS (July 28, 2020), https://www.ey.com/en_us/board-matters/four-esg-highlights-from-the-2020-proxy-season [https://perma.cc/UMW6-NDP7].

63. *Id.*

64. *Id.*

65. Deborah Beckmann et. al., *Moving Cautiously on ESG Incentives in Compensation*, HARV. L. SCH. F. ON CORP. GOV. (Apr. 15, 2021), https://corpgov.law.harvard.edu/2021/04/15/moving-cautiously-on-esg-incentives-in-compensation/ [https://perma.cc/6MW9-JRXH] (noting that boards "have begun the difficult work of determining which ESG goals are especially important for their company, and how to translate those goals into incentives for executive compensation").

66. WHO CARES WINS, *supra* note 15, at 6 (identifying board accountability as an important factor underlying all three ESG criteria).

> In 2020, we identified 244 companies that are making insufficient progress integrating climate risk into their business models or disclosures. Of these companies, we took voting action against 53, or 22%. We have put the remaining 191 companies "on watch." Those that do not make significant progress risk voting action against management in 2021.[67]

BlackRock showed that it was willing to back up that threat in ExxonMobil's recent contested board election. BlackRock, together with other large institutional investors, used its considerable voting power to elect two directors who had been nominated by an activist hedge fund concerned about ExxonMobil's approach to climate change, meaning that two company-nominated directors were voted off the ExxonMobil board.[68]

Shareholders with weak voting rights are much less likely to be able to vote directors out of office for ignoring the challenges posed by environmental and social issues. Thus, corporate governance practices that lead to strong shareholder rights[69] will help ensure the implementation of policies that address social and environmental issues.

Finally, the shareholder proposal process has become an increasingly important way for shareholders to influence the board's management of environmental and social issues. In the past, the conventional wisdom was that shareholder proposals addressing these matters were never successful, generally receiving only a small number of votes.[70] However, that has dramatically changed in the last few years. As more and more institutional investors have recognized the importance of ESG, more and more institutional investors are voting in favor of environmental and social shareholder proposals.[71] This has resulted in numerous shareholder proposals receiving significant shareholder support, with some environmental and social proposals even obtaining enough votes to become

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67. BLACKROCK INVESTMENT STEWARDSHIP, OUR APPROACH TO SUSTAINABILITY 4 (July 8, 2020), https://www.blackrock.com/corporate/literature/publication/our-commitment-to-sustainability-full-report.pdf [https://perma.cc/48FT-NQWT].

68. Steven Mufson, *The Fight for the Soul—and the Future—of ExxonMobil*, WASH. POST (May 22, 2021), https://www.washingtonpost.com/climate-environment/2021/05/21/exxon-faces-shareholder-revolt-over-climate-change/ [https://perma.cc/P7KU-KTW2].

69. For further discussion of corporate governance practices that lead to strong shareholder rights, *see supra* Subsection I.D.2.a.

70. HILL, *supra* note 26, at 152 (stating that social and environmental shareholder proposals "have historically received few votes and were offered more to make a statement than with any real hope of passage").

71. BlackRock, in particular, has significantly increased its support of a variety of shareholder proposals on environmental and social matters. Dawn Lim, *BlackRock Starts to Use Voting Power More Aggressively*, WALL ST. J. (May 1, 2021), https://www.wsj.com/articles/blackrock-takes-aggressive-posture-on-esg-proxy-votes-11619775002 [https://perma.cc/9HC4-TKGF] (noting that BlackRock voted in favor of 91% of environmental shareholder proposals and 23% of social shareholder proposals).

successful shareholder proposals.[72] For example, Chevron shareholders recently cast 61% of votes in favor of a shareholder proposal requesting the company to substantially reduce its greenhouse gas emissions.[73] To ensure that boards do not simply ignore shareholder proposals that receive majority support, good corporate governance practices are needed. For example, boards should adopt policies stating how they will address successful shareholder proposals, such as whether the board will reconsider successful shareholder proposals, and when and how the board will communicate any action on the successful shareholder proposal to its investors.[74]

## II. THE SEC'S APPROACH TO ESG DISCLOSURE

As discussed in the previous Part, ESG has become increasingly important to many investors, leading to an increased demand for ESG information. In this Part, I describe the SEC's approach to ESG disclosure. I begin by showing that the SEC does not currently require companies to provide investors with environmental and social information. While the SEC does require companies to provide extensive information on governance, I demonstrate that this mandatory disclosure is largely limited to one type of corporate governance: practices relating to the board of directors. By contrast, public companies are required to disclose very little information about governance practices relating to shareholders. Following this discussion of the SEC's current approach, I turn to the SEC's recent ESG-disclosure initiative. I show that this disclosure initiative focuses exclusively on environmental and social information, overlooking the investor's need for additional information on governance practices.

### *A. Current Law*

#### *1. Environmental Disclosures*

The federal securities laws include numerous mandatory disclosure rules. Many appear in Regulation S-K,[75] which sets forth more than 35 specific "line-item disclosure requirements," most of which have subparts that require the disclosure of additional information. The line-item disclosure requirements include such

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72. Mindy Lubber, *Why This Proxy Season Is a Record Breaker for Climate Proposals*, FORBES (May 14, 2021), https://www.forbes.com/sites/mindylubber/2021/05/14/why-this-proxy-season-is-a-record-breaker-for-climate-proposals/?sh=38773d7a54d4 [https://perma.cc/VG7Z-HTZR].

73. Sergio Chapa & Caroline Hyde, *Chevron Investors Back Climate Proposal in Rebuke to C-Suite*, BLOOMBERG (May 26, 2021), https://www.bloomberg.com/news/articles/2021-05-26/chevron-investors-back-climate-proposal-in-rebuke-to-management [https://perma.cc/Z8ZG-X5XZ].

74. *See, e.g.*, EXXONMOBIL, CORP., EXXONMOBIL CORPORATE GOVERNANCE GUIDELINES (Mar. 1, 2020), https://corporate.exxonmobil.com/About-us/Who-we-are/Corporate-governance/Corporate-governance-guidelines-and-additional-policies#CorporateGovernanceGuidelines [https://perma.cc/N9ZN-NW3V] (stating its policy that "[i]f a shareholder proposal that is not supported by the Board receives a majority of the votes cast at a meeting at which a quorum is present, the proposal will be reconsidered by the Board. Action taken on the proposal will be reported to shareholders in a timely manner").

75. 17 C.F.R. §§ 229.10–229.802 (2021).

information as "Description of Business,"[76] "Risk Factors,"[77] "Directors, Executive Officers, Promoters and Control Persons,"[78] "Executive Compensation,"[79] and "Corporate Governance."[80] Additional specific mandatory disclosure requirements are also set forth in SEC Forms, such as the proxy statement.[81] While there are hundreds of pages of line-item disclosure requirements, none of them specifically require disclosure of environmental information.

Instead, the SEC has taken the position that existing line-item disclosure requirements might require companies to disclose environmental information—but only if the information is material to investors.[82] For example, the mandatory disclosure item that requires disclosure of "Risk Factors" could be interpreted as requiring companies to disclose material environmental risks in their quarterly and annual periodic reports. Similarly, the "MD&A" mandatory disclosure item, which requires companies to disclosure "any known trends or uncertainties that have had or that the [company] reasonably expects will have a material favorable or unfavorable impact on its [operations]," could be interpreted as requiring companies to disclose material environmental risks in their periodic reports.[83] However, if the company determines that the information is not material, the company is not required to disclose it. Because the SEC relies on companies to make the materiality determination,[84] environmental disclosures have been viewed as essentially voluntary.

*2. Social Disclosures*

Like its approach to environmental information, the SEC, in general, has not promulgated line-item disclosure requirements for social information. There are, however, a few exceptions. Two of these line-item disclosure requirements were a result of congressional directives. First, in response to concerns that trade in certain minerals (including gold) was contributing to the conflict and human rights violations in the Democratic Republic of the Congo, Congress directed the SEC to

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76. *Id.* at Item 101.
77. *Id.* at Item 105.
78. *Id.* at Item 401.
79. *Id.* at Item 402.
80. *Id.* at Item 407.
81. *Id.* § 240.14A-101.
82. Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release No. 33-9106, 75 Fed. Reg. 62,290 (Feb. 8, 2010) (describing "the most pertinent non-financial statement disclosure rules that may require disclosure related to climate change"). The SEC reiterated that approach in 2016, stating that it "has determined in the past that disclosure relating to environmental and other matters of social concern should not be required of all [public companies] unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material." Concept Release on Business and Financial Disclosure Required by Regulation S-K, Exchange Act Release No. 33-10064, 81 Fed. Reg. 23,916 (Apr. 22, 2016).
83. 17 C.F.R. § 303(b)(2).
84. U.S. GOV'T ACCOUNTABILITY OFF., REPORT 20-530, DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 33 (July 2020) (noting that the SEC's principles-based approach to sustainability information means that "SEC staff rely primarily on companies to determine what information is material and requires disclosure in their SEC filings").

promulgate rules requiring public companies to report on their use and sourcing of "conflict minerals."[85] Second, in response to concerns about the safety of workers in mines, especially coal mines, Congress directed the SEC to promulgate rules requiring public mining companies to disclose information relating to violations of health and safety standards.[86]

The SEC, on its own initiative, promulgated disclosure rules in only one other area: human capital. The SEC recently required companies to provide more information about practices relating to its workforce, i.e., its "human capital."[87] Under the rule, public companies must disclose, to the extent material to an understanding of its business, the measures or objectives used by the company to manage its business, including how it attracts, retains, and contributes to the professional development of its workforce.[88] Although the SEC does not explicitly say so, this disclosure would presumably include information on diversity initiatives, gender equity, and employee working conditions (including health and safety metrics).

*3. Governance Disclosures*

In contrast to the SEC's relatively hands-off approach to mandatory disclosure regarding environmental and social information, the SEC has promulgated numerous disclosure rules relating to corporate governance.[89] As shown below, most of the mandatory disclosure relates to the board and board practices. The SEC requires companies to disclose very limited information about governance practices relating to shareholders.

*a. Mandatory Disclosure of Governance Practices Relating to the Board*

Public companies are required to disclose extensive information about the composition of the board in the proxy statement. Among other items, the SEC requires companies to disclose certain biographical information about each director that is intended to demonstrate that he or she is qualified to serve on the board.[90] The company must also identify which directors are independent directors.[91] In addition, all public companies are required to disclose "whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for

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85. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) (amending the Securities Exchange Act of 1934 to add Section 13(p), which requires the SEC to promulgate disclosure rules). The SEC's final rules appear in Rule 13p-1 of the Securities Exchange Act of 1934. *See* 17 C.F.R. § 240.13p-1.

86. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1503, 124 Stat. 1376, 1386 (2010) (directing the SEC to promulgate mine safety disclosure rules). The SEC's final rules appear in Item 104 of Regulation S-K. *See* 17 C.F.R. § 229.104.

87. *See* 17 C.F.R. § 229.101(c)(2)(ii).

88. *Id.*

89. For example, Regulation S-K includes a line-item disclosure requirement for information on "Corporate Governance." *Id.* § 229.407.

90. *Id.* § 229.401(e)(1).

91. *Id.* § 229.407(a).

director."[92] Finally, to help shareholders determine whether directors are devoting the appropriate amount of time to board service, the SEC requires companies to identify any director who attended fewer than 75% of the company's board meetings[93] and disclose the number of other directorships held by each board member.[94]

The SEC also requires disclosure of the board's leadership structure.[95] Specifically, companies must "[b]riefly describe the leadership structure of the [company's] board, such as whether the same person serves as both principal executive officer and chairman of the board, or whether two individuals serve in those positions."[96] If the Chairman of the Board and the CEO are the same person, the company must "disclose whether [it] has a lead independent director and what specific role the lead independent director plays in the leadership of the board."[97] Finally, the company is required to disclose "why the [company] has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the [company]."[98]

While the SEC does not require public companies to describe the board's role and general responsibilities, it does require the company to "disclose the extent of the board's role in the risk oversight of the [company]."[99] In addition, companies are required to make voluminous disclosures concerning the use of the nominating committee,[100] audit committee,[101] and compensation committee.[102]

Public companies must also disclose extensive information about executive compensation. Companies must disclose information about director compensation.[103] However, most of the required disclosure relates to management compensation, which is approved by the board. Thus, the company must prepare a "Summary Compensation Table," which discloses all compensation earned by specified executives,[104] including annual salary, bonuses, equity and non-equity

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92. *Id.* § 229.407(c)(2)(vi). If there is such a policy, the company must disclose how the policy is implemented. *Id.* Note that Nasdaq has recently proposed a rule that would require all Nasdaq-listed companies to include at least two diverse directors on their boards or explain why they were not able to comply with the rule. *See* The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, Exchange Act Release No. 34-90574 (File No. SR-NASDAQ-2020-081) (Dec. 4, 2020). (The rule has not yet been approved by the SEC.).

93. 17 C.F.R. § 229.407(b)(1).

94. *Id.* § 229.401(e)(2).

95. *Id.* § 229.407(h).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* § 229.407(c).

101. *Id.* § 229.407(d).

102. *Id.* § 229.407(e).

103. *Id.* § 229.402(k).

104. Executive-compensation disclosure must be made for each of the company's "Named Executive Officers," which generally includes the CEO, the CFO, and the three most highly compensated officers (other than the CEO and CFO) of the company. *Id.* § 229.402(a)(3).

incentive compensation, deferred compensation, and perquisites.[105] In addition, the company must prepare a related "Compensation Discussion and Analysis," which provides a lengthy and detailed explanation of the information contained in the Summary Compensation Table and the objectives of the executive-compensation program.[106] Companies are also required to disclose the ratio of the annual total compensation of the CEO to the median of the annual total compensation of all company employees.[107]

Finally, because ownership of company stock can also be an effective way to align the interests of the board (and management) with shareholders, the SEC requires companies to disclose the amount of stock owned by each director and specified high-level executives.[108] Because hedging company stock undercuts the alignment of interests, public companies must also disclose whether they have adopted rules prohibiting the board (and management) from hedging their company stock.[109]

*b. Mandatory Disclosure of Governance Practices Relating to Shareholders*

**i. Information Relating to Shareholder Voting Rights**

While the SEC has required public companies to make comprehensive disclosures regarding the governance practices relating to the board, the SEC has promulgated very few disclosure items regarding governance practices relating to shareholders. There are a few line-item disclosure requirements regarding voting rights relating to board elections. Specifically, public companies are required to disclose the vote required for director elections.[110] They must also disclose whether proxies are revocable.[111] If the company has more than one class of common stock, the number of votes to which each class of stock is entitled must be disclosed.[112] If the company uses cumulative voting for director elections, the company must disclose that information.[113] Finally, the SEC requires public companies to describe their policy regarding the nominating committee's consideration of shareholder-nominated directors.[114] If the company does not have a policy, the board must explain why "it is appropriate . . . not to have such a policy."[115]

**ii. Information on Governance Practices Relating to Opportunities for Shareholders to Communicate and Engage with the Board of Directors**

Similarly, there are only a small number of mandatory disclosure items addressing the opportunity for shareholders to communicate and engage with the board. Public companies must disclose if they have a policy regarding director

105. *Id.* § 229.402(c).
106. *Id.* § 229.402(b).
107. *Id.* § 229.402(u).
108. *Id.* § 229.403(b).
109. *Id.* § 229.407(i).
110. *Id.* § 240.14a-101, Item 21.
111. *Id.* at Item 2.
112. *Id*. at Item 6(a).
113. *Id.* at Item 6(c).
114. *Id.* § 229.407(c)(2)(ii).
115. *Id.*

attendance at the annual shareholder meeting as well as the number of directors who attended the most recent annual meeting.[116] They must also describe how shareholders can send communications to the board.[117] If the board does not have a process, it must explain why.[118] Companies must also disclose the frequency of shareholder say-on-pay votes.[119] Finally, the proxy statement must set forth the deadline for submitting shareholder proposals for inclusion at the next annual shareholder's meeting.[120]

### *B. The SEC's Recent ESG-Disclosure Initiative*

In 2020, it appeared that, no matter how loud the calls for increased mandatory disclosure of ESG information,[121] the SEC was not going to change course. The SEC had two perfect opportunities to do so and each time chose not to proceed. For example, in August 2020, the SEC adopted new disclosure rules intended to modernize several mandatory disclosure items, including the description of "Risk Factors" facing the company.[122] However, the new rules did not require additional environmental or social disclosures, leading to dissents by the two Democratic Commissioners.[123] Similarly, in November 2020, the SEC amended

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116. *Id.* § 229.407(b).

117. *Id.* § 229.407(f)(2).

118. *Id.* § 229.407(f)(1).

119. *Id.* § 240.14a-101, Item 24.

120. *Id.* § 240.14a-5(e).

121. Moreover, several SEC committees have recently recommended that the SEC issue mandatory disclosure rules. The Investor-as-Owner Subcommittee of SEC Investor Advisory Committee called upon the SEC to "begin in earnest an effort to update the reporting requirement of Issuers to include material, decision-useful, ESG factors. *Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure*, U.S. SEC. & EXCH. COMM'N 7 (May 14, 2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf [https://perma.cc/3Q4T-PKD3]. In addition, the ESG Subcommittee of the SEC Asset Management Advisory Committee issued a discussion draft, which included several potential recommendations for improved disclosure of ESG information. *Asset Management Advisory Committee Potential Recommendations of ESG Subcommittee*, U.S. SEC. & EXCH. COMM'N (Dec. 1, 2020), https://www.sec.gov/files/potential-recommendations-of-the-esg-subcommittee-12012020.pdf [https://perma.cc/8V3Q-6D8Y].

122. Modernization of Regulation S-K Items 101, 103, and 105, Exchange Act Release No. 33-10825, 85 Fed. Reg. 63,726 (Nov. 9, 2020).

123. Public Statement of Comm'r Caroline Crenshaw, U.S. SEC. & EXCH. COMM'N, Statement on the "Modernization" of Regulations S-K Items 101, 103, and 105 (Aug. 26, 2020), https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k [https://perma.cc/R2WJ-6HJ3] (criticizing the rule for "fail[ing] to deal adequately with two significant modern issues affecting financial performance: climate change risk and human capital"); Public Statement of Comm'r Allison Herren Lee, U.S. SEC. & EXCH. COMM'N, Regulation S-K and ESG Disclosures: An Unsustainable Silence (Aug. 26, 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26 [https://perma.cc/R2WJ-6HJ3] (criticizing the rule because it was "silent on two critical subjects: diversity and climate risk disclosure"). The new disclosure rules did require more information about one area of social concern: human capital. For additional discussion, see *supra* note 87 and accompanying text.

several line-item disclosure requirements, including the MD&A.[124] Once again, however, the new rules did not require any additional environmental or social disclosures, and, once again, the two Democratic Commissioners dissented, arguing that the SEC should have required companies to disclose information on climate risk.[125]

In 2021, however, things began to rapidly change.[126] Only weeks after President Biden was sworn in as President of the United States, the SEC created a new policy position: Senior Policy Advisor for Climate and ESG.[127] Shortly thereafter, then-Acting SEC Chair Allison Herren Lee directed the SEC's Division of Corporate Finance to "enhance" the SEC's disclosure rules on climate change[128] and then requested public comment on climate disclosure.[129]

In early March 2021, the SEC announced the creation of a "Climate and ESG Task Force" in the Division of Enforcement that was charged with "identify[ing] any material gaps or misstatements in issuers' disclosure of climate risks under existing rules."[130]

Around the same time, incoming SEC Chair Gary Gensler was signaling that ESG disclosure would be one of his priorities as the agency's new leader. During his SEC confirmation hearings, he stated that the SEC should require public

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124. Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Exchange Act Release No. 33-10890, 86 Fed. Reg. 2080 (Feb. 10, 2021).

125. *See* Joint Statement of Comm'r Allison Herren Lee and Comm'r Caroline Crenshaw, U.S. SEC. & EXCH. COMM'N, Joint Statement on Amendments to Regulation S-K: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Information (Nov. 19, 2020), https://www.sec.gov/news/public-statement/lee-crenshaw-statement-amendments-regulation-s-k [https://perma.cc/AG7Q-Q7SM] (criticizing the rule for "fail[ing] completely to address climate risk").

126. *See* Emily Glazer, *Companies Brace Themselves for New ESG Regulations Under Biden*, WALL ST. J. (Jan. 18, 2021, 9:15 AM), https://www.wsj.com/articles/companies-brace-themselves-for-new-esg-regulations-under-biden-11610719200 [https://perma.cc/KB3R-TLD6] (discussing the expected change in ESG policy in the Biden administration).

127. *See* Press Release, U.S. SEC. & EXCH. COMM'N, Satyam Khanna Named Senior Policy Advisor for Climate and ESG (Feb. 1, 2021), https://www.sec.gov/news/press-release/2021-20 [https://perma.cc/TDQ3-D23W].

128. *See* Public Statement of Acting Chair Allison Herren Lee, U.S. SEC. & EXCH. COMM'N, Statement on the Review of Climate-Related Disclosure (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure [https://perma.cc/E9A6-BF6P].

129. *See* Public Statement of Acting Chair Allison Herren Lee, U.S. Sec. & Exch. Comm'n, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures [https://perma.cc/ZTU8-BAWR].

130. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 [https://perma.cc/T3RR-GW2P].

companies to disclose more information on climate risk and diversity.[131] Following his confirmation, in May 2021, during testimony before the House Financial Services Committee, Chair Gensler went a step further, stating that the SEC needed to prioritize new ESG disclosure rules, particularly those regarding the risks of climate change.[132] He followed through on his statement: in June, the SEC indicated that it would be proposing disclosure rules on board diversity, climate change, human capital (including workforce diversity), and cybersecurity risk governance during Fall 2021.[133]

## III. THE SEC MUST NOT FORGET THE "G" IN ITS ESG-DISCLOSURE INITIATIVE

Since the change in administration, the SEC has repeatedly stated its commitment to increased ESG disclosure. However, the SEC has been using the term "ESG" even though the SEC seems to be referring to only two of the three ESG criteria: environmental and social information.[134] In other words, although the SEC is using the umbrella term "ESG" to describe its current disclosure initiative, its

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131. Paul Kiernan & Andrew Ackerman, *Biden's SEC Pick Faces Senate Panel Amid Calls to Address Game Stop Frenzy*, WALL ST. J. (Mar. 2, 2021, 4:07 PM), https://www.wsj.com/articles/bidens-sec-pick-faces-senate-panel-amid-calls-to-address-gamestop-frenzy-11614691808 [https://perma.cc/M4EY-9YGY] ("Mr. Gensler said high interest from investors in companies' efforts to address environmental and social issues suggests such information should sometimes be disclosed, even if large sums of money aren't involved.").

132. Daniel F. C. Crowley et al., *SEC to Move Quickly on Proposed ESG Disclosures*, NAT'L L. REV. (May 13, 2021), https://www.natlawreview.com/article/sec-to-move-quickly-proposed-esg-disclosures [https://perma.cc/TZU4-2TQR].

133. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Annual Regulatory Agenda (June 11, 2021), https://www.sec.gov/news/press-release/2021-99 [https://perma.cc/8WEV-QRK3]. However, the SEC has not yet proposed these rules.

134. The SEC is not alone in using ESG to refer to only environmental and social information. Although academics have called upon the SEC to improve disclosure of ESG, upon review, most of these recommendations are actually for improved disclosure of environmental and social information. For example, in 2018, two prominent law professors, on behalf of certain institutional investors, petitioned the SEC to promulgate rules requiring mandatory "ESG disclosure." Letter from Cynthia A. Williams & Jill E. Fisch to Brent J. Fields, Secretary, SEC (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf [https://perma.cc/WL57-SDWN]. However, this petition focused primarily on enhanced environmental and social disclosure. As Professor Virginia Harper Ho noted:

> Since financial reporting in the U.S. and most other jurisdictions already includes disclosures on many aspects of corporate governance, the debate of the materiality of ESG disclosure tends to focus more heavily on environmental or social issues, despite the increasingly blurred lines between these two categories.

Virginia Harper Ho, *"Comply or Explain" and the Future of Non-Financial Reporting*, 21 LEWIS & CLARK L. REV. 317, 323 (2017); *see also* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 931–32 (2019) (noting that the term "ESG" is often used interchangeably with "sustainability"—which typically refers to environmental and social issues); Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures*, 23 U. PA. J. BUS. L. 740 (2021) (using the term "ESG" to refer only to environmental and social issues).

actions show that improving governance disclosure is not part of that initiative. The governance factor of ESG—which is so critical to effective management of environmental and social risks[135]—has been forgotten by the SEC.

Some commentators may respond that the SEC has not forgotten governance. They might argue that the SEC is deliberately choosing to focus on mandatory disclosure of environmental and social information because that is where improved mandatory disclosure is most needed. However, the SEC has not stated that its omission of governance in its ESG-disclosure initiative is purposeful. But if it is, the SEC has made a significant mistake, as discussed below.

### *A. Additional Mandatory Disclosure of Governance Information Is a Necessary Component of the SEC's ESG-Disclosure Initiative*

Additional mandatory disclosure of governance information is a necessary component of the SEC's ESG-disclosure initiative. Presumably, the SEC will adopt new rules requiring companies to disclose more information about the environmental and social risks facing the company. It is clear that investors want this information. But to be fully informed about the company's exposure to environmental and social risks, investors also need to know how the company will respond to these risks and whether those responses will be effective. For example, is the board qualified to address these risks? Are shareholders able to communicate their concerns about environmental and social risks to the board? Can shareholders hold the board accountable if they fail to address the risks? These are all governance issues. Because the company's success in managing environmental and social risks turns on whether it has adopted sound corporate governance practices, investors need more information about the company's governance.

Commentators might argue that additional governance disclosure is not necessary because public companies are already required to make extensive disclosures about their corporate governance practices in their proxy statements. That is partly true. The SEC does require public companies to make lengthy disclosures about their governance,[136] but almost all of this mandatory information concerns the company's board.[137] There are very few rules requiring mandatory disclosure of governance practices relating to shareholders, such as shareholder voting rights.[138] The federal securities laws do not require public companies to disclose even the most basic information about shareholder voting rights.[139]

This deficiency creates a curious result: shareholders currently receive the information they need to make informed voting decisions about who to elect to the board, but they are not required to receive the information that will help them determine whether they can hold those elected directors accountable for their decisions. Investors need to know the extent to which the board is accountable to them. If shareholders are not able to hold boards accountable for their decisions by exercising their voting rights, there is a danger that the board will not adequately

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135. *See supra* Section I.E.
136. *See supra* Subsection II.A.3.
137. *See supra* Subsection II.A.3.a.
138. *See supra* Subsection II.A.3.b.
139. *See supra* Subsection II.A.3.b.i.

address ESG.[140] Therefore, to assess whether the board will be effective in responding to the "E" and "S" of ESG, investors need more information about their voting rights.

In addition, currently, the SEC does not generally require companies to disclose their practices relating to shareholder communication and engagement with the board of directors.[141] Specifically, the SEC does not require companies to disclose whether the board has a policy relating to how it will respond to two of the most significant ways shareholders communicate with the board: say-on-pay votes and advisory shareholder proposals.[142]

This deficiency means that shareholders currently receive the information they need to make informed voting decisions about whether to approve compensation plans and whether to vote in favor of shareholder proposals, but they do not receive any information about how the board will respond if shareholders vote down a say-on-pay proposal or approve a shareholder proposal that is not supported by the board. Considering that say-on-pay votes and advisory shareholder proposals are two of the most important ways that shareholders communicate with the board regarding the board's management of environmental and social risks,[143] shareholders need information on board responsiveness policies to become fully informed about the ESG risks facing the company.

Finally, even though the SEC requires extensive disclosures about boards, none of the current mandatory disclosure requirements about the board expressly relate to the board's responsibility to manage environmental and social risks. For example, under current SEC rules, companies are not required to disclose whether their board has the qualifications needed to address environmental and social risks or whether the board or a board committee is responsible for ESG oversight. Investors need this minimal information so that they can evaluate whether the board can effectively address the company's exposure to environmental and social risks.

### *B. Additional Mandatory Disclosure of Governance Information Will Encourage Boards to Improve Management of ESG Risks*

In addition to furthering the SEC's traditional goal of promoting informed decision-making, increased mandatory disclosure of governance practices will encourage boards to adopt corporate governance practices that will help the board manage the company's environmental and social risks. Good corporate governance practices are essential for boards to implement policies to address environmental and social challenges.[144] To be sure, requiring *disclosure* of good corporate practices is not the same thing as *requiring* good corporate governance practices. But if the SEC requires companies to disclose more information about their corporate governance practices, companies will no doubt improve their corporate governance practices.

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140. *See supra* Section I.E.
141. *See supra* Subsection II.A.3.b.ii.
142. *See id.*
143. *See supra* Subsection I.D.2.b.
144. *See supra* Section I.D.

When the SEC promulgates a new disclosure requirement relating to governance, public companies often decide to alter their governance practices to avoid highlighting what might be considered poor corporate governance.[145] For example, in 2003, the SEC adopted a rule requiring public companies to disclose in their proxy statements whether their audit committee includes a "financial expert," and if not, why not.[146] Because public companies did not want to broadcast to the investing public that their audit committee did not have a financial expert, most public companies quickly added a financial expert to their audit committee.[147] Today, many public companies have ensured that they have more than one financial expert on their audit committee as a way of signaling their superior corporate governance practices to the investing public.[148]

New governance disclosure rules, if adopted, will presumably have the same effect, causing public companies to adopt practices that will lead to greater board accountability to shareholders. For example, if the SEC promulgates a rule requiring public companies to disclose if company shareholders can call special meetings, it is likely that public companies (who do not currently permit shareholders to do so) will amend their bylaws to allow their shareholders to call special meetings.

Similarly, new governance disclosure rules adopted as part of the SEC's ESG-disclosure initiative will presumably cause public companies to adopt practices that will help the board manage environmental and social risks. For example, if the SEC promulgates a rule requiring public companies to disclose which directors have been determined to be knowledgeable about environmental and social risks, public companies will be likely to ensure that there are members of the board with this experience. Improving the composition of the board will improve the company's management of its environmental and social risks.

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145. The effect of SEC disclosure rules on company conduct is well-known. *See, e.g.*, Donald E. Schwartz, *Federalism and Corporate Governance*, 45 OHIO ST. L.J. 545, 575–76 (1984) (referring to these rules as "therapeutic disclosure" rules because the disclosure rule caused companies to change their behavior to cure a problem); *cf.* Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1047–48 (2019) (noting that disclosure rules "produc[e] substantive behavior—discourse with officers and management and potentially, changes in policies and procedures—on the part of directors").

146. 17 C.F.R. § 229.407(d)(5)(i)(C) (2021).

147. *See* Julie H. Daum & Thomas J. Neff, *Spencer Stuart Governance Letter*, DIRS. & BDS. (Jan. 1, 2005), https://www.thefreelibrary.com/SSBI:%20key%20trends%20drive%20board%20composition;%20The%20latest%20Spencer%20Stuart . . . -a0129967683 [https://perma.cc/338W-A274] (reporting Spencer Stuart Board Index 2004 annual survey results showing that in the year following the rule, 91% of boards identified at least one financial expert, compared to 21% the previous year).

148. For example, in its most recent survey of audit committee practices, Ernst & Young found that 91% of large public companies had more than one financial expert on their audit committee. Jennifer Lee, *Audit Committee Reporting to Shareholders in 2020*, ERNST & YOUNG (Sept. 16, 2020), https://www.ey.com/en_us/board-matters/audit-committee-reporting-to-shareholders-in-2020 [https://perma.cc/8VP7-AR7Z].

Some critics have argued that the SEC should not use disclosure rules to cause public companies to change their conduct relating to ESG.[149] These critics contend that the SEC—an administrative agency charged with the protection of *investors*—should not be using its rulemaking authority primarily for the purpose of protecting *society*. For example, the U.S. Chamber of Commerce recently sent a letter to the House Financial Services Committee about a bill that would, among other things, direct the SEC to promulgate rules requiring public companies to make disclosures on climate risk.[150] The Chamber of Commerce argued that "[w]hile disclosures may be a part of an all of government, comprehensive policy to combat climate change, disclosures should be used to protect investors and should not be used as a means to achieve policy goals outside the scope of the federal securities laws."[151]

Fortunately, this concern does not apply to SEC rules requiring disclosure of corporate governance practices. Corporate governance directly relates to investor protection, the SEC's main responsibility.[152] Poor corporate governance may lead to poor company results. Moreover, investors need to understand how a company is managed. The SEC has recognized this; as discussed above, the federal securities laws already require public companies to make extensive disclosures about their corporate governance.[153] Those disclosure rules often have the effect of encouraging companies to change their behavior. While controversial at first,[154] the SEC has been

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149. *See, e.g.*, The Wall St. J. Ed. Bd., *The Securities and Politics Commission: The Woke Agenda Is About to Redefine Financial Regulation*, WALL ST. J. (Mar. 19, 2021) ("The goal [of mandating ESG-related disclosures] is to suppress corporate political advocacy by exposing companies to political and media harassment.").

150. U.S. Chamber Letter on a Markup in the House Financial Services Committee, U.S. CHAMBER OF COM. (May 12, 2021), https://www.uschamber.com/letters-congress/us-chamber-letter-markup-the-house-financial-services-committee-2 [https://perma.cc/M7WQ-R3A2].

151. *Id.*

152. The SEC's mission is "to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation." *About the SEC*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about.shtml [https://perma.cc/Z8D8-L2CA] (last visited Mar. 10, 2022).

153. *See supra* Subsection II.A.3.

154. For example, in 1978, the SEC adopted new rules that required disclosure of, among other things, the structure, composition, and functioning of the board and director attendance at board and board committee meetings. Some critics objected, stating that the rules were intended to regulate conduct, as opposed to provide information to shareholders. The SEC responded that:

> The Commission believes that the rules adopted today will facilitate informed voting decisions and promote fair corporate suffrage and are an appropriate exercise of its rulemaking authority under section 14(a) of the Securities Exchange Act. The rules do not, as some commentators thought, constitute a regulatory effort by the Commission to prescribe or determine board composition or corporate governance mechanisms. The legislative history of the federal securities laws reflects a recognition that disclosure, by providing corporate owners with meaningful information about the way in which their corporations are managed, may promote the accountability of corporate managers. Thus, while the federal securities

using disclosure rules to cause changes in corporate governance practices for at least 30 years.[155]

## IV. Recommendations

It appears that the SEC will respond to calls to improve disclosure of environmental and social issues. As part of its initiative to improve ESG disclosure, the SEC should also require public companies to provide additional information about its governance practices, particularly those relating to shareholder rights. In addition, the SEC should require public companies to present information about their fundamental corporate governance practices in a new "Summary Corporate Governance Table." Finally, the Summary Corporate Governance Table should be disclosed in the proxy statement and be posted on the company's corporate website.

### *A. The SEC Should Promulgate Rules Mandating Disclosure of Additional Information on Governance Practices*

#### *1. Additional Disclosures Relating to Shareholder Rights*

As discussed above,[156] the SEC requires public companies to disclose extensive information about governance practices relating to the board of directors, but it requires companies to disclose very limited information about governance practices relating to shareholder rights. To help ensure that investors have sufficient information to determine the level of board accountability to shareholders, the SEC should promulgate rules requiring companies to disclose basic information relating to shareholder voting rights.

The disclosures currently required by the SEC do not provide enough information for investors to understand whether the board will be responsive to shareholders. As discussed above,[157] to assess board accountability, shareholders also need to know:

- Whether the full board stands for election each year;

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> laws generally embody a disclosure approach, it has long been recognized that disclosure may have beneficial effects on corporate behavior. Accordingly, although the Commission's objective in adopting these rules is to provide additional information relevant to an informed voting decision, it recognizes that disclosure may, depending on determinations made by a company's management, directors and shareholders, influence corporate conduct. This sort of impact is clearly consistent with the basic philosophy of the disclosure provisions of the federal securities laws.

Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, SEC Release No. 34-15384, at 3 (Dec. 6, 1978).

155. For a good discussion of the SEC's history of using disclosure rules to regulate behavior, see generally J. Robert Brown, Jr., *Corporate Governance, the Securities and Exchange Commission, and the Limits of Disclosure*, 57 CATH. U. L. REV. 45, 60–73 (2008). *See also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1269–71 (1999) (reviewing the SEC's approach to rules that impact behavior).

156. *See supra* Subsection II.A.3.

157. *See supra* Subsection I.D.2.a.

- Whether shareholders have reasonable access to the company's proxy materials;
- Whether proxy votes are kept confidential;
- Whether shareholders have the power to call special meetings;
- Whether shareholders can act by written consent without a meeting; and
- Whether bylaws can be amended by a majority vote of the shareholders.

Therefore, the SEC should require companies to disclose this information in their proxy statements.

In addition, investors need information to determine whether they have meaningful opportunities to communicate and engage with the board of directors. Currently, the SEC requires very little information in this area.[158] Therefore, the SEC should also require public companies to disclose:

- Whether the board has a policy concerning its response to failed say-on-on-pay votes; and
- Whether the board has a policy concerning its response to shareholder proposals that have received shareholder approval.

Some commentators may argue that the SEC does not need to require information on shareholder rights because public companies already voluntarily disclose this information in their proxy statements. While some public companies do, others do not. And those companies that do disclose information on shareholder rights almost certainly choose to focus on their good practices, bypassing disclosure of any problematic governance policies. For example, in its 2021 Proxy Statement,[159] Comcast, Inc. voluntarily disclosed "Corporate Governance Highlights," which tout a variety of Comcast's good corporate practices, including holding annual board elections and having a proxy access bylaw.[160] However, the proxy statement is silent on whether shareholders can call special meetings, whether shareholders can act by written consent, whether proxy votes are confidential, and whether the bylaws can be amended by a majority vote. Nor does the proxy statement disclose whether the board has a policy on failed say-on-pay votes or successful shareholder proposals. Why did the company choose not to disclose this information—which is so important to assessing board accountability—in a 70-page document? The answer is obvious: Comcast did not want to disclose less-than-stellar corporate governance practices.

In addition, some commentators may argue that it is not necessary for the SEC to require corporations to disclose this basic information relating to shareholder rights because institutional investors—who own significant amounts of stock of many public companies—are already aware of their shareholder rights. They have the expertise, the resources, and the power to determine their shareholder rights on their own, without mandatory disclosure. It is true that institutional investors may not need mandatory disclosure documents to become informed about their rights, but that does not mean that the SEC should continue its current approach of

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158. *See supra* Subsection II.A.3.b.ii.

159. Comcast Corp., Notice of 2021 Annual Meeting of Shareholders and Proxy Statement (Form DEF 14A) (June 2, 2021).

160. *Id.* at 24.

providing such limited information on shareholder rights. First, the argument proves too much. Institutional investors can presumably obtain from public companies whatever information they need to make informed investment decisions—not just corporate governance information—but mandatory disclosure continues to be the defining characteristic of the federal securities laws.[161]

Second, this argument ignores the existence of retail investors, who *do* need this information. The SEC has always recognized that it has a special responsibility to protect individual investors, who may lack the sophistication and resources of institutional investors.[162] While U.S. markets have become increasingly "institutionalized," individuals have always invested directly in the stock market and continue to do so. For example, according to a recent survey conducted by the Federal Reserve, approximately 15% of U.S. households directly own stock.[163] And retail investing is currently growing at a dramatic pace. The boom began with COVID, when many employees who had shifted to working from home discovered online trading, and the growth was fueled by low trading fees or zero-commission trading.[164] Retail investing has continued to surge. Individuals have opened record numbers of new retail brokerage accounts.[165] In addition 20% of U.S. stock trading is now being made by retail investors, as compared to 10% last year.[166] And these retail investors use the information disclosed in the company's periodic reports and proxy statements. For example, aside from financial professionals, the most important source of information for their investment decisions is the company's

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161. The debate over mandatory disclosure is beyond the scope of this Article. For a good overview, compare Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998) (arguing against mandatory disclosure), with Merritt Fox, *Retaining Mandatory Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1345–46 (1999) (arguing for mandatory disclosure).

162. *See, e.g.*, Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1025 (2009) (stating that "[t]he Securities and Exchange Commission thinks of itself as the investors' advocate, by which it means retail investors—individuals and households—as opposed to institutional investors").

163. Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, FED. RSRV. BULL., Sept. 2020, at 19, https://www.federalreserve.gov/publications/files/scf20.pdf.

164. Alexander Osipovich & Caitlin McCabe, *Coronavirus Turmoil, Free Trades Draw Newbies Into Stock Market*, WALL ST. J. (Apr. 30, 2020), https://www.wsj.com/articles/coronavirus-turmoil-free-trades-draw-newbies-into-stock-market-11588158001 [https://perma.cc/PAA6-25HY] ("Enticed by an industrywide move last year to zero-commission trading—and with more time on their hands as many work from home—individual investors flocked to platforms such as TD Ameritrade Holding Corp. and E*Trade Financial Corp.").

165. Caitlin McCabe, *Individual Investors Pour Record Cash Into Markets*, WALL ST. J. (July 6, 2021), https://www.wsj.com/articles/retail-investors-power-the-trading-wave-with-record-cash-inflows-11625477401 [https://perma.cc/9BSC-T89K] (noting that more than 10 million new accounts were opened in the first six months of 2021).

166. Brooke Fox, *Professional Investors Should Not Ignore the Retail Wave*, FIN. TIMES (Sept. 25, 2020), https://www.ft.com/content/ddc4630c-c27c-47e6-b13e-1e036d16b0f9 [https://perma.cc/G8TX-H8PB].

mandatory disclosure documents.[167] As more retail investors enter the market, the justification for mandatory disclosure becomes more apparent.

*2. Additional Disclosures Relating to the Board of Directors*

While the SEC already requires extensive mandatory information about the board of directors, it does not currently require public companies to disclose information about the board's ability to manage environmental and social risks.[168] Thus, the SEC should promulgate rules that require companies to disclose which members of the board have been determined to be knowledgeable about the environmental, social, and governance risks facing the company. Similarly, the SEC should require companies to disclose the board's role in the oversight of ESG risks.

***B. The SEC Should Require Public Companies to Present Fundamental Corporate Governance Information in a New "Summary Corporate Governance Table"***

Proxy statements are voluminous documents, typically between 50 and 75 pages in length. Under current rules, the SEC does not require corporate governance information to be disclosed in a specific area of the proxy statement.[169] Corporate governance information is therefore spread throughout the document. The combination of the lengthiness of the document and the lack of an assigned location for disclosure of information creates obstacles for shareholders to become informed about the company's corporate governance practices. For the same reasons, investors will find it difficult to compare corporate governance practices between and among different companies. However, there is a simple solution to this problem: public companies should be required to disclose a summary of fundamental corporate governance practices. To accomplish this, the SEC should revise Schedule 14A to require a new section in the proxy statement: a "Summary Corporate Governance Table." A proposed form of Summary Corporate Governance Table is included as an Appendix to this Article.

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167. MARK LUSH ET AL., FINRA INVESTOR EDUCATION FOUNDATION & NORC AT THE UNIVERSITY OF CHICAGO, INVESTING 2020: NEW ACCOUNTS AND THE PEOPLE WHO OPENED THEM 14 (Feb. 2021), https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them_1_0.pdf [https://perma.cc/8E38-C49V] (showing that approximately 40% of retail investors relied on the information in annual reports and company websites to make investment decisions).

168. *See supra* Section III.B.

169. Contrast the presentation of information in the proxy statement with the presentation of information in the Annual Report on Form 10-K. The Form 10-K requires information to be presented in a specific area in the document. Form 10-K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, at 8–11, https://www.sec.gov/files/form10-k.pdf [https://perma.cc/YJ7A-M563] (last visited Mar. 10, 2022). For example, all corporate governance information will be disclosed in each annual report under the heading "Item 10. Directors, Executive Officers and Corporate Governance." *Id.* The proxy rules do not require information to be presented in a specific order, and there is no requirement that information be disclosed under a particular item number. *See* 17 CFR § 240.14a-101 (2021).

*1. Summarizing Corporate Governance Information*

A summary will provide investors with a helpful overview of the company's approach to corporate governance. This recommendation should be noncontroversial. The SEC has recognized the benefits of using summaries to present information to investors, and it has required public companies to summarize information in other mandatory disclosure documents. For example, when a corporation sells securities to the public, its Registration Statement[170] must include a summary of the "key aspects" of the offering.[171] In addition, when a bidder launches a tender offer to acquire another company, the Schedule TO[172] must include a "summary term sheet" that "provide[s] security holders with sufficient information to understand the essential features and significance of the proposed transaction."[173]

Congress has also recognized the benefits of summarizing information contained in mandatory disclosure documents. In 2015, it directed the SEC to promulgate rules allowing—but not requiring—public companies to include a "summary page" in their Annual Report on Form 10-K.[174] The SEC responded by adding a new Item 16 to the Form 10-K, entitled "Form 10-K Summary," as a place for companies to include a summary of the information if they choose to do so.[175]

Moreover, the SEC has recognized that even specific disclosures in the disclosure document—as opposed to the entire disclosure document—might need to be summarized to help investors understand the information. For example, the SEC has encouraged public companies to include a summary of the Management's Discussion and Analysis of Financial Condition and Results of Operations

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170. The basic form of Registration Statement used by companies going public requires a summary of the offering information. Form S-1 Registration Statement Under the Securities Act of 1933, at 4, https://www.sec.gov/files/forms-1.pdf [https://perma.cc/K8PQ-LAL8] (last visited Mar. 10, 2022) (requiring disclosure of "Summary Information). In addition, the short form of Registration Statement used by larger, more established, public companies also requires a summary of offering information. Form S-3 Registration Statement Under the Securities Act of 1933, at 8, https://www.sec.gov/files/forms-3.pdf [https://perma.cc/4TW5-QHSD] (last visited Mar. 10, 2022) (requiring disclosure of "Summary Information").

171. 17 C.F.R. § 229.503(a).

172. *Id.* § 240.14d-100 (requiring disclosure of "Summary Term Sheet").

173. *Id.* § 229.1001.

174. Specifically, Congress required the SEC to promulgate rules "permit[ting] issuers to submit a summary page on form 10-K . . . but only if each item on such summary page includes a cross-reference . . . to the material contained in form 10-K to which such item relates." Fixing America's Surface Transportation Act of 2015, Pub. L. No. 115-94, § 72001, 129 Stat. 1312, 1320 (2015).

175. Form 10-K Summary, SEC Release No. 34-77969, 81 Fed. Reg. 37,132 (June 9, 2016) (adopting interim final rule, but noting that the new rule was not needed because public companies are free to include voluntary information in their annual reports on Form 10-K). Unfortunately, public companies generally have chosen not to include this optional summary in their Form 10-K.

("MD&A") section that appears in periodic reports.[176] The SEC also requires public companies to include a "Summary Compensation Table" in their proxy statements.[177] More recently, the SEC has required companies to provide a summary of the Risk Factors section that appears in most mandatory disclosure documents.[178]

The summary of corporate governance practices should be presented in a dedicated section of the proxy statement, making it easier for shareholders to locate the information in the document. This benefit can be demonstrated by comparing the approaches to governance disclosures made by two comparable public companies: Apple, Inc. and Amazon.com, Inc. Apple's 2021 proxy statement includes a page-long summary[179] of some of its significant governance practices, including information regarding five governance practices related to shareholder rights.[180] Apple shareholders can turn to page 16 of the proxy statement and easily find the following information about their voting rights: that directors are elected annually, that directors are elected by majority vote, that all shares have equal voting rights, that shareholders have access to the company's proxy, and that shareholders have the right to call special meetings.[181]

In contrast, Amazon's 2021 proxy statement does not summarize its governance information in one area.[182] Instead, information on shareholder rights is scattered throughout the proxy statement. Amazon shareholders would need to search through the 75-page proxy statement to find the same information that Apple shareholders would be able find on one page. Amazon shareholders would learn that directors are elected annually on page 5, that directors are elected by majority vote on page 3, that all shares have equal voting rights on page 1, and that shareholders have access to the proxy on page 16. Information on the right of shareholders to call special meetings does not appear in the main section of the proxy statement; it appears only in the board's response to a shareholder proposal that called on the

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176. Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 33-8350, 68 Fed. Reg. 75,055 (Dec. 29, 2003) (encouraging companies to provide summary to "help a reader's understanding of MD&A").

177. *See* 17 C.F.R. § 229.402(c).

178. Modernization of Regulation S-K Items 101, 103, and 105, Exchange Act Release No. 33-10825, 85 Fed. Reg. 63,726 (Nov. 9, 2020) (adopting this rule to make the disclosure more "user friendly" and to "improve readability").

179. A summary section often appears in proxy statements. *See, e.g.*, MORRISON & FOERSTER, FREQUENTLY ASKED QUESTIONS ABOUT PERIODIC REPORTING REQUIREMENTS FOR U.S. ISSUERS 9 n.13 (2018), https://media2.mofo.com/documents/faq-periodic-reporting-requirements-for-us-issuers-principal-exchange-act-reports.pdf [https://perma.cc/GS3S-5GPC] (noting that companies "have begun including a proxy summary because the quantity of information required to be presented in the proxy statement has increased in recent years, and issuers want to make it easier for shareholders to make an informed voting decision if they do not read the full document").

180. Apple Inc., Notice of 2021 Annual Meeting of Shareholders and Proxy Statement 16 (Form DEF 14A) (Jan. 5, 2021).

181. *Id.*

182. Amazon.com, Inc., Notice of 2021 Annual Meeting of Shareholders & Proxy Statement 16 (Form DEF 14A) (May 26, 2021), https://s2.q4cdn.com/299287126/files/doc_financials/2021/ar/Amazon-2021-Proxy-Statement.pdf [https://perma.cc/BK8L-JR6T].

board to make it easier for shareholders to call special meetings, on pages 54–55 of the proxy statement.

*2. Presenting Summary Corporate Governance Information in a Table*

To make the information even more accessible to shareholders, the proposed summary of corporate governance information should be presented in a table, as opposed to a narrative format.[183] For more than 20 years, the SEC has encouraged companies to disclose information in a format that makes it easier for investors to understand and interpret the information.[184] Using a table will convey corporate governance information clearly and effectively to shareholders.

Moreover, because this summary table—which is titled the "Summary Corporate Governance Table" ("SCGT")—will require public companies to present corporate governance information in the same order,[185] the SEC's goal of facilitating the comparability of information[186] will also be furthered.

Some public companies have already recognized the benefits of using tables to summarize their important corporate governance practices. For example, Target Corporation's 2021 proxy statement includes a two-page "Corporate

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183. Requiring information to be presented in tabular format is not a novel idea. Tables often appear in mandatory disclosure documents. The SEC encourages companies to use tables to increase the clarity of disclosure. SEC OFFICE OF INVESTOR EDUCATION AND ASSISTANCE, A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS 48 (Aug. 1998), https://www.sec.gov/pdf/handbook.pdf [https://perma.cc/TSH7-SEGR] (recommending the use of tables). In addition, the SEC has sometimes required certain types of information to be presented in tables, including, for example, the Summary Compensation Table found in the company's executive-compensation disclosure. *See* 17 C.F.R. § 229.407(c) (2021).

184. For example, the SEC requires companies issuing securities to write certain parts of the prospectus using "plain English" principles. 17 C.F.R. § 230.421(d). One of those principles is to use "tabular presentation or bullet lists for complex material, whenever possible." *Id.*

185. Requiring public companies to disclose the same types of information in the same sequence is the foundation of the mandatory disclosure approach of the federal securities laws.

186. Comparability of information is one of the cornerstones of the federal securities laws, which require companies to disclose the same types of information in the same order in their mandatory disclosure documents so that investors can easily compare company performances. The SEC has always placed great importance on ensuring comparability of information. *See, e.g.*, Business and Financial Disclosure Required by Regulation S-K, Exchange Act Release No. 33-10064, 81 Fed. Reg. 23,916 (Apr. 13, 2016) (discussing the importance of comparability in assessing a rules-based or principles-based system of disclosure). Congress has also emphasized the benefits of comparability to investors. *See, e.g.*, Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 72003, 129 Stat. 1312, 1320 (2015) (directing the SEC to conduct a study of the line-item requirements of Regulation S-K to determine how the SEC could modernize disclosure requirements while "preserving completeness and comparability of information across [public companies]").

Governance Highlights" table, which discloses 26 specific corporate governance practices.[187]

The SCGT should follow this approach. The SCGT should consist of four columns: (1) the SCGT line-item disclosure number; (2) the corporate governance practice; (3) a summary of the company's policy relating to that corporate governance practice; and (4) the page where additional information about the corporate governance practice can be found in the proxy statement. The tabular presentation is an extremely effective way to disclose fundamental information about corporate governance to shareholders. Furthermore, the cross-reference will provide companies with the opportunity to fully describe their corporate governance practices and to explain their corporate governance choices. A proposed form of Summary Corporate Governance Table is included as an Appendix to this Article.

*3. Determining What Information Should Be Included in the Summary Corporate Governance Table*

What information should be disclosed in the SCGT? It is clear that not every corporate governance practice should appear in the SCGT. Summarizing every practice will make the summary too long, defeating the purpose of providing an overview of the company's approach to corporate governance. Moreover, some corporate governance practices—such as executive compensation—are simply too complex to be summarized in a SCGT.

Therefore, the SCGT should set forth *fundamental* corporate governance practices: those practices that are crucial to determine whether the board is able to adequately oversee the company's business and to assess the level of board accountability to shareholders. Although reasonable minds may differ as to what corporate governance practices constitute "fundamental" practices, at a minimum, the SCGT should list basic information about the size and composition of the board, such as the number of independent directors, the number of women who serve on the board, the number of diverse directors, and the average tenure of the board.

In addition, the SCGT should provide basic information about the board's qualifications to manage the company. Consistent with the SEC's ESG-disclosure initiative, the SCGT should disclose the number of directors who are knowledgeable about the ESG risks facing the company.[188]

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187. Target Corp., 2021 Proxy Statement and Notice of Annual Meeting of Shareholders 10–11 (Form DEF 14A) (June 9, 2021).

188. To provide even more specific information about the ability of the board to manage the company's business, public companies should also consider using a "Board Skills Matrix," which lists certain skills and experience needed to manage a public company—such as industry experience, leadership, financial knowledge, etc.—along the horizontal axis, and the name of each board member along the vertical axis. The company then uses a bullet point or checkmark to identify which directors have the identified skills. Board skills matrixes have been identified as being a "best practice" of disclosure. In the same way, a board matrix can also be used to identify the demographic characteristics of directors, such as gender, race/ethnicity, sexual orientation, age, and years of service. *See, e.g.*, Office of the New York City Comptroller, "Best Practices" in Board Matrices (Aug. 2018), https://

The SCGT should also include key information about the board's leadership structure, such as whether the positions of CEO and Chair are held by the same person and whether the company has a Lead Independent Director.

In addition to information relating to corporate governance practices relating to the board, the SCGT should also include fundamental information about shareholder rights. At a minimum, the SCGT should include the new disclosure items recommended above, such as whether the entire board of directors stands for re-election each year.

Finally, the SEC should allow companies to include additional information in the SCGT if the company determines that the information is fundamental to an understanding of their corporate governance practices.

The SCGT should not be too burdensome for public companies to prepare. Some of the information is already required to be disclosed in the company's proxy statement.[189] Other fundamental information about the board of directors—such as demographic information—is generally voluntarily disclosed by public companies in their proxy statements.[190] To the extent public companies will be required to disclose new information, the information refers to such basic governance practices that it will not be difficult or costly for companies to summarize and include them in the SCGT.

A proposed form of a SCGT is included as an Appendix to this Article.

### *C. The SEC Should Require Companies to Post the Summary Corporate Governance Table on the Company Websites*

To improve the accessibility of corporate governance information, the SCGT should be posted as a standalone document on the company's website. Company websites serve as an important information hub for investors of public companies. Indeed, the SEC recognizes that the company website is the "obvious place for investors to find information about the company."[191] Therefore, the SEC should require public companies to post the SCGT on the company website.

Company websites generally include an "Investor Relations" section, which typically includes extensive information about the company's financial performance, including financial news and press releases, stock price information, and earnings webcasts.[192] There are also links to the company's mandatory

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comptroller.nyc.gov/wp-content/uploads/2018/08/NYC-Comptrollers-Office-Matrices-Compendium-8-2018-FINAL.pdf [https://perma.cc/JN54-4PUM] (providing examples of disclosures made by public companies).

189. *See infra* Appendix.

190. RICHARD B. ALSOP ET AL., SHEARMAN & STERLING, CORPORATE GOVERNANCE & EXECUTIVE COMPENSATION SURVEY 27–30 (2018), https://digital.shearman.com/i/1019978-2018-corporate-governance-survey/2? [https://perma.cc/DP3P-NFJ8] (describing the types of voluntary disclosure provided by public companies in their proxy statements).

191. Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 34-58288, 73 Fed. Reg. 45,862 (Aug. 7, 2008).

192. *See IR Website Best Practices Guide*, SNL IR SOLUTIONS, http://www.snl.com/Marketing/HTML_Email/Current/15049/SNLIR_CompDisclose0612.pdf [https://perma.cc/BJL3-QW5J] (last visited Mar. 10, 2022).

disclosure documents, including periodic reports and proxy statements, and links to the company's voluntary reports, such as its sustainability, corporate responsibility, or ESG reports.[193] In addition, the Investor Relations section usually contains a link to a separate "Corporate Governance" section of the company website.[194]

Not surprisingly, the Corporate Governance section typically describes the company's board and board committees. In addition, it often includes links to the company's significant corporate governance documents, such as its certificate of incorporation, bylaws, and committee charters, as well as other corporate governance policies, such as its corporate governance guidelines and code of conduct. Clearly, if an investor wanted to learn information about a company's corporate governance practices, this is where the investor would likely begin to look. Therefore, to further the SEC's goal of promoting informed investors, the SEC should require the SCGT to be included in this Corporate Governance section.[195]

An SEC rule requiring companies to post information on the company website would not be unusual or burdensome to public companies. In addition to encouraging public companies to use their websites to disseminate information, the SEC also strongly encourages[196] or requires[197] public companies to disseminate several types of information through their company websites. The New York Stock Exchange and Nasdaq also require listed companies to post specific information on their company websites.[198]

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193. *See id.*

194. *Website Posting of SEC and Corporate Governance Materials—Required Postings and Practical Advice*, PERKINS COIE (July 14, 2006), https://www.perkinscoie.com/en/news-insights/website-posting-of-sec-and-corporate-governance-materials.html [https://perma.cc/C2ZU-YN3F].

195. It is true that proxy statements are posted on company websites, so the SCGT would be available to investors through the proxy statement. However, requiring the SCGT to be posted on the company website would make the information easier to find. Moreover, posting the SCGT on the website ensures that the Corporate Governance section of the company website includes the basic governance information needed by the investing public.

196. For example, SEC rules require public companies to disclose in their Form 10-K whether they post their periodic reports—the Form 10-K, Form 10-Q, and Form 8-K—on the company website, and, if not, why not. SEC Regulation S-K Item 101(e), 17 C.F.R. § 229.101(e) (2021). This has caused public companies to "voluntarily" post their periodic reports on company websites. Similarly, SEC rules require public companies to disclose whether a copy of the each of the charters of the audit committee, compensation committee, and the nominating/corporate governance committee are posted on the company website. If they are not, they must be included as an appendix to the company's proxy statement every three years. *Id.* § 229.407. Similarly, this has caused public companies to "voluntarily" post their committee charters on company websites.

197. For example, the SEC generally requires public companies to post their proxy statements on the company website. *Id.* § 240.14a-16.

198. For example, the NYSE requires all listed companies to post their "Corporate Governance Guidelines" and their "Code of Business Conduct and Ethics" on the company website. NYSE LISTED COMPANY MANUAL §§ 303A.09, 303A.10 (Nov. 25, 2009). Nasdaq also requires all listed companies to post their "Code of Conduct" on the company website. NASDAQ LISTED COMPANY MANUAL § 5610 (July 22, 2010).

## CONCLUSION

The SEC is poised to promulgate rules requiring companies to disclose information relating to the environmental and social risks facing public companies today. The SEC's ESG-disclosure initiative will help shareholders become better informed about environmental and social challenges, but it will not be completely successful unless the SEC also recognizes the connection between governance on the one hand and environmental and social risks on the other. The SEC must ensure that its ESG-disclosure initiative will require public companies to provide additional information about their corporate governance practices to help shareholders evaluate whether the board is able to manage those risks and to strengthen the ability of shareholders to hold boards accountable if they fail to address the risks. The SEC must not forget the "G" in ESG.

## APPENDIX

***Proposed Form of Summary Corporate Governance Table***

| **SCGT Item Number** | **Corporate Governance Practice** | **Company Approach to Corporate Governance Practice** | **Where Additional Information Can Be Found in Proxy Statement** |
|---|---|---|---|
| **Board Composition** | | | |
| Item 1.01 | What is the size of the board of directors? | | |
| Item 1.02 | How many directors are independent?* | | |
| Item 1.03 | How many directors are women? | | |
| Item 1.04 | How many directors are diverse? | | |
| Item 1.05 | What is the average tenure of the current board? | | |
| **Board Knowledge and Experience** | | | |
| Item 1.06 | How many directors are "financial experts"?* | | |
| Item 1.07 | How many directors are knowledgeable about environmental risks facing the company? | | |
| Item 1.08 | How many directors are knowledgeable about social risks facing the company? | | |
| Item 1.09 | How many directors are knowledgeable about governance risks facing the company? | | |

| SCGT Item Number | Corporate Governance Practice | Company Approach to Corporate Governance Practice | Where Additional Information Can Be Found in Proxy Statement |
| --- | --- | --- | --- |
| **Board Leadership** | | | |
| Item1.10 | Are the positions of CEO and Chair of the Board held by different persons?* | | |
| Item 1.11 | Does the company have a Lead Independent Director?* | | |
| **Risk Oversight** | | | |
| Item 1.12 | What is the board's role in risk oversight of the company?* | | |
| Item 1.13 | What is the board's role in oversight of environmental, social, and governance risks? | | |
| **Shareholder Voting Rights** | | | |
| Item 2.01 | Do all shares of common stock have equal voting rights?* | | |
| Item 2.02 | Does the entire board stand for election each year? | | |
| Item 2.03 | What is the shareholder vote required to elect directors?* | | |
| Item 2.04 | What is the nominating committee's policy with regard to the consideration of director candidates nominated by shareholders?* | | |

| SCGT Item Number | Corporate Governance Practice | Company Approach to Corporate Governance Practice | Where Additional Information Can Be Found in Proxy Statement |
|---|---|---|---|
| Item 2.05 | Do shareholders have access to the company's proxy materials? | | |
| Item 2.06 | Are proxy votes kept confidential? | | |
| Item 2.07 | Do shareholders have the power to call special meetings? | | |
| Item 2.08 | Can shareholders act by written consent without a meeting? | | |
| Item 2.09 | How much notice to the company is required for a matter to be brought to shareholders for a vote? | | |
| Item 2.10 | What is the shareholder vote required to amend the bylaws? | | |
| **Opportunities for Shareholders to Communicate with Board** | | | |
| Item 2.11 | What is the company's policy regarding director attendance at the annual shareholder meeting?* | | |
| Item 2.12 | What is the process for shareholders to communicate with the board?* | | |
| Item 2.13 | How often do shareholders vote on executive compensation?* | | |
| Item 2.14 | What is the board's policy concerning its response to failed say-on-pay votes? | | |
| Item 2.15 | What is the board's policy concerning its response to shareholder proposals that | | |

| | | | |
|---|---|---|---|
| | have received shareholder approval? | | |
| **Optional Information** | | | |
| Item 3.01 | | | |

* The SEC already requires this information, or similar information, to be disclosed by public companies.