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VIRGINIA LAW & BUSINESS REVIEW

VOLUME 18 FALL 2023 NUMBER 1

THE SECURITIES AND EXCHANGE COMMISSION AS HUMAN RIGHTS ENFORCER?

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ABSTRACT

On April 28, 2022, the Securities and Exchange Commission (SEC) announced that it had charged Brazilian mining company Vale with misleading investors about safety issues prior to a deadly dam collapse that killed hundreds and led to significant environmental harm in the Brazilian state of Minas Gerais. The action against Vale was largely seen as the agency's first significant move after it had created an Environmental, Social, and Governance (ESG) Task Force within the Division of Enforcement, the purpose of which is to identify and investigate ESG-related violations.

This action against Vale also emerged at a time when scholars, practitioners, and regulators, are engaged in a larger debate regarding what role the SEC should have in regulating corporate actions and statements that are connected to human rights harms. Here, we move the debate forward by offering a first-of-its kind analysis regarding whether the SEC's Division of Enforcement—as the country's leading financial markets enforcer—should broaden its focus to include issues that would traditionally fall within a business and human rights, i.e., non-financial, framework.

Our analysis comes at a particularly prescient time in the agency's history:

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Research for this article was supported, in part, by a Hodges's Faculty Research Grant from West Virginia University. An earlier version of this article was presented at the University of Illinois College of Law Corporate and Securities Litigation Workshop, September 2022. The authors would like to thank the Workshop participants and the following people for their comments and insights: Valarie Blake, Cody Corliss, Amy Cyphert, Kirsha Trychta, and Elaine Waterhouse Wilson. In addition, Trevor Crudele and Kevin Musco provided valuable research and citation assistance.

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on March 4, 2021, the SEC announced the creation of an "Enforcement Task Force" that would focus on ESG. In this article, we argue that there are three developments, in particular, that have led to the Division of Enforcement's prioritization of this issue. First, institutional investors have become increasingly engaged with corporations (e.g., through shareholder proposals and shareholder litigation) regarding issues that implicate broader societal impacts. A second development relates to the impact that external rule setters have had on ESG reporting by corporations, particularly in the global context. Finally, the Division of Enforcement's actions comes at a time when the agency, more generally, has embarked on a rulemaking process surrounding ESG disclosure requirements for both corporations and institutional investors.

We believe that these three developments, in turn, have created mutually reinforcing notions regarding what the "reasonable" investor considers material (a key element in securities fraud litigation). As a result, the landscape regarding what types of cases are brought under securities fraud may broaden significantly soon. Is this, however, a welcome development? We conclude that, while not ideal, the SEC's potential to expand case law in this area may prove to be a key tool that business and human rights advocates use to hold corporations accountable for its abuses.

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INTRODUCTION

> *THE disaster . . . it destroyed everything, community life. We left home at [six AM] am to go to work one morning and some of us just didn't make it back home alive. We had [ten] minutes to run away from death. Imagine if you had lost your mum, a son of [seven] and daughter of [five] all of this because of irresponsibility and greed for profit? The relationship with Samarco before the dam ruptured was good, they used to help us a lot with the kids at school and for parties, mostly social things. They only had one employee from our Bento community [an] employee who worked directly at Samarco. They held direct meetings with the community to discuss their social investment projects and where we also questioned the possible rupture of the dam. They told us they were super sure, that we could sleep carefree—that such a disaster would never happen. The company always told us we could sleep safely.*

> *They explained that the dam was monitored [twenty-four] hours a day, it had the best standards, best professionals working there. Of course we believed them! What choice did we have? They were the experts, well at least that's what they said, that they knew what they were doing.*[1]

On April 28, 2022, the Securities and Exchange Commission (SEC) announced that it had filed suit against Vale SA, a Brazilian company, in connection with its operations of a tailings dam[2] for the Brumadinho iron mine, in the Brazilian state of Minas Gerais. Three years earlier, on January 25, 2019, the dam—which is owned and operated by Vale—catastrophically failed, releasing a wave of mining waste in the form of toxic sludge.[3] The consequences for people and planet were horrific. The death toll stands at 270 people, with 11 people still missing.[4] Of the lives lost, around 150 people were buried alive in the sludge that engulfed the town of Brumadinho.[5]

The dam collapse inflicted grave damage to the environment, with immeasurable consequences for people's lives and livelihoods. The mud destroyed "almost 300 acres of native forest and polluted 200 miles of the local Paraopeba River" and its tributaries.[6] The river can no longer serve as a source of drinking water for the state.[7]

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1 Rajiv Maher & Adriana Bravin, *The Rupturing of the Dam and the Community's Social Fabric: A Testimony from an "Atingido" from Bento Rodrigues, Brazil*, WHEN BUSINESS HARMS HUMAN RIGHTS: AFFECTED COMMUNITIES THAT ARE DYING TO BE HEARD 57, 60 (Jena Martin et al. eds., 2020) [hereinafter DYING TO BE HEARD]. This chapter provides a first-hand account regarding the tragedy from one of the individuals affected by a previous dam bursting on November 5, 2015 in the same Brazilian state of Minas Gerias. Vale had an ownership interest in both the Samarco and the Brumadinho mine. While the SEC's lawsuit, discussed *infra*, relates to a subsequent dam bursting, the parallels between the operations and actions of Vale in both 2015 and 2019 are striking. In fact, one could say that Vale's actions in connection with this second dam failing are even more problematic because the company was specifically on notice regarding the risk of dam's bursting within its operations. Indeed, as the SEC notes in its 2022 complaint against the company, "Vale was well aware of the risks of liquefaction when the Brumadinho dam collapsed in 2019. Just over three years earlier, in November 2015, another dam, known as the Fundão dam, near the city of Mariana, Brazil and co-owned by Vale, failed as a result of liquefaction." Complaint at ¶ 6, Complaint at 3, SEC v. Vale, No. 22-cv-2405 (E.D.N.Y. Apr. 28, 2022) [hereinafter SEC Vale Complaint]. *See also* discussion *infra* note 2.

2 A tailings dam is a mining waste dam. *See Tailings Dams: An Explainer*, LONDON MINING NETWORK, https://londonminingnetwork.org/get-informed/tailings-dams-explainer/.

3 Manuela Andreoni & Letícia Casado, *Vale Mining Company to Pay $7 Billion in Compensation for Brazil Dam Collapse*, N.Y. TIMES (Feb. 4, 2021), https://www.nytimes.com/2021/02/04/world/americas/vale-brazil-dam-collapse-7-billion-compensation.html.

4 *Id.*

5 SEC Vale Complaint, *supra* note 1, at ¶ 2.

6 Andreoni & Casado, *supra* note 3.

7 *Id.*

What makes this disaster particularly tragic is that it was preventable. The company was on high alert after another of its dams, Fundão, in the state of Minas Gerais, collapsed only a few years earlier, causing loss of human life and massive environmental destruction.[8] According to a report by an independent commission, hired by Vale, the company knew about the safety risks at the Brumadinho dam as early as 2003.[9]

As tragic as the human and environmental costs may be, the collapse of the dam also had financial fallout, removing more than $4 billion in Vale's market capitalization.[10] "Its American Depository Shares,[11] which trade on the New York Stock Exchange, lost more than 25% of their value."[12] This loss, along with fact that Vale is alleged to have misled investors with assurances in its sustainability reports and other company documents about the safety of the dam, brought it to the attention of the SEC. Although catastrophic harm to people and planet lies at the heart of the Brumadinho matter, the SEC's interest is not in the incident *per se*; rather the agency's interest is in whether the company misled investors about the risk of the incident occurring and the steps it was taking to prevent it.

For years, there has been a growing debate regarding what role (if any) the U.S. securities laws should have in the business and human rights (BHR) ecosystem. BHR is a field of law and practice that pushes for increased corporate accountability for human rights violations.[13] Given the overlapping nature of the types of corporate actions that can lead to both fraud and human

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8 DYING TO BE HEARD, *supra* note 1, at 81; SEC Vale Complaint, *supra* note 1, at ¶ 6.

9 Andreoni & Casado, *supra* note 3.

10 SEC Vale Complaint, *supra* note 1, at ¶ 3.

11 For an overview of ADRs and their impact on the extraterritorial reach of the SEC, see Raphael G. Toman, *The Extraterritorial Reach of the U.S. Securities Laws and Non-Conventional Securities: Recent Developments After Morrison and Dodd-Frank*, 14 N.Y.U. J.L. & BUS. 657 (2018) (explaining that American Depository Shares (ADR) are a type of security that allows American investors to trade in foreign corporations. In addition, because these shares (which are actually negotiable bank certificates) trade on U.S. securities markets, they are subject to the enforcement purview of the SEC).

12 SEC Vale Complaint, *supra* note 1, at ¶ 3.

13 *See* discussion *infra* Section I.A. and related footnotes.

rights violations, scholars,[14] commentators,[15] and advocates,[16] have called for an expanded focus of securities regulation to also encompass non-financial harms.[17] The starting point for this debate is that securities regulation, generally, and the SEC, specifically, have typically (but not always) focused on financial-based misconduct rather than a broader, non-financial mandate. Beginning with Cynthia Williams' seminal article in 1999, scholars[18] and practitioners[19] have challenged this viewpoint and argued that the SEC should use its powers to address some social and environmental as well as financial issues.[20] Others, meanwhile, have noted that Securities Exchange Act Rule 10b-5—the principal tool used to fight fraud in the securities markets—can also be used to address corporate actions that lead to social harms.[21] However, we do not believe that

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14 For an example of early pioneers, see Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1998-99 (defending "the view that the . . . SEC can and should require expanded social [and environmental] disclosure by public reporting companies to promote corporate social transparency comparable to the financial transparency that now exists"). Williams' work marked an early intervention into the larger BHR field. Other pioneers include: Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (discussing how to hold corporations liable for social impacts); David Weissbrodt & Muria Kruger, *Business and Human Rights*, *in* HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN 421-49 (Morten Bergsma ed., 2003) (coining the term "business and human rights" as the conceptual framework for understanding corporate accountability for human rights abuses); Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006) (discussing the international law landscape prior to the development of the United Nations Guiding Principles on Business and Human Rights).

15 *See* Rachel Cherington, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10B-5*, 25 U. PA. J. INT'L ECON. L. 1439 (2004) (surveying investor litigation against transnational corporations); *see also* Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97 (2013) (analyzing the normative implications of the broader strategy of using securities regulation to hold companies accountable for human rights abuses). With regard to Dodd-Frank § 1502, the Conflict Minerals Rule, the ability of the SEC to be a "humanitarian watchdog" has been questioned due to the organization's lack of specialist knowledge. *See* Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315 (2012) (arguing that this is an over-extension of the SEC's powers).

16 INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, KNOWING AND SHOWING: USING U.S. SECURITIES LAWS TO COMPEL HUMAN RIGHTS DISCLOSURE (Cynthia A. Williams ed., 2017), https://icar.squarespace.com/publications/2017/1/4/knowing-and-showing-using-us-securities-laws-to-compel-human-rights-disclosure [hereinafter KNOWING AND SHOWING].

17 Cherington, *supra* note 15, at 1439-41.

18 *See* Sarfaty, *supra* note 15.

19 *See* KNOWING AND SHOWING, *supra* note 16.

20 *See* Williams, *supra* note 14.

21 *See* Cherington, *supra* note 15.

any author—until now—has suggested that the SEC's Division of Enforcement, specifically, should be using its powers to hold corporations accountable for acts that lead to human rights abuses. To that end, our article offers the first comprehensive analysis regarding the implications and challenges that the SEC could face should it become a human rights enforcer.

And yet, the SEC, it seems, has already begun taking on that role. The question, then, is why? Specifically, why is the Division of Enforcement beginning to act on matters that have broad implications for a BHR framework? This is not a simple question to answer. Certainly, in the last few years, there have been a number of developments that have forced the issue of corporate influence on workers and communities to the fore. This article focuses on three.

First, over the last few years,[22] institutional investors have become increasingly engaged with corporations regarding issues that implicate broader societal impacts. This has been done both informally and in more formal settings. For example, Larry Fink, the CEO of BlackRock Investments, has recently been calling on corporations to consider the larger societal impacts of their operations and in their relationships.[23] On the more formal side, shareholder proposals, filed by investors before corporate annual meetings, have increasingly requested additional information about a corporation's impact on larger communitarian issues.[24] In addition, investors-turned-litigants have begun bringing claims based on statements and conduct relating to those same communitarian issues.[25] Specifically, these shareholders are using Rule 10b-5 and similar statutory provisions to try and hold these corporations accountable by alleging that they have suffered damage as a result of a corporation's fraud. While these cases face significant challenges, plaintiffs have also been successful in a handful of actions concerning a corporation's environmental, health, and safety misrepresentations,[26] including cases brought following the collapse of the Fundão and Brumadinho dams.[27]

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22 We should note, however, that even prior to this trend, shareholders have attempted to use the various corporate governance tools offered to influence corporate behavior on non-financial and social justice related issues. *See* discussion *infra* Section III.A. and related footnotes.

23 *See infra*, note 129.

24 *See* discussion *infra* Section III.A. and related footnotes.

25 *See* discussion *infra* Section III.B. and related footnotes.

26 *See, e.g.*, *In re* BP P.L.C. Sec. Litig., 843 F. Supp. 2d 712 (S.D. Tex. 2012); Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832, 839 (N.D. Tex. 2018).

27 Consol. Amended Class Action Complaint, *In re* Vale S.A. Sec. Litig., No. 1:15-cv-9539-GHW, 2017 U.S. Dist. LEXIS 42513 (S.D.N.Y. Mar. 23, 2017); *In re* Vale S.A. Sec. Litig., No. 19-cv-526, 2020 U.S. Dist. LEXIS 91150 (E.D.N.Y. May 20, 2020).

A second development relates to the impact that external rule setters have had on environmental, social, and governance (ESG) reporting by corporations, particularly in the global context. For instance, as a result of rules developing in Europe, commentators have begun to focus on the specific measures and benchmarks needed to align corporate actions with larger societal goals. Specifically, there are two legal developments that are gaining traction in Europe—"double materiality"[28] and "human rights due diligence,"[29] (HRDD) both of which assess and evaluate corporate risks from the standpoint of impacted individuals or communities, rather than simply examining how a corporation's actions impact its own bottom line. As more of these external standards become institutionalized, we believe that it will become increasingly difficult for corporations (and their regulators) to disregard these greater social harms when implementing an enforcement framework.

The final development concerns the SEC's own rulemaking. The decision to bring an enforcement action against Vale comes at a time when the SEC has embarked on a rulemaking process targeted at ESG disclosure requirements for issuers, investment companies, and investment advisers.[30]

This article asks whether the culmination of these developments may signal

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28 Double materiality refers to a framework regarding what is material in a corporation's operations. Specifically, the concept advocates for a material assessment not just from an investor's point of view but also from the viewpoint of an impacted community or individual. *See* discussion *infra* Section IV.A. and related footnotes.

29 The concept of human rights due diligence (HRDD) was developed by then UN Special Representative John Ruggie in connection with his creation of the UN Guiding Principles on Business and Human Rights (and its foundational document, the Protect, Respect, and Remedy Framework). Specifically, HRDD encourages companies to engage in a comprehensive risk assessment regarding their operations and relationships. However, rather than examining the risk to the corporation, HRDD examines the risk to impacted individuals and communities. In that way, it shares many similar traits to the double materiality framework. *See* discussion *infra* Section I.A. and related footnotes.

30 While the term ESG has been the subject of much debate and confusion, at its heart, the concept relates to corporations and investors considering more than just their financial impact within their operations and investments. Specifically, as the term implies, ESG primarily engages with environmental, social, and governance concerns. *See* section I.A. *infra* and surrounding footnotes for the evolution and use of the framework. However, we note that the SEC's current activities are **not** the agency's first foray into these matters. For a discussion of the SEC's history related to more social initiatives, see Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 COLUM. J. TRANSNAT'L L. 530, 537 (2018) [hereinafter *Hiding in the Light*] (discussing the SEC's 1971 rule-making in this area). For an overview of the genesis and evolution of ESG, see Elizabeth Pollman, *The Making and Meaning of ESG* (Univ. Pa. L., Working Paper No. 659, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857.

the SEC's increased willingness to enforce BHR matters.[31] If so, we believe that given the agency's orientation, this would be suboptimal. BHR's focus is on the impact of business on *people*. In contrast, the SEC's focus is on the impact of businesses' ESG statements on *investors*. As a result, we believe that the SEC's actions are less than ideal for holding corporations accountable for human rights abuses.

Unfortunately, the current legal landscape in the United States provides little in the way of corporate accountability for human rights violations.[32] For instance, unlike in Europe, in the United States there is a diminishing legal pathway for *victims* of harm at the hands of businesses to hold those actors legally responsible.[33] In addition, while there is no bespoke government agency—anywhere in the world—that could bring claims against corporations for human rights impacts *per se*, there are new corporate accountability mechanisms for such impacts in European countries, including the emergence of some regulatory oversight in this area.[34] However, there is no corresponding trend in the United States. Not only does this result in the United States failing to meet its obligations under international human rights law,[35] but it leaves victims of even the most egregious human rights violations without a way to be made whole.

Consequently, while the SEC's focus makes it less than ideal for establishing liability for BHR-related harms, it is nevertheless a crucial gap-filler in the search for corporate accountability on these matters. Specifically, by using tools like Rule 10b-5,[36] the SEC can tie a corporation's actions and statements to larger societal harms and, in doing so, begin to change the discussion regarding what matters to a reasonable investor—a crucial element in a corporate fraud charge—to include these larger BHR issues. In short, in

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31 The BHR framework provides increased accountability for businesses (either through an international or national law framework) regarding a corporation's social impact on communities and individuals. *See infra* Section I.A., for more explanation regarding the genesis of the framework.

32 *See* discussion *infra* Section I.A.

33 *See* discussion *infra* Section I.A.; *see also* Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519 (2021) (demonstrating that the U.K. courts, and the courts of other European states, are becoming more receptive to business and human rights cases while the Alien Tort Statute has been cut back by the U.S. Supreme Court).

34 *See infra* Section IV.

35 Specifically, the State's Pillar 1 obligations under the UN's Guiding Principles on Business and Human Rights (the "UNGPs"). *See infra* Section I.A.

36 Rule 10b-5 of the Exchange Act is the primary fraud tool used by the agency to hold corporations and other individuals liable for fraudulent misstatements and omissions. 17 CFR § 240.10b-5. *See infra* Section I.A. for more details.

the absence of any currently viable alternatives, the SEC still has a vital role to play.

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The rest of the article will proceed in five parts. Part One lays the foundation by explaining what is meant by BHR and relating it to the more widely known concept of ESG. Part Two discusses the SEC's current ESG-related initiatives and why the agency's rulemaking signals a shift in its willingness to regulate on ESG-related issues. Part Three turns to the roles other actors, including investors, may play in the SEC's increased vigilance on ESG issues: (1) bringing shareholder resolutions; and (2) using private lawsuits to hold companies accountable for fraudulent misstatements.

Part Four examines the international picture. Specifically, we discuss the developments noted above: the adoption of double materiality and the enactment of human rights due diligence laws. We survey the regulatory oversight of BHR in European states and demonstrate how BHR is increasingly legalized, thereby facilitating any leap the SEC may take in this area. Finally, Part Five provides an analysis of how the SEC's enforcement actions may shift jurisprudential norms regarding the "reasonable investor" standard that permeates U.S. case law, using some of the SEC's recent actions as a foundation. This section also discusses the role the agency's work can have in determining necessary interventions to move the BHR agenda forward in the United States while acknowledging that, because of the perspective the agency takes when fashioning corporate accountability, its actions cannot (and should not) be viewed as a panacea of corporate accountability for human rights violations.

I. ESG AND BHR: AN EXPLAINER

Despite the overlapping nature of these conceptual frameworks, the genesis of ESG and BHR comes from two very different theoretical perspectives. The ESG framework evolved from an investor perspective and arose specifically within the context of the investing community—in essence serving as an outlet for investors who wanted to "do good" while "doing well" in their investments.

In contrast, the BHR framework was an outgrowth of international human rights law (IHRL) and, as such, starts from this conceptual vantage point. As a result, BHR is firmly situated in the larger IHRL field of study. As we discuss below, the impact of each of these conceptual birthplaces has long-lasting consequences.

A. A Brief History of the Conceptual Landscape

1. The Birth of BHR

The BHR landscape is a relatively new development in the law—rising in stature within legal practice and academia after the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs).[37] As a field of study, BHR has been described as being "about how business may negatively impact human rights and the various ways in which such violations can be prevented and addressed, including how business can be held accountable."[38]

Because the BHR movement developed out of the larger field of IHRL, the movement always struggled with reconciling the typical structure of IHRL with the new reality of businesses and corporations. For instance, under the prototypical IHRL structure, countries (or States) have duties to individuals to protect, respect, and fulfill their human rights. In addition, because IHRL is a bottom-up framework, States can largely only be bound to obligations to which they have previously consented. As such, although the *categories* of rights that may pertain to an individual as a rightsholder are substantial (including, for instance, the right to life,[39] the right to health,[40] freedom from both racial[41] and gender[42] discrimination and freedom from torture[43]), they are generally only enforceable to the extent a State consents to be bound.

Moreover—and particularly significant here—in the traditional IHRL field, other non-State actors (such as corporations) were generally absent from the

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37 John Ruggie, U.N. Special Representative for Bus. & Hum. Rts., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 11, 2011). For a comprehensive look at the UN's role in the larger BHR landscape, see Jena Martin Amerson, *"The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871 (2012) [hereinafter *End of the Beginning*]. That is not to say, however, that there were not early scholars that paved the way for the BHR discussion to go mainstream. *See supra* note 14 for a list of academics that began work in this field.

38 Chiara Macchi & Nadia Bernaz, *Business, Human Rights and Climate Due Diligence: Understanding the Responsibility of Banks*, SUSTAINABILITY (2021), at *2 (citing NADIA BERNAZ, BUSINESS AND HUMAN RIGHTS: HISTORY LAW AND POLICY - BRIDGING THE ACCOUNTABILITY GAP (2017)).

39 *See* International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966), art. 6 [hereinafter ICCPR].

40 *See* International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (Dec. 16, 1966), art. 12 [hereinafter ICESCR].

41 ICCPR, *supra* note 39, art. 26.

42 *Id.*

43 *Id.* art. 7.

conceptual landscape. Unfortunately, their absence belied a grim reality: in many instances, the corporations (who had no duties under international law) had significantly more leverage and power than the States in which they were operating. It is out of this absence that the BHR framework developed.

BHR recognized that, while businesses could achieve some good in the communities in which they operate, businesses could also cause substantial negative human rights impacts, either through their operations or their relationships. It identified both States and corporations as having either an obligation (in the case of States) or a responsibility (in the case of businesses) to prevent these negative impacts and remediate any harm that did occur as much as possible.[44]

As such, the distinguishing feature of BHR is in the prioritization of rightsholders.[45] Nowhere is this more apparent than in the creation of the conceptual framework of Human Rights Due Diligence (HRDD)—a key contribution of the UNGPs.[46] Unlike traditional due diligence, which examines corporate operations and relationships from the perspective of harm to the *company*,[47] HRDD examines corporate operations and relationships from the perspective of harm to *people*.[48] In recent years, HRDD frameworks have been institutionalized into national and regional laws, a trend still largely confined to European States and the European Union.[49] In contrast, the United States has not yet adopted the concept of HRDD within its legal framework.[50]

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44 *See* Macchi & Bernaz, *supra* note 38.

45 At least, theoretically. As one of us has noted in a recent edited volume, although the BHR framework tries to center communities and individuals, it often does so with little input or consultation from those individuals. *See* DYING TO BE HEARD, *supra* note 1, at 1.

46 U.N. Special Representative for Bus. & Hum. Rts, *supra* note 37, at Principle 8. This is the key international framework for BHR, comprising both "hard" (i.e., mandatory legal obligations) and "soft" (i.e., legal responsibilities that, while persuasive, have not "hardened" into mandatory law. For a comparison of the two, see MARK JANIS, INTERNATIONAL LAW 5 (7th ed. 2016).

47 For a general comparison of these two types of diligence, see generally Jena Martin, *Business and Human Rights: What's the Board Got to Do with It?*, 2013 ILL. L. REV. 959 (2013) (comparing traditional notions of corporate due diligence and risk assessment with human rights due diligence).

48 Malcolm Rogge, *Risk, Uncertainty and the Future of Corporate Human Rights Due Diligence* 4 (Corp. Resp. Initiative Working Paper No. 81, 2022).

49 *See, e.g.*, *Loi 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'Ordre* [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 [hereinafter *Loi de Vigilance*].

50 There are, however, examples of laws that have an HRDD component, e.g., the recently enacted Uyghur Forced Labor Prevention Act. Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. (2020). *See infra* Section IV.B. and related footnotes.

While there is no current mechanism to hold corporations liable for negative human rights impact under *international law*,[51] businesses can be held legally accountable under some country's national laws for human rights abuses in different ways. For instance, in the United States, victims of such abuse can seek accountability for harm they have suffered (*e.g.*, by suing in tort law),[52] but legal accountability also encompasses alternative approaches such as import bans preventing goods made under particularly exploitative conditions from entering the market.[53] In addition, U.S. consumers, investors, or the SEC can bring lawsuits for false and misleading claims related to a corporation's operations, relationships, or impacts, and their respective effects on an individual's community's human rights.[54] In other countries (primarily in Europe) courts or regulators can check that companies properly fulfill their HRDD obligations[55] or comply with human rights[56] or modern slavery reporting[57] obligations. These entities could also verify that such reports are not false or misleading.[58]

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51 This, despite the fact that some of the corporations that have been involved in egregious human rights scandals are often significantly larger than countries in which they operate (many of whom also have legal obligations under IHRL). *See* Martin, *End of the Beginning*, *supra* note 37, at 883-87.

52 *See* the well-known Alien Tort Statute (ATS) cases, e.g., Doe v. Unocal, 248 F.3d 915 (9th Cir. 2001). Unfortunately, over the last fifteen years, the Supreme Court has severely curtailed the ability of plaintiffs to use this tried and tested means of bringing corporate human rights litigation in the United State, culminating with the court's 2021 Nestle v. Doe, decision. Nestle v. Doe, 141 S. Ct. 1931 (2021). For a discussion of the recent trend in ATS litigation *see* Rachel Chambers & Jena Martin, *United States: Potential Paths Forward after the Demise of the Alien Tort Statute*, *in* CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX (Ekaterina Aristova & Ugljesa Grusic eds., 2022).

53 *See, e.g.*, § 307 of the Tariff Act, 19 U.S.C. 1307; Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. (2020).

54 *See, e.g.*, Hodsdon v. Mars, Inc., 162 F.Supp. 3d. 1016 (N.D. Cal. 2016), *aff'd* Hodsdon v. Mars, Inc., 891 F.3d 857 (9th Cir. 2018); Rachel Chambers, *Litigating Corporate Human Rights Information*, 60 AM. BUS. L. J. 111, 138 (2023).

55 *See, e.g.*, *Loi de Vigilance*, *supra* note 49.

56 In the United States, there is no legal requirement for companies to report on their human rights impacts, but such a requirement exists in many other countries, e.g., Companies Act of 2006, c. 46, §§ 414C, 414CB pt. 15 (Eng.) (reforming English company law to mandate certain disclosures including on human rights). Oversight of this law is, in theory, provided by the U.K. Financial Conduct Authority and the Financial Reporting Council.

57 *See e.g.*, California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West 2012). The Attorney General of California, in theory, provides oversight of the law, but in practice, has shown an extremely light touch. *See* Martin, *supra* note 30, at 551 (discussing the lack of enforcement by California's Attorney General).

58 For example, under *Loi de Vigilance*, *supra* note 49, the courts have a role in verifying the content of the "vigilance plans" that companies issue to comply with the law.

2. The Evolution of ESG

Like the BHR field, the concept of reporting on "ESG" factors is a relatively new phenomenon, albeit one that pre-dates the international institutionalization of BHR. Specifically, "[a]n institutionalized socially responsible investing industry (SRI) has existed at least since the 1970s, when the first socially screened mutual funds were established."[59] ESG investing evolved out of this context. The term ESG was first used in a 2005 United Nations report, entitled "Who Cares Wins," that launched a new UN initiative—the Principles for Responsible Investment.[60] In essence, these principles were a mission statement for asset owners and managers, encouraging them to take ESG factors into account when making investment decisions. The take-up of the term of ESG since 2005 has been phenomenal, but with this has come some confusion about what exactly is encompassed by the term "ESG." As Elizabeth Pollman says: "The word that follows the famous refrain of 'environmental, social, governance' shapeshifts from 'criteria' to 'factors,' 'standards,' 'strategies,' 'risks,' 'issues,' 'activity,' or even 'goals.'"[61] In this Article we define ESG as three issue areas (with factors or criteria in each) that have been devised to evaluate a company's performance.

3. The Intersection of Fraud, the SEC and ESG

In the United States, what little regulation of ESG there is occurs chiefly[62] at the hands of the SEC. Using its general regulatory authority, the agency attempts to provide companies with guidance regarding evaluating and reporting on ESG. For instance, in a February 26, 2021 Investor Bulletin[63] the

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[59] John Ruggie, *Corporate Identity in Play: The Role of ESG Investing*, (Mossavar-Rahmani Center for Bus. & Gov't Fac. Working Paper Series, Working Paper No. 2019.05, 2019).

[60] U.N. Glob. Compact, Who Cares Wins: Connecting Financial Markets to a Changing World, at i-ii (2005).

[61] Pollman, *supra* note 30, at 3.

[62] Chiefly, but not exclusively. For instance, the Department of Labor has also thrown its hat in the ESG ring by issuing a final rule regarding what ESG criteria an ERISA-covered plan should consider. *See* 29 C.F.R. § 2550 (2022). For an analysis of the final rule, see Ropes & Gray, *DOL Final Rule Embraces Principles-Based Approach to ESG Factors in Investments and Proxy Voting - Initial Reactions* (Nov. 23, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/november/dol-final-rule-embraces-principles-based-approach-to-esg-factors-in-investments-and-proxy-voting.

[63] U.S. Sec. & Exch. Comm'n, Environmental, Social and Governance (ESG) Funds - Investor Bulletin (Feb. 26, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/environmental-social-and-governance-esg-funds-investor-bulletin [hereinafter SEC, Investor Bulletin].

SEC sought to discuss the concept of ESG and how mutual funds analyze these concepts. However, as the SEC notes at the outset, "[f]unds that elect to focus on companies' ESG practices may have broad discretion in how they apply ESG factors to their investment or governance processes."[64] According to the SEC, the criteria fund managers can use in the evaluative process include:

1. For the "environmental component":
   - A company's energy use
   - Its assessment regarding climate change risks
   - Impacts that its operations may have on the environment as a whole[65]
2. For the "social component":
   - The company's "relationship with people … that impact diversity and inclusion, [or] human rights"[66]
   - The corporation's treatment of its employees
   - Any efforts the company may make to invest in its surrounding community[67]
3. For the "governance component": "[I]ssues [regarding] how the company is run," [68] including
   - Its transparency
   - Its ethics
   - Its relationship with shareholders[69]

The main <u>enforcement</u> tool of the SEC, in turn, is rule 10b-5 of the Securities Exchange Act.[70] Rule 10b-5 is the SEC's chief weapon deployed in the fight against fraud. Under the rule, the SEC can go after any person that engages in some deception in connection with the purchase or sale of a

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64 *Id.*

65 *Id.*

66 *Id.* We note that this is the only time that the SEC used the term "human rights" in the bulletin.

67 *Id.*

68 *Id.*

69 *Id.*

70 Securities and Exchange Act of 1934, 17 C.F.R. § 240.10b-5.

security.[71] Specifically, for a "garden-variety" fraud case,[72] the following elements are at play: (1) a material misstatement or omission; (2) that is made (or omitted) with scienter; (3) that an investor has *relied*[73] upon; (4) and that subsequently *causes losses* in connection with the purchase or sale of a security.[74] A private litigant must prove all of these elements. In contrast, the SEC must only prove that there was a material misstatement or omission that was made with scienter.[75] As such, proving the issue of materiality becomes crucial to advancing the SEC's case under Section 10(b) and Rule 10b-5.

The concept of materiality originally developed within the reporting and disclosure ambit of the SEC's realm as the baseline threshold for information that the mandatory reporting system would require firms[76] to disclose; however, it has since been used within the context of securities fraud enforcement cases. Courts have stated that something is material if there is a "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix'

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71 Specifically, the language of the rule states the following:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

17 CFR § 240.10b-5 (1934).

72 The term "garden-variety fraud" refers to the case where "a company or executive tells a significant lie—or makes a significant misrepresentation—that misleads investors about some important aspect of the company." Jena Martin, *Why Facebook's Mark Zuckerberg May Be in Hot Water with the SEC*, THE CONVERSATION (Sep. 29, 2021), https://theconversation.com/why-facebooks-mark-zuckerberg-may-be-in-hot-water-with-the-sec-168797 [hereinafter *Zuckerberg & the SEC*].

73 In class action lawsuits, the reliance element can be proved using a "fraud-on-the-market" theory, which is itself (in turn), an outgrowth of the Efficient Market Hypothesis (EMH). EMH stands for the proposition that stock prices automatically reflect material information in the market. Therefore, under the fraud-on the-market theory, plaintiffs in class actions can show reliance by providing evidence of how the market, as a whole, reacted to a corporation's misstatements, rather than being required to interview each and every person in a class to determine why they purchased a stock.

74 Erica P. John Fund, Inc. v. Halliburton Co., et. al., 563 U.S. 804, 809-10 (2011) (citing Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37-38 (2011)).

75 For an overall discussion of scienter see *Zuckerberg & the SEC*, *supra* note 72.

76 *See, e.g.*, Securities and Exchange Act of 1934, 17 CFR §§ 229, 229.10 (discussing the need to disclose "material facts, both favorable and unfavorable, regarding their financial condition" when providing projections).

of information made available."[77] The definition of materiality is therefore intrinsically intertwined with what the reasonable investor thinks. Much has been written about the lack of a precise definition of materiality and the resulting confusion in lower court decisions.[78] As one commentator wryly states: "What is [m]aterial? The SEC [s]ays [y]ou [d]ecide."[79] As investors' views of what they believe will alter the "'total mix' of information" have evolved, the type of cases that the SEC can bring may also be affected.[80]

To be clear, both financial and non-financial statements and information can implicate materiality under the current case law standard.[81] However, in both instances, the SEC is exclusively using materiality from an investor's perspective as the basis for its arguments,[82] and its most consistent benchmark for materiality is linked to statements that somehow relate to the financial performance of the company.[83] Nonetheless, even within this paradigm, the agency has some flexibility. To wit, (as we discuss below) the SEC's initiative within its rulemaking space, specifically with regards to ESG.

II. CURRENT SEC INITIATIVES: RULEMAKING ON ESG

Historically, the SEC has been known as the nation's premier securities market regulator. The stock market, in turn, (in the words of one report) currently represents "around a record 40% of the nation's wealth."[84] This amounts to a seismic level of influence and leverage on the nation's finances (and at least indirectly) on the nation's values. Although, for most of its existence, the SEC has styled itself as a "financial" regulator, over the years some of its policies have reflected (sometimes explicitly and sometimes implicitly) the larger societal values of the time.[85] Arguably, however, the SEC's current ESG initiatives represent the boldest proclamation that the agency is

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77 Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (citing TSC Indus., Inc. v. N.way, Inc., 426 U.S. 438, 449 (1976)).

78 Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L. J. 645, 658 n.63 (2019).

79 Timothy J. Horstmann & Erica M. Wible, "*What Is Material? The SEC Says You Decide,*" MCNEES WALLACE & NURICK LLC (Dec. 7, 2018), https://www.mcneeslaw.com/what-is-material-the-sec-says-you-decide/.

80 *Id.* (citing TSC Indus., Inc. v. N.way Inc., 426 U.S. 438, 449 (1976)).

81 *See infra* Section V.D.

82 *See infra* Section V.D.

83 *See* SEC Vale Complaint, *supra* note 1.

84 Desmond Lachman, *The Stock Market Isn't the Economy. It's Still Bad News for the Party in Power*, BARRON'S (May 13, 2022), https://www.barrons.com/articles/the-stock-market-isnt-the-economy-its-still-bad-news-for-the-party-in-power-51652391415.

85 *See, e.g.*, Jena Martin, *Hiding in the Light*, *supra* note 30, at 538, 551.

interested in more than "just the numbers" with corporate disclosures.

Specifically, on March 4, 2021, the SEC announced the creation of an "Enforcement Task Force" that would focus on climate and ESG Issues.[86] In announcing the initiative, the agency noted that their prioritization of ESG-related fraud and disclosures was "[c]onsistent with increasing investor focus and reliance on climate and ESG-related disclosures and investment."[87] To that end, the SEC identified specific actions that the task force would undertake. As the release noted, the work of the task force would include the following:

- Identifying material gaps in a company's disclosures relating to climate risk
- Analyzing corporate disclosures related "to investment advisers' and funds' ESG strategies"
- Providing complementary support for other divisions in the Commission who do work in this area[88]

One year later, on March 21, 2022, the SEC proposed rules that would require issuers to include specific climate-related disclosures in their filings with the SEC, including disclosures related to potential climate risks that may have a material impact on the corporation's business, operations, or activities.[89]

As such, the SEC has been taking a three-tiered approach to ESG rulemaking. First, it has tried to provide specific parameters regarding what will and will not comprise environmental corporate disclosures—effectively providing substantive guidelines around this element of ESG. Second, it is attempting to expand its regulatory requirements related to ESG by proposing rules that would require Investment Advisers (IAs)[90] and Investment Companies (ICs)[91] to report on ESG-related disclosures. Finally, the Commission is attempting to expand its regulatory scope to include current third-party index and data providers that are providing ESG data.

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

87 *Id. See infra* Section V.C.

88 SEC ESG Take Force Announcement, *supra* note 86.

89 Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposed Rules to Enhance and Standardize Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 [hereinafter SEC 2022 Climate Rule].

90 Investment Advisers Act of 1940, § 202(a)(11), 15 U.S.C. § 80(b)-2 [hereinafter the '40 Act]; *see also* U.S. Sec. & Exch. Comm'n, *Regulation of Investment Advisers* (Mar. 2013), https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.

91 *See* U.S. Sec. & Exch. Comm'n, *Investment Companies*, https://www.sec.gov/answers/mfinvco.htm (last visited Feb. 7, 2023).

A. The SEC's Rule on Climate Change: Addressing the "E" in ESG

Previously, the SEC had made modest moves toward encouraging climate-related disclosure with its 2010 guidance on the materiality of climate change-related risk.[92] However, this did no more than identify specific areas in which disclosure under federal securities law would be required by reporting companies.[93] In contrast, the SEC's draft climate change rule, proposed in March 2022, is designed specifically to standardize the climate-related environmental aspect of ESG reporting.[94] The proposal provides for specific, measurable, and actionable items that would ensure that corporations are providing consistent disclosures related to its actions on climate and its risk exposure. For instance, the proposal would require companies to report on their emissions processes—depending on their scope of emissions.[95]

The response to the SEC's proposed rule has varied dramatically. For instance, sustainability organizations have lauded the move saying "[i]nvestors need consistent and comparable information about climate-related risks from the companies they invest in."[96] On the other side of the spectrum, some corporations and business associations have lampooned the proposed rule,[97] telling the agency to "dramatically scale back its climate mandates."[98] Specifically, business associations are keen to ensure that disclosure mandates relate to financial materiality only and, as such, are contending that the rules should be "flexible" rather than "prescriptive."[99] Interestingly, investors appear to be supportive of the proposed rule.[100] Finally, some state officials have also

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92 Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61,469, 97 SEC Docket 2414 (Feb. 2, 2010) [hereinafter SEC 2010 Climate Rule].

93 *Id.*

94 SEC 2022 Climate Rule, *supra* note 89.

95 *See, e.g.*, U.S. Env't Prot. Agency, *Greenhouse Gases at EPA* (July 18, 2022), https://www.epa.gov/greeningepa/greenhouse-gases-epa (discussing the various scopes in relation to corporate operations).

96 Ceres, *Get Ready for Standardized Climate Disclosure*, https://ceres.org/accelerator/regulating-climate-financial-risk/sec (last visited on Feb. 8, 2023).

97 Tom Quaadman, Exec. Vice President, U.S. Chamber Ctr. for Cap. Mkt. Competitiveness, Comment Letter Requesting Information on Climate Change Disclosure (June 11, 2021) https://www.sec.gov/comments/climate-disclosure/cll12-8907271-244249.pdf.

98 Andrew Ramonas & Amand Iacone, *SEC Climate Rules Pushed Back amid Bureaucratic, Legal Woes*, BLOOMBERG (Oct. 19, 2022), https://news.bloomberglaw.com/securities-law/sec-climate-rules-pushed-back-amid-bureaucratic-legal-woes.

99 Tom Quaadman, *supra* note 97.

100 Steven M. Rothstein, *Analysis Shows that Investors Strongly Support the SEC's Proposed Climate Disclosure Rule*, CERES (Oct. 11, 2022), https://www.ceres.org/news-center/blog/analysis-shows-investors-strongly-support-secs-proposed-climate-disclosure-rule.

entered the fray, decrying the SEC's move. For instance, Patrick Morrisey, the Attorney General for West Virginia, led a coalition of twenty-four states' attorneys general, stating that the SEC's proposed rule was an unconstitutional encroachment upon the regulatory authority of state power.[101]

B. Tackling the "S"—The SEC's Hope for Human Capital

In regard to the SEC's rulemaking strategy for further developing the "social" prong related to ESG, the SEC seems to be taking a multi-faceted approach. First, the agency has announced plans to update its 2020 rules on "human capital management"[102] (HCM) in corporate disclosures.[103]

The SEC also appeared to be taking action seemingly related to the "S" part of ESG when, in September 2022, it held an open meeting of its Investor Advisory Committee to discuss HCM and how it might be valued by investment companies.[104]

In addition, the SEC received comments related to a rulemaking petition that would require issuers to provide HCM-related information, and recently proposed similar rules would have required corporations "to disclose information about their human capital management policies, practices and performance."[105] The submission process (which began in 2017) resulted in new regulation that took effect in November 2021. The new rule states that a

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101 *See* Patrick Morrisey, W. Va. Att'y Gen., et al., Comment Letter on Proposed Rule Amendments Entitled "the Enhancement and Standardization of Climate-related Disclosures for Investors" (July 13, 2022) https://www.sec.gov/comments/s7-10-22/s71022-20134128-303943.pdf.

102 *See* Alison Omens et. al., *The Current State of Human Capital Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 31, 2021), https://corpgov.law.harvard.edu/2021/10/31/the-current-state-of-human-capital-disclosure/.

103 *See* Erin Martin & Celia Soehner, *How to Respond to SEC's Focus on Human Capital Disclosures*, BLOOMBERG (Oct. 14, 2022), https://news.bloomberglaw.com/esg/how-to-respond-to-secs-focus-on-human-capital-disclosures (stating "[t]he Securities and Exchange Commission may now be shifting focus from the "E" to the "S" in environmental, social, and governance matters.").

104 Press Release, U.S. Sec. & Exch. Comm'n, SEC Investor Advisory Committee to Discuss Human Capital Labor Valuation, Security-Based Swaps, Beneficial Ownership, and ESG Disclosure on Sept. 21 (Sep. 19, 2022), https://www.sec.gov/news/press-release/2022-166.

105 *Comments on Rulemaking Petition to Require Issuers to Disclose Information about their Human Capital Management Policies, Practices and Performance*, https://www.sec.gov/comments/4-711/4-711.htm (last modified Aug. 31, 2023); *see* Jessica Mach, *Will New SEC Disclosure Rules on 'Human Capital' Further Befuddle Companies?*, LAW.COM (Mar. 15, 2022), https://www.law.com/corpcounsel/2022/03/15/will-new-sec-disclosure-rules-on-human-capital-further-befuddle-companies/?slreturn=20220508115653.

public company must provide "a description of [its] human capital resources, including any human capital measures or objectives that [it] focuses on in managing the business'; the information is required 'to the extent such disclosure is material to an understanding of the [company's] business taken as a whole.'"[106] "The formulation of the HCM [rule as] 'principles-based'—placing heavy reliance on the complex and contested concept of materiality" attracted criticism, e.g., from the two Democratic SEC commissioners.[107]

This effort also seems to be an attempt to push corporations to provide more individually tailored disclosure that is specific to the issuer. As one commentator noted: "I think the SEC in some effect has told the marketplace, 'We've told you repeatedly and for many years that we want companies to move away from formulaic disclosure, toward disclosure that really focuses on the specifics of the company and the industry, in markets in which they operate.'"[108]

In that regard it may be effective. For instance, in an empirical study of comment letters regarding the SEC's attempt to streamline the disclosure obligations of publicly traded companies, the vast majority of individual comments discussed the SEC's attempt to incorporate ESG risk factors into the larger disclosure framework.[109] As Virginia Harper Ho notes:

> [T]here is also evidence that material ESG information is *under-reported* in public filings, in part because of companies' failure to identify ESG information as material and in part because of a lack of integration between the corporate risk management, internal controls, and reporting functions that apply to public filings, and those through which voluntary reports are produced.[110]

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106 *See* George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law,* 95 TUL. L. REV. 639, 678 (2021) (citing Modernization of Regulation S-K Items 101, 103, and 105, Securities Act Release No. 33-10825, Exchange Act Release No. 34-89670, 85 Fed. Reg. 63726, 63789 (Oct. 8, 2020)). 17 C.F.R. § 229.101(c)(2)(ii) (2020).

107 Georgiev, *supra* note 106, at 680-82. *See also* George S. Georgiev, *The SEC's New Proposal on Climate Disclosure: Critiquing the Critics*, OXFORD BUS. L. BLOG (Mar. 22, 2022), https://www.law.ox.ac.uk/business-law-blog/blog/2022/03/secs-new-proposal-climate-disclosure-critiquing-critics.

108 Mach, *supra* note 105.

109 Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 77 (2020).

110 *Id.* at 82.

C. The SEC's Expansion of ESG for Investment Advisers and Investment Companies

Unlike the SEC's substantive attempts (discussed above) that would provide for specific standards and markers, the SEC's rulemaking proposals under the Investment Advisers Act are a hallmark of the agency's disclosure-based regulatory framework.[111] The proposed rule, issued in May 2022, suggests updating the fiduciary standards for IAs and ICs related to their ESG practices.[112] According to the release, the SEC's goal in promulgating the rule is to ensure that investors are provided with "consistent, comparable, and reliable" information that these investors can use to evaluate ESG products such as ESG index funds.[113]

Surely, the need is great.

As the SEC notes in the issuing release, the ESG industry has grown exponentially in the last several years.[114] For instance, ESG-labeled index funds now account for $2.7 trillion within the U.S. market,[115] with some commentators predicting that it could hit $53 trillion worldwide by 2025.[116]

Unfortunately, the proposed rule would do little to address the greatest concerns related to ESG standards for two reasons. First, the proposed rule, rather than addressing corporate disclosures, takes aim at a much smaller segment of the financial markets: ICs and IAs. As such, while ICs and IAs command a large segment of the financial markets, much of the regulatory effects against corporations would only be felt indirectly.

Second, and more importantly, the SEC's proposed rule does not provide a substantive standard. Instead, it requires ICs and IAs to determine their own

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111 For a comprehensive critique of the SEC's disclosure-based framework, see generally Jena Martin, *Changing the Rules of the Game: Beyond a Disclosure Framework for Securities Regulation*, 118 W.V. L. REV. 59 (2015) [hereinafter *Beyond Disclosure*] (discussing the general misalignment between the securities regulatory disclosure-based framework and the way that securities are currently being traded in the market).

112 Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (June 17, 2022) (to be codified at 17 C.F.R § 200, 17 C.F.R. § 230, 17 C.F.R. § 232, 17 C.F.R. § 249, 17 C.F.R § 274, 17 C.F.R § 279) [hereinafter SEC 2022 Proposed Rule on Investment Advisers & ESG].

113 *Id.*

114 *Id.* at 7.

115 Sanjat Bhagat, *An Inconvenient Truth About ESG Investing*, HARV. BUS. REV. (Mar. 31, 2022), https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing.

116 Bloomberg Intelligence, *ESG Assets May Hit $53 Trillion by 2025, a Third of Global AUM*, BLOOMBERG (Feb. 23, 2021), https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/.

standards and then disclose to investors what those standards are. This, according to the SEC, is what will provide "consistent, comparable, and reliable information."[117]

However, not everyone agrees.

Even under the compressed rulemaking schedule, the proposed rule still generated close to 200 comments[118] from a number of stakeholders, including industry leaders, law firms, and members of civil society. Many of the comments, particularly those from non-governmental organizations, expressed the concern that, by leaving IAs and ICs to their own devices, the SEC essentially undermines its very aim of providing for consistency across the investment industry. For instance, a group comment letter from Inclusive Development International (IDI); Accountability Counsel and Friends of the Earth notes that:

> [I]t is seemingly illogical to, on the one hand, note that ESG funds attract a typical type of investor who would like their investments to 'do good', while, on the other hand, fail to ensure that these same investors have access to the very type of information that is necessary to making these investment choices.[119]

D. The SEC's Other Attempt to Expand its Regulatory Reach for ESG

The third way that that the SEC is expanding its reach into ESG is through proposed rulemaking expansion to include "index providers, model portfolio providers, and pricing services."[120] While the SEC's proposed rule does not focus exclusively on ESG funds, the proposed rule does specifically contemplate having ESG-related index providers[121] and pricing services within

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117 U.S. Sec. & Exch. Comm'n, *Fact Sheet: ESG Disclosures for Investment Advisers and Investment Companies*, https://www.sec.gov/files/ia-6034-fact-sheet.pdf.

118 *Comments on Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies*, https://www.sec.gov/comments/s7-17-22/s71722.htm (last modified Aug. 21, 2023); *see, e.g.*, Inclusive Dev. Int'l et. al., Comment Letter on SEC Proposed Rule on Enhanced Disclosures by Certain Investment Advisors and Investment Companies About Environmental, Social, and Governance Investment Practices (Aug. 16, 2022), https://www.sec.gov/comments/s7-17-22/s71722-20136257-307294.pdf (commenting on the SEC proposed rule).

119 Inclusive Dev. Int'l et al., *supra* note 118.

120 Request for Comment on Certain Information Providers Acting as Investment Advisers, Inv. Adv. Act Rel. No. 6050 (Jun. 15, 2022), https://www.sec.gov/rules/other/2022/ia-6050.pdf.

121 *Id.* Index providers are a crucial part of the ESG value chain. Specifically, they will purchase ESG scores from ESG ratings firms and then use those models to determine which

the proposed rule's ambit.[122] As such, the Commission sought comments "regarding information providers to facilitate consideration of whether regulatory action is necessary and appropriate to further the Commission's mission."[123]

A growing chorus of commentators have recognized how crucial an effect ESG-related index providers have on this segment of the market. However, many also recognize that, given the lack of oversight, the calculations that ESG index providers make are, at best, opaque and, at worst, creating false impressions regarding what (and how) they value portfolio companies within their ESG bundle. As one civil society organization notes:

> For the large index providers like MSCI and S&P Dow Jones Indices, weighting is based not on a company's ESG performance, as a reasonable person might assume, but on its market capitalization, a rough approximation of its size. In other words, being large and valuable—as opposed to getting high ESG ratings—[sic] is the key factor in determining how much investment a particular company receives.[124]

While each of these actions on the part of the SEC may not be enough, individually, to move the SEC forward with regard to ESG-related litigation, the cumulative effect on all three fronts is, at a minimum, a strong signaling device to the market that the SEC is willing to engage with ESG explicitly.[125] However, the agency does not regulate in a vacuum. More than likely, the SEC's actions are at least, in part, influenced by the changing focus of institutional

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companies should be a part of their index models. This information is subsequently used to help ICs and IAs create an ESG related portfolio.

[122] *See, e.g.*, Inclusive Dev. Int'l et al., *supra* note 118, at 7-8 (noting that certain model portfolio advisers "design allocation models [that] may . . . provide various degrees of customization . . . [based on] defined outcomes or investment strategies . . . for example, models that focus on sustainable or 'ESG' (environmental, social, and governance) investments"); *see also* SEC 2022 Proposed Rule on Investment Advisers & ESG, *supra* note 112, at 8.

[123] Inclusive Dev. Int'l et al., *supra* note 118, at 4.

[124] Inclusive Dev. Int'l & ALTSEAN-Burma, *Myanmar ESG Files: How "Responsible Investment" is Enabling a Military Dictatorship* (Mar. 9, 2022), https://www.inclusivedevelopment.net/myanmaresgfiles/.

[125] As the law firm White & Case noted, "These proposals [along with the SEC's Vale litigation] . . . [t]aken together with the recent formation of the SEC's Climate and ESG Task Force in the Division of Enforcement, [make it] clear that the SEC Staff is increasingly focused on reviewing disclosure with respect to ESG issues." White & Case, *SEC Proposes Amendments to Rules Regulating ESG Disclosures* (June 13, 2022), https://www.whitecase.com/insight-alert/sec-proposes-amendments-rules-regulate-esg-disclosures-investment-advisers-investment.

and other investors.[126] As we discuss in Section III, below, the influence of large, institutional, investors such as BlackRock and the members of the Investor Alliance for Human Rights have also likely played a role in the SEC's new seemingly enthusiastic embrace of ESG indicia.

III. THE EFFECT OF OTHER ACTORS

There are a number of different ways that institutional investors—and the standard setters[127] upon which they rely—can alter the overall ESG landscape. In this section, we discuss three. First, we discuss how shareholders have increasingly been using their voice and leverage (either informally or through the shareholder proposal mechanism) to move the needle on ESG issues. Next, we provide an overview of another time honored tool used by investors—litigation—and analyze how the claims in these lawsuits may be changing what we see as important in a shareholder action. Finally, we discuss the role of ESG standard setters specifically, and how they may help to institutionalize ESG norms.

A. Shareholders' Voice

For decades, shareholders have attempted to leverage their voice as investors to communicate their interest in the larger societal impact of the corporations they invest in. The most common avenue for leverage seems to

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126 For instance, in the first sentence of their proposed rule regarding enhanced ESG disclosures, the agency notes, "Many registered funds and investment advisers to institutional and retail clients consider environmental, social, and governance ('ESG') factors in their investment strategies." SEC 2022 Proposed Rule on Investment Advisers & ESG, *supra* note 112, at 7. In the citing footnote, the agency then goes on to provide evidence that "ESG [i]nvesting [n]ow [a]ccounts for [o]ne-[t]hird of [t]otal U.S. [a]ssets [u]nder [m]anagement." *Id.* at n.1 (citing Debbie Carlson, *ESG Investing Now Accounts for One-Third of Total U.S. Assets Under Management*, MKT. WATCH (Nov. 17, 2020), https://www.marketwatch.com/story/esg-investing-now-accounts-for-one-third-of-total-u-s-assets-under-management-11605626611). According to the U.S. Sustainable Investment Forum Foundation (the report that was, in turn, cited in MarketWatch's story), this amounts to $17.1 trillion in assets under management in the United States representing "a 42% increase over 2018." *Id.*

127 Standard setters refer to several different organizations that operate in this space. As the name implies, the mission of standard setters is to provide consistent metrics that companies can use in measuring their ESG impacts. Institutional investors, in turn, benefit from a consistent standard that allows it to compare apples to apples in the ESG space. Examples of standard setters for ESG include the Sustainability Accounting Standards Board (SASB), now part of the International Sustainability Standards Board (ISSB). *See infra* discussion III.C. for a fuller decision of the major standard setters in this area.

occur within the shareholder proposal process. However, as we note below, there are some institutional investors who are so large that they only need to muse out loud on what they expect from the companies in which they invest for those corporations to pay attention. Enter Larry Fink.

1. Larry Fink and the Letter Heard 'Round the World

One of the most news-making events regarding investors and social justice occurred when Larry Fink, the CEO of BlackRock Investments (one of the largest institutional investment companies in the world)[128] sent out an open letter to CEOs in 2018 stressing the importance of articulating an expansive corporate purpose in order for companies to prosper financially while simultaneously benefiting corporate stakeholders. "Without a sense of purpose," he wrote, "no company, either public or private, can achieve its full potential. It will ultimately lose the license to operate from key stakeholders."[129]

Since then, Fink's annual letter to CEOs has consistently included the message that the corporation's focus should go beyond mere financial performance. His most recent letter, written with a nod to critiques of so-called "woke capitalism,"[130] argued that a focus on ESG issues does not conflict with money-making.[131] He wrote: "[m]ake no mistake, the fair pursuit of profit is still what animates markets; and long-term profitability is the measure by which markets will ultimately determine your company's success."[132]

There has been much speculation about why Fink has been engaging in such a practice. The more cynical commentators have noted that, as the millennial generation comes of age as a key investor segment of the population, they will control trillions of dollars' worth of wealth.[133] In addition, this same

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128 Specifically, the company commands over $8.5 trillion in assets under management. *Total Assets Under Management (AUM) of BlackRock from 2008 to 2nd Quarter 2022*, STATISTA, (Sept. 14, 2023), https://www.statista.com/statistics/891292/assets-under-management-blackrock/.

129 Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter.

130 For a discussion of Fink's actions within the context of "woke capitalism," *see* Sam Meredith, *BlackRock CEO Larry Fink Says Stakeholder Capitalism is Not 'Woke'*, CNBC (Jan. 18, 2022), https://www.cnbc.com/2022/01/18/blackrock-ceo-larry-fink-says-stakeholder-capitalism-is-not-woke.html.

131 *Id.*

132 Larry Fink, *Larry Fink's 2022 Letter to CEO's: The Power of Capitalism,* BLACKROCK (2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter; *see also infra* Part IV, for a discussion of long-term profitability.

133 *See, e.g.*, Hernando Cortina, *The New Investor Imperative*, FORBES (Feb. 6, 2018),

group of potential investors have, on numerous occasions, indicated that they care about socially conscious investing.[134] Seen in this light, Fink's open letters could be understood as a bid to appeal to those would-be investors. A counterpoint to Fink's letters is the viewpoint of former chief investment officer for sustainable investing at BlackRock, Tariq Fancy, who has argued that ESG investment is a sham.[135] There are also vocal critics who argue that BlackRock is disingenuous and does not practice what Fink preaches in his letters.[136] Fancy's critiques notwithstanding, Fink's letters have, at a minimum, exposed the growing shift in popular culture regarding the ends of investing. This, in turn, could influence how we categorize what matters to investors.

Alas, not all have Fink's level of influence. For the rest of us, there are shareholder proposals.[137]

2. The Increasing Importance of Shareholder Proposals

Investors have long attempted to leverage their voice to communicate their interest in the larger societal impact of the corporations they invest in, but shareholder proposals that relate to human rights issues have made it on the

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https://www.forbes.com/sites/justcapital/2018/02/06/the-new-investor-imperative/ (stating that "[c]hanging demographics are one factor behind the shift towards" socially responsible investing).

134 John G. Ruggie & Emily K. Middleton, *Money, Millennials and Human Rights: Sustaining 'Sustainable Investing'* (Harv. Kennedy Sch., Working Paper No. 2018-01, 2018), https://www.hks.harvard.edu/centers/mrcbg/publications/fwp/2018-01 (discussing the rise in number of millennial investors, and their investment preferences); Keith Robinson, *Managing the Millennial Generation*, INVS. & WEALTH (Nov.-Dec. 2016), https://investmentsandwealth.org/getattachment/c0aeea35-bf2f-4138-b788-c71eac724b32/IWM16NovDec-ManagingMillennialGeneration.pdf (stating that, for millennials, "[i]t's not about making money for the wealthy. It's about socially responsible investing.").

135 Tariq Fancy, *Financial World Greenwashing the Public with Deadly Distraction in Sustainable Investing Practices*, USA TODAY (Mar. 16, 2021) https://www.usatoday.com/story/opinion/2021/03/16/wall-street-esg-sustainable-investing-greenwashing-column/6948923002/ ("In truth, sustainable investing boils down to little more than marketing hype, PR spin and disingenuous promises from the investment community. . . . [E]xisting mutual funds are cynically rebranded as 'green' — with no discernible change to the fund itself or its underlying strategies — simply for the sake of appearances and marketing purposes.").

136 *See, e.g.*, the campaign "BlackRock's Big Problem." BLACKROCK'S BIG PROBLEM, https://blackrocksbigproblem.com (noting the problem being that "BlackRock invests in climate destruction").

137 And even then, thanks to SEC rules regarding which shareholder proposals can be excluded from a corporate ballot, those who fall into "the rest of us" category is still a rather small subset of the population.

ballot with increasing frequency in recent years.[138] For instance, requests for companies to conduct "Racial Equity Audits (to remove systemic racism) were on nine corporate ballots" in 2022.[139] There have also been requests for companies to conduct human rights due diligence, such as one made to Tyson Foods in 2020.[140] In a related important trend, on average, human rights-related shareholder proposals are securing greater shareholder support compared to years past.[141] While the regulatory wind has not always blown in favor of these developments,[142] recent support for proxy voting is taking place in the Senate, with a 2022 hearing on the proposed Index Act[143] which provided shareholders who lack a voice with a place on proxy ballots.[144]

Research examining this trend of shareholder proposals concerning corporations' larger societal impact has identified that these proposals are increasingly being supported by institutional investors who have significantly

138 *See* Kishanthi Parella, *Investors as International Law Intermediaries: Using Shareholder Proposals to Enforce Human Rights,* 45 SEATTLE U. L. R. 41, 69 (2021) (noting the number of faith-based organizations and other organizations dedicated to sustainable investment that have filed shareholder proposals in recent years).

139 *See, e.g.*, a proposal for a Racial Equity Audit at Home Depot, which was supported by 62.7% of shareholders. HOME DEPOT, PROXY STATEMENT AND NOTICE OF 2022 ANNUAL MEETING OF SHAREHOLDERS 42 (2022), available at https://www.sec.gov/Archives/edgar/data/354950/000035495022000116/hd-2022proxystatement.htm#ic093c1edc810406d92fceac310f5482e_106; *Between The Lines Issue #6: The INDEX Act And Pass-Through Voting,* CIVEX (June 29, 2022), https://www.civex.io/between-the-lines-issue-6/.

140 TYSON FOODS, INC., PROXY STATEMENT PURSUANT TO SECTION 14(A) OF THE SECURITIES EXCHANGE ACT OF 1934 23 (2020), available at https://www.sec.gov/Archives/edgar/data/100493/000010049322000129/a2022proxystatement.htm.

141 Parella, *supra* note 138, at 46 (citing COURTENEY KEATINGE ET AL., 2020 PROXY SEASON REVIEW: SHAREHOLDER PROPOSALS 32 (2020)).

142 In 2020, for example, the SEC amended certain requirements regarding both eligibility and resubmission of proposals in a move that inhibited the ability of shareholders to hold companies accountable through shareholder proposals. Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Amendments to Modernize Shareholder Proposal Rule (Sept. 23, 2020). These changes have been met with criticism and opposition. Parella, *supra* note 138, at 48.

143 Lauren Foster, *Proposed Legislation Promises to Empower Investors. What to Know,* BARRON'S (Jun. 14, 2022), https://www.barrons.com/articles/proposed-legislation-promises-to-empower-investors-what-to-know-51655172926.

144 CIVEX, *supra* note 139 (explaining that "[i]ndex ETF and mutual funds make up a significant [proportion] of the investment [world]. . . . Proxy votes are a shareholder right that direct shareholders receive. . . . [I]ndex ETF and mutual funds shareholders do not have a right to proxy voting as their money managers vote for them." The Index Act is viewed as a potential solution in that it gives mutual fund and ETF shareholders "a voice on proxy ballots.").

more power than the previous incarnation of activist shareholders.[145] Gone, for instance, are the days when shareholder activism was consigned to retail investors who bought shares in a company solely to influence the corporate agenda. While there remains a dominance of faith-based organizations and other organizations dedicated to sustainable investment among the entities making shareholder proposals that communicate interest in societal impacts, their proposals are being supported by institutional investors such as BlackRock and Vanguard.[146] Thus, the shareholders who are making and supporting these claims are increasingly of the ilk that care about both the financial and the social bent of the companies in which they invest. In short, investment is no longer just the means to the end of activism; rather, activism is the means to the end of a shareholder's investment.

B. Shareholders' Action(s)

Shareholder lawsuits are not new. The first investor lawsuit under 10b-5 occurred shortly after the rule was promulgated in 1943. However, more recently, these lawsuits have begun to follow a pattern. With ever increasing frequency, shareholder actions will arise after a major corporate failing that falls in the "environmental," "social," or "governance" bucket. Specifically, shareholders have brought lawsuits in the wake of corporate scandals related to corporate harms surrounding human rights abuses.[147] In this Section, we discuss three: (1) the BP Oil Spill; (2) Walgreens' role in the opioid crisis; and (3) the massive fraud enacted by Elizabeth Holmes, the former CEO of Theranos, that may have led to hundreds of Theranos' customers being misdiagnosed with various health conditions. By examining these three lawsuits from a BHR perspective, we show how human rights violations have in effect been taken up by investors to hold corporations accountable.[148]

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145 Parella, *supra* note 138 (outlining the role of institutional investors like BlackRock in supporting shareholder proposals).

146 BlackRock and Vanguard, for instance, supported the Tyson Foods proposal. Parella, *supra* note 138, at 76.

147 We should also note that private investors have brought securities actions against Vale Corporation for the same conduct that was subject to the SEC's investigation, as well for the earlier dam bursting. *See In re* Vale S.A. Sec. Lit., No. 19-CV-526-RJD-SJB (E.D.N.Y. Mar. 31, 2022) (order granting class certification); *In re* Vale S.A. Sec. Litig., No. 1:15-cv-9539, 2017 U.S. Dist. LEXIS 42513 (S.D.N.Y. Mar. 23, 2017).

148 While our focus remains on the use of the *federal securities* laws to shift the paradigm with regard to human rights enforcement, we note that this trend may also be occurring on the state level with the use of corporate governance theories regarding breaches of fiduciary

1. The BP Oil Spill

On April 20, 2010, an explosion occurred off the coast of the United States on the Deepwater Horizon drilling rig.[149] The explosion killed 11 people and led to the biggest offshore oil spill in U.S. history.[150] While the company's actions have been discussed within an environmental,[151] workers' rights and safety lens,[152] some scholars have also classified the spill from a human rights perspective. Specifically, the spill affected individuals' rights to a healthy environment and disproportionally affected communities of color.[153] Researchers have also examined the oil spill through the lens of human health and the ecosystem as a whole.[154] For instance, as Dr. Maureen Lichtveld and others have noted:

> Epidemiologic studies conducted in workers and vulnerable

duties to advance this claim. *See, e.g.,* Complaint at ¶ 64, McRitchie v. Zuckerberg et. al., No. 2022-0890 (Del. Ct. Ch. Oct. 3, 2022) (alleging that Meta's board breached their fiduciary duties when they changed their algorithm to increase the company's profits while explicitly knowing that doing so would " 'tap[] into anger' [and] increase the risk of political instability globally." Surely these allegations, if proven true, would implicate a number of IHRL principles, including the right to health). *See also* Zijia Song, *Meta Directors Sued for 'Outdated' Focus on Profits Over All Else*, BLOOMBERG (Oct. 4, 2022), https://www.bloomberg.com/news/articles/2022-10-04/meta-directors-sued-for-outdated-focus-on-profit-over-all-else.

149 Lisa Friedman, *Ten Years After Deepwater Horizon, U.S. Is Still Vulnerable to Catastrophic Spills*, N.Y. TIMES (Apr. 21, 2020), https://www.nytimes.com/2020/04/19/climate/deepwater-horizon-anniversary.html.

150 *Id.*

151 Ten years after the spill, the environmental impact could still be felt. *See, e.g.*, Edward Helmore, *Deepwater Horizon Disaster Had Much Worse Impact than Believed, Study Finds*, THE GUARDIAN (Feb. 13, 2020), https://www.theguardian.com/environment/2020/feb/13/deepwater-horizon-disaster-oil-worse-impact-study-finds (discussing a federal report that details the long-term environmental consequences of the spill).

152 *See, e.g.*, McKenzie Turner, *Workplace Safety Lessons from the Deepwater Horizon Oil Spill*, SEMICONDUCTOR ENG'G (Nov. 18, 2021), https://semiengineering.com/workplace-safety-lessons-from-the-deepwater-horizon-oil-spill/ ("The events of the Deepwater Horizon Oil Spill, while tragic, serve as an important reminder of how workplace safety plays in the success of a company's endeavor.").

153 *See* Perry Wallace, *Commentary: Environmental Justice and the BP Oil Spill: Does Anyone Care About the "Small People" of Color?*, 6 THE MOD. AM. 65 (2010), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1133&context=tma.

154 *See* Maureen Lichtveld et al., *The Deepwater Horizon Oil Spill Through the Lens of Human Health and the Ecosystem,* 3 CURRENT ENV'T HEALTH REP. 370 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5112119/.

> communities in the spill's aftermath showed that non-chemical stressors affect resilience. Ecosystem-wise salt marsh species showed variability in structural and functional changes, attributed to species-specific tolerance, oil exposure, and belowground plant organs damage.[155]

Finally, at least one scholar has noted that the "quick compensation" scheme implemented in the wake of the disaster may have undermined individuals' due process rights related to judicial adjudication.[156]

While most of the world focused on the environmental consequences of the oil spill, investors began alleging securities violations related to the disaster. For instance, four employee investments and savings (ERISA) plans that had invested in BP filed a complaint in the wake of the scandal alleging securities law violations, including violations under Rule 10b-5 of the Exchange Act.[157] Significantly, plaintiffs' Second Amended Complaint characterized their cause of action in human rights undertones. As the filing notes, the action against BP was brought "to recover for the investment losses they suffered as a result of numerous false and misleading statements made by BP and its representatives that were designed to downplay the magnitude of the *worst environmental disaster in the history* of the United States."[158] To that end, the plaintiffs' case specifically cites to twelve different instances of false and misleading statements made by the company and various numbers of executives.[159] Nonetheless, the plaintiffs also discussed the environmental and human harm element of BP's actions, at least suggesting that bringing BP to justice for these claims would provide some measure of accountability for the harms that the company caused to people and planet. As such, though framed within the language of securities fraud litigation, the underlying message of harm to community remains clear—the harm that was inflicted by BP did more than just damage shareholders' investments; it damaged the environment and the living standards of the impacted

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155 *Id.* at 370.

156 *See* Arthur Ewencyk, *For a Fistful of Dollars: Quick Compensation and Procedural Rights in the Aftermath of the 2010 Deepwater Horizon Spill,* 44 J. MAR. L. & COM. 267 (2013). In addition to procedural rights being codified in various U.S. statutes, the right to due process has been recognized under international law as a fundamental human right. *See* ICCPR, *supra* note 39, art. 26.

157 Similar to Vale, BP is a foreign corporation that is nonetheless subject to U.S. securities enforcement by dint of having its American Depository Receipts traded on U.S. exchanges.

158 Second Amended Complaint and Jury Demand, *In re* BP P.L.C. Sec. Litig., 2016 WL 706549 (S.D. Tex. Jan. 19, 2016) (No. 4:15-cv-01061), at ¶ 1 (emphasis added).

159 *Id.* at 61-70.

communities, both of which constitute clear human rights violations.[160]

2. Walgreens' Role in the Opioid Crisis

The opioid crisis in the United States that exploded in the last ten years has been categorized as an epidemic,[161] a public health emergency,[162] and significantly, a human rights scandal.[163] As one commentator notes in a recent blog, "Human rights concerns connected to the epidemic have begun to grow in recent years as controversies regarding the United States health care system and law enforcement systems have come to light."[164] Even more heart-breaking than the crisis itself is that it was the result of corporate practices that rewarded the prescription of opioids to an untold number of patients who sought medical help—at least initially—for legitimate, diagnosed health issues.[165] The loss to

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160 *See, e.g.*, *id.* at ¶ 86 (stating BP's public statement was "a less-than-subtle attempt by BP to distance itself from any responsibility for the Deepwater Horizon explosion, the resulting loss of life, and for preventing the environmental damage and other harm that was likely to ensue"); *id.* at ¶ 121 ("The Macondo blowout produced the largest marine oil spill in United States history. Its impact on the environment, the economy, and human health was devastating."); *id.* at ¶124 (alleging that "[f]rom a human health standpoint, in addition to the eleven lives that were lost and the multiple injuries that crew members sustained as a result of the explosion on the Deepwater Horizon, the psychological harm and physical ailments that have been inflicted by the oil spill on the residents of the Gulf of Mexico are immeasurable").

161 Center for Disease Control and Prevention, *Understanding the Opioid Overdose Epidemic* (Aug. 8, 2023), https://www.cdc.gov/opioids/basics/epidemic.html.

162 State of Georgia, Office of the Attorney General, *Opioid Abuse*, https://law.georgia.gov/key-issues/opioid-abuse ("In October 2017, the U.S. Department of Health and Human Services declared the opioid crisis a national public health emergency.").

163 Anna Presnall, *A Human Rights Perspective on the Opioid Crisis in America*, UNIV. OF ALA. AT BIRMINGHAM INST. FOR HUM. RTS. BLOG (Jul. 2, 2020), https://sites.uab.edu/humanrights/2020/07/02/a-human-rights-perspective-on-the-opioid-crisis-in-america/.

164 *Id.*

165 For instance, the CDC groups the national opioid crisis into three waves, which began with the first wave in the 1990s that resulted from an increased rate of prescription for opioids by medical professions. This, in turn led to the second wave where the now addicted patients began turning to illegal street drugs like heroin. Finally, in 2013, there were "significant increases in overdose deaths involving synthetic opioids, particularly those involving illicitly manufactured fentanyl. The market for illicitly manufactured fentanyl continues to change, and it can be found in combination with heroin, counterfeit pills, and cocaine." Center for Disease Control and Prevention, *supra* note 161. Significantly, at least one scholar claims that a "state prescription drug policy first adopted in 1939, and last ended in 2004, appears to have influenced where Purdue Pharma chose to market its opioid drug OxyContin upon launch in 1996." Janet Weiner, *The Origins of the Opioid Epidemic*, UNIV. OF

affected individuals and communities has been devastating, with the crisis causing loss of life (which in turn violates the IHRL principles around the right to life), right to health (regarding access to quality treatment and management care for the underlying conditions that led to increased prescriptions), as well as issues surrounding principles of non-discrimination. As Presnall notes, "The crisis has highlighted the racial disparities in the U.S. healthcare system. . . ."[166]

In the wake of the crisis, shareholders filed suit against Walgreens, alleging that the corporation's actions in relation to the crisis sound in fraud.[167] However, tellingly, much of the language in the investors' lawsuit echoes the language used by human rights advocates.[168] For instance, in paragraph one of the plaintiff's complaint, which was filed as a shareholder derivative action, the plaintiff contextualizes their cause of action within the larger societal landscape immediately:

> The United States is in the grips of the deadliest drug epidemic in its history. The opioid epidemic takes many forms—from illegal narcotics to those prescribed by licensed physicians. In 2019 alone, nearly 50,000 people died from an opioid overdose in the United States. And according to the U.S. Department of Health and Human Services, an estimated 40% of opioid overdose deaths involved a ***prescription*** opioid. In recent years, prescription painkillers have been

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PA. LEONARD DAVIS INST. OF HEALTH ECONS. (Jan. 11, 2022), https://ldi.upenn.edu/our-work/research-updates/the-origins-of-the-opiod-epidemic/.

166 Presnall, *supra*, note 163. Among the issues that Presnall notes:

> [M]any experts believe that the number of opioid related deaths in minority populations would be greater if minorities had access to the same level of health care as white Americans. It is known that people of color have had a significant lack of access to the American healthcare system throughout history and throughout the recent years. This disparity lowers the probability that non-whites in American [sic] would be prescribed opioids and thus lowers the chance that the population would suffer fatal overdoses. Despite the low death rates due to the exclusions within the health care system, the abuse of opioids is still abundant in communities of color. Scientists have witnessed a doubling of overdose death rates among African Americans, a factor that is being overshadowed by the media and societal focus on the death rates of whites.

Id.

For an overall look at the crisis and its origins, *see generally* JOHN TEMPLE, AMERICAN PAIN: HOW A YOUNG FELON AND HIS RING OF DOCTORS UNLEASHED AMERICA'S DEADLIEST DRUG EPIDEMIC (2015).

167 *See* Verified Stockholder Derivative Complaint, Vladimir Gusinsky Revocable Tr. v. Walgreens, 2022 WL 19396524 (N.D. Ohio 2022) (No. 1:22-cv-1717).

168 *Id.*

> responsible for more deaths than all illegal street drugs, cocaine, heroin, and amphetamines ***combined***.[169]

While the case was brought, among other causes of action, under Section 14(a) of the Securities Exchange Act (which entails a lower standard of culpability than 10b-5), the complaint nonetheless details acts that provide culpability and accountability under the securities law that could later be used in connection with fraud actions.[170] Specifically, plaintiffs note:

> The misrepresentations and omissions in the proxy statement were material to Company shareholders in voting on the proxy statement. The proxy statement solicited and obtained shareholder votes for: (i) director nominees and (ii) executive compensation. … The Company was damaged as a result of the defendants' material misrepresentations and omissions in the proxy statement.[171]

3. Elizabeth Holmes and Theranos

Prior to the discovery of the actions that led to her conviction on January 3, 2022,[172] Elizabeth Holmes was a genuine rock star in the elite circles of Silicon Valley.[173] Her professed advances in medical devices were heralded as a tectonic shift in patient health care—seemingly bolstering patient's rights to health surrounding issues of access to health care. During her time leading Theranos, Holmes repeatedly claimed that "with one drop of blood" Theranos could run diagnostic tests to detect a host of different diseases and conditions. In doing so, Holmes bilked a number of different and high-profile investors

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[169] *Id.* at ¶ 1 (emphasis in original).

[170] Despite the lower standard of culpability needed for accountability under Section 14(a) (which prohibits false and misleading statements in a company's proxy statements), an examination of a cause of action under this portion of the act is nonetheless informative. Specifically, under both 10b-5 and 14(a) a key element is materiality. This materiality prong, in turn, relates to the reasonable investor standard discussed in Section IV *infra*.

[171] Verified Stockholder Complaint, *supra* note 167, at ¶¶ 181-82.

[172] U.S. v. Elizabeth Holmes, Case Notification, U.S. ATT'Y'S OFFICE FOR N.D. CAL. (Dec. 12, 2022), https://www.justice.gov/usao-ndca/us-v-elizabeth-holmes-et-al.

[173] The coverage of Elizabeth Holmes' rise and fall as the founder and CEO of Theranos has been comprehensive, encompassing everything from multiple investigative newspaper stories (led by John Carreyrou who went on to write the book Bad Blood that documents much of the same), podcasts, two documentaries, and even a Hulu television story that is based on Holmes' tenure at Theranos. *See* Penguin Random House Speakers Bureau, *John Carreyou*, Penguin Random House, https://www.prhspeakers.com/speaker/john-carreyrou; Alec Bojalad, *The Dropout: Understanding Elizabeth Holmes and the Theranos Scandal*, DEN OF GEEK (March 3, 2022), https://www.denofgeek.com/tv/the-dropout-elizabeth-holmes-theranos-scandal-real-life/.

out of multi-millions of dollars, at one point leading Theranos to being valued at over $9 billion.[174] Unfortunately, it was all a lie. While most of the attention for the case focused on the impact of Theranos' lies to investors, at least one whistleblower was concerned with Theranos' actions from (arguably) a human rights perspective. For instance, in an interview with John Carreyou after the jury's verdict was announced, Theranos' whistleblower Tyler Shultz expressed disappointment at the jury's focus on the securities violation of the case. Specifically, Shultz noted that what motivated him to finally come forward and expose Holmes was the potential risk to consumers of Theranos' devices who were relying on the tests the company performed to their detriment, often being misdiagnosed for their harms. In many ways, analyzing the Theranos lawsuit is more challenging than other private investor actions. Specifically, because Theranos was not a publicly traded company, its shares were held by a much smaller number of investors, many of whom may not have wanted the publicity that comes from a long, drawn-out civil action. That could, in turn, explain why a settlement was quickly reached by the investors shortly after a lawsuit had been filed.[175] Nevertheless, Theranos makes a compelling case for exploration because of the way that investor harms and community harms intersect.

C. Standard Setters: The New Influencers

Institutional investors who are interested in more than just the financial performance of a corporation use corporate sustainability reporting to understand the societal impacts and approaches of the corporation in question. One of the main challenges that has arisen within the context of ESG reporting is that, to date, there is no one standard for what constitutes accurate ESG reporting. As one research study noted: "Despite the surge in environmental, social, and governance (ESG) reporting worldwide, company ESG reports display wide variations in content. The prevailing discrepancies in disclosure content stand in the way of effective comparisons and raise concerns over the credibility of these reports."[176] As such, even corporations that are trying

174 The company was privately held with Holmes owning 50%. *See* Roomy Khan, *Theranos' $9 Billion Evaporated: Stanford Expert Whose Questions Ignited the Unicorn's Trouble,* FORBES (Feb. 17, 2017), https://www.forbes.com/sites/roomykhan/2017/02/17/theranos-9-billion-evaporatedstanford-expert-whose-questions-ignited-the-unicorn-trouble/.

175 Christopher Weaver, *Theranos Settles Investor Suit as Funds Run Low*, WALL ST. J. (July 22, 2018, 9:14 PM), https://www.wsj.com/articles/theranos-settles-investor-suit-as-funds-run-low-1532275276.

176 Mert Demir et al., *Discrepancies in Reporting on Human Rights: A Materiality Perspective*, *in* CORPORATE RESPONSIBILITY RESEARCH CONFERENCE 139 (2019),

diligently to maintain ESG standards may run into difficulties when those standards do not align with those set forth by standard setters. The question then becomes, are the corporations using a particular standard because they think it provides greater clarity, or are they engaging in a type of "standard shopping" wherein corporations look for the least stringent standard that, nonetheless makes it appear as if they are engaged on the issue of ESG. If so, this is, in effect, the latest iteration of greenwashing or bluewashing.[177] As Harper Ho notes:

> At present, in fact, information on corporate ESG risks is reported primarily in corporate sustainability reports. Although voluntary reporting is less prevalent among smaller public companies, 90% of public companies in the S&P 500 produce such reports, which must often be accessed from individual corporate websites. … [B]ecause sustainability reporting is generally directed at a wide range of stakeholders identified by the company [itself], it is subject to self-defined materiality standards that are **not aligned with the financial definition of materiality that applies to public reporting**. As a result, the informational content of voluntary reports, even if based on the same framework, may vary widely across sectors and among companies in the same industry.[178]

The need to hold corporations to more specific reporting standards is one of the drivers behind SEC rulemaking in this area.[179] In other words, private standard-setting serves to encourage regulators like the SEC to up their game.

All of the outside factors discussed in this Part likely play a role in the SEC's recent push in the area of ESG. However, the effect of these (and, as we will discuss in more detail below, the SEC's new and not-so new push into ESG enforcement) may go beyond what the SEC intended. To wit, moving the standard of materiality beyond its current parameters in litigation. Whether or not the SEC's explicit moves in the ESG space signal a willingness to enforce

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https://www.crrconference.org/files/3115/6805/9672/Book_of_abstracts_CRRC2019.pdf#page=140.

177 Martin, *End of the Beginning*, *supra* note 37.

178 Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL L. REV. 277, 288-90 (2022) (emphasis added).

179 The SEC, in announcing the decision to review climate-related disclosure, explained the need for "developing a more comprehensive framework that produces consistent, comparable, and reliable climate-related disclosures." Public Statement from Allison Herren Lee, Comm'r, SEC, Statement on the Review of Climate-Related Disclosure (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure.

BHR cases is the subject that we take up in Part IV. First, however, we compare the regulatory context for BHR in European states to that in the United States.

IV. THE GLOBAL CONTEXT

Whether or not the SEC's explicit moves in the ESG space signals a willingness to enforce BHR cases is the subject that we take up in the next section. The question is not an idle one. If, in fact, the SEC's actions related to ESG signal a shift within the agency to engage in corporate accountability for businesses' role in social impacts, then this will mark a significant shift in the way BHR issues are litigated in the United States. To that end, current activity that is occurring—most notably in Europe—with regard to corporate compliance and accountability may provide some useful indicia regarding ways that the regulatory landscape may unfold in the United States around BHR. In this section we focus on three: double materiality,[180] mandatory human rights due diligence, and the increasing amount of regulatory oversight in the business and human rights field that, we feel, could become a part of the SEC's arsenal in later years. However, in each instance, we believe that the only way these frameworks could be incorporated into the SEC's enforcement arsenal is if it were executed from an investor-protection perspective. We question later whether this is a desirable development or not.

A. Double Materiality

The question of whether ESG issues (including human rights) are material to investors has been the subject of great debate. On the one hand, there are authoritative statements confirming that they are indeed material, for instance, from the International Organization of Securities Commissions (IOSCO): "ESG matters, though sometimes characterized as non-financial, may have a material short-term and long-term impact on the business operations of the issuers as well as on risks and returns for investors and their investment and voting decisions."[181] On the other hand, certain companies and the U.S.

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180 "'Double materiality' . . . describes an approach whereby materiality has two alternative prongs, a financial one and a social/environmental one. Double materiality considers both environmental and social impacts on a company and impacts of a company on the environment and people." This is exemplified in the E.U. Non-Financial Reporting Directive's provision: "Companies should disclose not only how sustainability issues may affect the company . . . but also how the company affects society and the environment."

Int'l Org. Sec. Comm'ns (IOSCO), *Statement on Disclosure of ESG Matters by Issuers* 1 (Jan.19, 2019), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf (acknowledging the potential impact of ESG factors on issuer operations and investment risk and return).

Chamber of Commerce "have categorically rejected the materiality of ESG information in the past."[182] When considering this question, Harper Ho differentiates types of investor, arguing that ESG information may become material in the aggregate to institutional investors due to the amplification of systematic (i.e. market) risk related to ESG factors across a broad or even market-wide portfolio.[183] She highlights that large institutional investors are particularly exposed to such risks.[184] Overall she supports the generally accepted view that at the very least some ESG information is financially material. This however leaves other business impacts on people and planet that are not financially material. To cater for these, the concept of "double materiality" has been coined.

"Double materiality"[185] sometimes known as "dynamic materiality"[186] describes an approach whereby materiality has two prongs, a financial one and a social / environmental one. Double materiality considers both environmental and social impacts on a company and the impacts of a company on the environment and people. This approach has been adopted at the European Union, in contrast to the strict adherence to financial materiality adopted by the SEC. Double materiality is expressed in law through the E.U. Corporate Sustainability Reporting Directive's obligation to: "report information necessary to understand the undertaking's impacts on sustainability matters, and information necessary to understand how sustainability matters affect the

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[182] Harper Ho, *supra* note 178 at 293 (citing U.S. CHAMBER OF COM. CENTER FOR CAP. MKTS. COMPETITIVENESS, ESSENTIAL INFORMATION: MODERNIZING OUR CORPORATE DISCLOSURE SYSTEM 13-14 (2017), https://www.centerforcapitalmarkets.com/resource/essential-information-modernizing-our-corporate-disclosure-system/). Harper Ho acknowledges that the argument "that ESG information is categorically immaterial[] is no longer widely held." *Id.* at 304.

[183] *Id.* at 293-94.

[184] *Id.* at 294. *See* discussion of long v. short term, *infra* Part V.C.1.

[185] The European Commission, for instance, describes the NFR Directive as having "a double materiality perspective . . . The reference to the company's 'development, performance [and] position' indicates financial materiality, in the broad sense of affecting the value of the company [while] [t]he reference to "impact of [the company's] activities" indicates environmental and social materiality . . . Companies should consider [disclosing climate-related information] if they decide that climate is a material issue from either of these two perspectives." *See* 2019/C 2019/01 Communication from the Commission, Guidelines on Non-financial Reporting: Supplement on Reporting Climate-related Information, 62 O.J. 1, 4 (June 20, 2019), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019XC0620%2801%29.

[186] Donato Calace, *Double and Dynamic: Understanding the Changing Perspectives on Materiality*, SASB (Sept. 2, 2020), https://sasb.org/blog/double-and-dynamic-understanding-the-changing-perspectives-on-materiality/.

undertaking's development, performance and position."[187] There are competing schools of thoughts about whether, from a human rights or environment perspective, it is better to stress that the two aspects are different (see e.g., Business for Social Responsibility,[188] which stresses that each is separate and stands on its own merit) or it is better to argue that the two are one and the same:

> Double materiality may be a distinction without a difference. If the fundamental concept of materiality is whether a matter impacts the judgment and actions of a person relying on that information, does the directional effect really matter (climate on company vs. company on climate)? If any information is truly important, the results will ultimately be reflected in the company's value.[189]

The following explanation helps to distill why double materiality may be "a distinction without a difference," responding to the question why information on environmental impacts could be material in the first place:

- Either because environmental impacts could translate into financial risks, e.g. through legal liabilities or negative effects on a company's reputation, etc. (a weak conception of double materiality)
- Or because a "reasonable person" might consider the information material for reasons other than direct financial repercussions (a strong conception of double materiality).[190]

In the second category, the "reasonable person" might consider information material because they wish to follow a specific investment policy for instance one guided by social and/or environmental considerations. They may also consider this information material "because investors themselves are

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[187] Council Directive 2022/2464, 2022 O.J. (L 322) 15, 42; *see also* Council Directive 2014/95, 2014 O.J. (L 330) 57 ("companies should disclose not only how sustainability issues may affect the company . . . , but also *how the company affects society and the environment* . . .") (emphasis added).

[188] Dunstan Allison-Hope & Paloma Muñoz Quick, *Human Rights Are Not Just an "ESG Factor"*, BUS. FOR SOC. RESP. (Sept. 23, 2021), https://www.bsr.org/en/blog/human-rights-are-not-just-an-esg-factor ("[T]he two dimensions of double materiality—to investors, for the creation of enterprise value, and to society, for impacts on people and the environment—are distinct and exist entirely on their own merits.").

[189] Jeffrey Johanns, *ESG and the Myth of Double Materiality*, LINKEDIN (Jan. 17, 2022), https://www.linkedin.com/pulse/esg-myth-double-materiality-jeffrey-johanns/.

[190] Matthias Täger, *'Double Materiality': What Is It and Why Does It Matter?*, LONDON SCH. ECON. & GRANTHAM RSCH. INST. ON CLIMATE CHANGE & ENV'T (Apr. 21, 2021), https://www.lse.ac.uk/granthaminstitute/news/double-materiality-what-is-it-and-why-does-it-matter/.

required to report on these impacts, especially under the EU's Sustainable Finance Disclosure Regulation"[191] If this "reasonable person" considers information material, i.e., important to them, then arguably the concept of "double materiality" is inapplicable. Their focus is not on business impacts on people and planet *per se*, but on their particular interest in these impacts.

B. Mandatory Human Rights Due Diligence

The question of the materiality of human rights impacts and response, at least for investors might also be revisited in light of new laws which are placing increased human rights obligations on companies. The text of a proposed E.U. Directive, for example, requires companies to identify, prevent, and mitigate/bring to an end risk to human rights and the environment by conducting human rights and environmental due diligence.[192] These obligations extend to a company's own operations and those of its subsidiaries, and to entities within its value chain with whom the company has "an established business relationship."[193]

The E.U. Directive builds on the experience of the first state to have a human rights due diligence law in force, France. The French Law on the Corporate Duty of Vigilance, requires companies meeting the threshold requirements for size to create, implement, and publish an annual "vigilance plan."[194] The plan is aimed at identifying and preventing human rights

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191 *Sustainable Finance*, EUROPEAN COMM'N NEWSROOM (Jul. 26, 2022), https://ec.europa.eu/newsroom/fisma/items/754701/en.

192 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM (2022) 71 final (Feb. 23, 2022) 1, 1 [hereinafter Sustainability Due Diligence Directive]. The following actions are specified: integrating due diligence into their policies in accordance with art. 5; identifying actual or potential adverse impacts in accordance with art. 6; preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimizing their extent in accordance with arts. 7 and 8; establishing and maintaining a complaints procedure in accordance with art. 9; monitoring the effectiveness of their due diligence policy and measures in accordance with art. 10; and publicly communicating on due diligence in accordance with art. 11. *Id.* at 24.

193 *Id.* at 46. This test is akin to the test found in the French Law on the Corporate Duty of Vigilance, which extends to the activities of subcontractors or suppliers with whom there is an established commercial relationship. *Loi de Vigilance*, *supra* note 49.

194 *Loi de Vigilance*, *supra* note *49*. The law applies to any company registered in France that has (a) 5,000 or more employees, including employees of its direct or indirect French-registered subsidiaries; or (b) 10,000 or more employees, including employees of its direct or indirect French-registered or foreign subsidiaries. *Id.* The law applies to approximately 150 companies. Anna Triponel & John Sherman, *Legislating Human Rights Due Diligence:*

violations in companies' domestic and international operations, including those associated with their subsidiaries and supply chains.[195] The plan must set out the steps that the company will take to detect risks and prevent serious violations with respect to human rights and fundamental freedoms, health and safety, and the environment.[196] This includes mapping out and analyzing the risks, putting measures in place to mitigate any risks and address any negative impacts, and monitoring the plan's implementation.[197] Other European countries are following France. Germany, for instance, has enacted its own supply chain due diligence law.[198] The Netherlands has passed a due diligence law focused on the issue of child labor.[199]

If human rights due diligence is a legal obligation, fulfilling this obligation therefore becomes a compliance matter for companies, meaning that whether it is done properly or not becomes material to investors. While the enactment of such laws seems a long way off at this time in the United States, U.S. companies may be caught by the provisions in European laws. For instance, the proposed Sustainability Due Diligence Directive applies directly to certain

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Opportunities and Potential Pitfalls to the French Duty of Vigilance Law, INT'L BAR ASS'N (May 2017), https://respect.international/wp-content/uploads/2018/08/Legislating-human-rights-due-diligence-opportunities-and-potential-pitfalls-to-the-French-duty-of-vigilance-law.pdf.

195 This covers the companies that the company controls directly or indirectly and, moving down the supply chain, the activities of its subcontractors and suppliers "with which [it] *maintains an established commercial relationship." Loi de Vigilance*, *supra* note 49, art. 1, ¶ 3.

196 *Id.*

197 *Id.* at ¶¶ 4-9.

198 *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten* [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021, Bundesgesetzblatt [BGBI] I at 2959 (Ger.), *translated in* https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3; *see* Constanze Illner, *Germany Announces Supply Chain Due Diligence Law – Everything You Need to Know*, DQS HOLDING GMBH (Feb. 22, 2021), https://dqs-cfs.com/2021/02/germany-announces-supplychain-due-diligence-law-everything-you-need-to-know/. Norway enacted a similar law, *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold* [Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Norwegian Transparency Act)], on June 18, 2021. An unofficial English translation can be found at https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises.

199 Child Labor Duty of Care Act, Stb. 2019. Although enacted a few years ago, this law has not come into force and may be superseded by a law not limited to the issue of child labor but rather requiring companies to undertake due diligence on all human rights impacts. Covington & Burling LLP, *Business and Human Rights: Developments and What to Watch For* (Jan. 24, 2022), https://www.cov.com/en/news-and-insights/insights/2022/01/business-and-human-rights-developments-and-what-to-watch-for.

U.S. (and other non-E.U.) companies operating in the E.U. market,[200] and indirectly to U.S. (and other non-E.U.) companies that are in the value chains of companies subject to the proposed Directive.[201] As such, U.S. companies may be willing to comply with a higher standard than is currently enforced in the United States, rather than aligning their standard to different legal regimes.[202]

While HRDD laws may seem a distant possibility in the United States at this time, certain legislative developments take steps in this direction. The Uyghur Forced Labor Prevention Act (UFLPA),[203] which recently went into effect, creates a rebuttable presumption that no goods produced wholly or in part in the Xinjiang Uyghur Autonomous Region (XUAR), China, may be imported into the United States. In order for companies to rebut this presumption, they need to present clear and convincing evidence that goods were not produced using forced labor. Guidance from U.S. Customs and Border Protection (CBP)[204] assists companies in understanding some of the types of information that CBP will require if they request an exception to the UFLPA's presumption. Types of information include due diligence system information, supply chain tracing information, and information on supply chain management measures.[205] A due diligence obligation is also found in the Conflict Mineral Rule, a rule which was promulgated by the SEC pursuant to § 1502 of Dodd-Frank.[206] The rule imposes disclosure requirements on any

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[200] Luca Enriques & Matteo Gatti, *The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention*, EUR. CORP. GOVERNANCE INST. (Apr. 26, 2022), https://www.ecgi.global/blog/extraterritorial-impact-proposed-eu-directive-corporate-sustainability-due-diligence-why ("[I]f a U.S. company's own, as opposed to its [E.U.] subsidiaries', activities cross the threshold requirements (namely, if its net turnover within the [European Union] is above €150 million or €40 million if it operates in critical sectors), the Proposed Directive will directly apply to it.").

[201] *Id.*

[202] *Cf.* Directive 2016/679, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR]. Under the terms of the Directive, companies that operate in Europe need to request consent from users who were navigating websites in Europe. However, to maintain operational simplicity it seems that corporations have now embedded the request to web users outside of Europe as well.

[203] U.S. Customs & Border Prot., *Uyghur Forced Labor Prevention Act*, https://www.cbp.gov/trade/forced-labor/UFLPA (last modified July 21, 2023).

[204] U.S. CUSTOMS & BORDER PROT., UYGHUR FORCED LABOR PREVENTION ACT: U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS (2022), https://www.cbp.gov/document/guidance/uflpa-operational-guidance-importers.

[205] *Id.* at 13-15.

[206] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111- 203, § 1502 (2010).

reporting[207] company that uses conflict minerals as a necessary part of their business model.[208] If conflict minerals are used, the rule requires that the disclosure "includes a description of the measures taken by the [issuer] to exercise due diligence on the minerals' source and chain of custody."[209]

Finally, should the SEC be willing, the agency is currently able to bring cases under 10b-5 of the Exchange Act for violations that relate to a corporation's activities and statements overseas. To wit, if a corporation lied in its statements related to its mandatory human rights due diligence disclosures, the SEC would be able to sue based on those statements even if the corporation is a foreign one.[210]

C. Regulatory Oversight

The field of business and human rights law has, until recently, been characterized by a lack of regulatory oversight.[211] The first phase of laws passed in this field, namely modern slavery reporting laws,[212] conflict minerals laws,[213] and human rights reporting laws,[214] relied on the market for oversight—in other words, investors, consumers, and civil society organizations. While these laws had some built-in enforcement mechanisms, they were modest and rarely, if ever, used in practice. In recognition of this deficiency, reform proposed for the UK Modern Slavery Act specifies stronger enforcement powers.[215] Human

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207 Reporting companies are any companies that have registered their securities with the SEC, and as such, are required to file periodic reports with the Commission pursuant to §§1, 13, or 15(d) of the Exchange Act. *See* Securities Exchange Act of 1934, §§12, 13, 15; 15 U.S.C. §§781, 78m, 78o.

208 Conflict Minerals, 77 Fed. Reg. 56274, 56276 (Sept. 12, 2012) (codified at 17 C.F.R. § 240, 17 C.F.R § 249b).

209 *Id.* Companies must submit a Conflict Mineral Disclosure Report, which requires the following items: (a) a description regarding what due diligence measures the company took; (b) a statement regarding the company's independent audit mechanisms; and (c) a risk mitigation analysis that discussed additional steps the company took to improve its due diligence in this area. *See id.* at 56363.

210 *See* SEC Vale Complaint, *supra* note 1.

211 Rachel Chambers & Anil Yilmaz-Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. INT'L L. 323, 350 (2021).

212 *Id.* at 338.

213 *Id.* at 340-41.

214 Companies Act of 2006, c. 46, §§ 414C, 414CB pt. 15 (Eng.), at 326-28.

215 In January 2021, the Foreign Secretary announced that the Home Secretary would be introducing legislation that included fines for businesses that did not comply with their transparency obligations under the Modern Slavery Act. This was followed in June 2021 by

rights reporting that forms part of annual corporate reports has seemingly gone under the radar of financial regulators in Europe,[216] and ironically it seems that the United States, despite having no BHR law on the books, is seen as being a leader in ESG regulation.[217] The creation of the SEC's ESG Enforcement Taskforce has prompted regulators in Europe to think about how they should enforce in the ESG sphere.[218]

The enactment of a second wave of BHR laws has brought greater attention to the question of regulatory oversight. Such oversight is still at a fairly embryonic phase. For instance, the E.U. Conflict Minerals Regulation specifies that E.U. Member States must designate a "competent authority" to conduct checks on how corporations that import goods to the European Union comply with the Regulation.[219] This system has drawbacks, including divergent implementation of the law and lack of sanction for noncompliance, but compared to the original conflict minerals law, Dodd Frank Section 1502,[220] it is a step forward in that there is enforcement in place for it. As due diligence laws are debated and adopted, the question of regulatory oversight has received even greater thought and attention.[221]

Turning to enforcement of the new wave of BHR laws, the French Duty of Vigilance law relies on courts for oversight and enforcement.[222] The German Supply Chain Law establishes the powers of oversight and enforcement and names the Federal Office for Economic Affairs and Export Control as the

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the Department for Business, Energy, and Industrial Strategy's confirmation that it would be creating a new Single Enforcement Body which would have powers to impose financial penalties against those organisations which did not comply with their statutory obligations under Section 54 of the Modern Slavery Act. In May 2022, these commitments were formalised in the announcement in the Queen's Speech of the Modern Slavery Bill which set out proposals including the introduction of civil penalties for non-compliance. Katherine Tyler, *UK: The Modern Slavery Act 2015 - What You Need to Know*, ONETRUST DATAGUIDANCE (Aug. 2022), https://www.dataguidance.com/opinion/uk-modern-slavery-act-2015-what-you-need-know.

216 Chambers & Yilmaz-Vastardis, *supra* note 211, at 362-63 (discussing oversight of the E.U. Nonfinancial Reporting Directive, and of civil society efforts to engage the FRC).

217 Sophie Kemp et al., *Greenwashing: Engaging with regulators on ESG concerns*, KINGSLEY NAPLEY (Aug. 8, 2022), https://www.kingsleynapley.co.uk/our-news/press-releases/greenwashing-engaging-with-regulators-on-esg-concerns.

218 *Id.*

219 Chambers & Yilmaz-Vastardis, *supra* note 211, at 342 (discussing that this includes audits of records as well as on-the-spot inspections).

220 *Id.* at 357 (noting that any enforcement of this provision was specifically stopped under the Trump Administration).

221 Rachel Davis, *Enforcement of Mandatory Due Diligence: Key Design Considerations for Administrative Supervision*, SHIFT & U.N. HIGH COMM'R FOR HUM. RTS. (Oct. 2021), https://shiftproject.org/resource/enforcement-mhrdd-design/.

222 Chambers & Yilmaz-Vastardis, *supra* note 211, at 332-35 (discussing the drawback of this).

responsible body.[223] A Norwegian due diligence Law names the Consumer Authority as the body to monitor compliance with the act.[224] The proposed E.U. Directive has a specific provision for regulatory oversight. Articles 17 and 18(1) of the proposal require that Member States designate one or more national independent supervisory authorities of a public nature with appropriate powers and financing to take on this role. The proposal leaves it to the Member States to decide whether they will establish a new public supervisor or embed this task with existing supervisors. Unlike the French, German, and Norwegian laws, the European proposal contains a new civil cause of action for victims in addition to the regulatory oversight over the HRDD process just discussed. Thus, we see overall a far more sophisticated regulatory approach in these European States to that taken in the United States.

V. THE SEC'S ROLE IN THE BHR FIELD—WHAT'S AT STAKE

The SEC's willingness to bring enforcement actions for ESG-related misstatements has been heralded as a welcome development. Proponents of the SEC's actions believe that it could bring corporate accountability for corporations that fail to take ESG-related issues seriously. However, the agency's actions are not a panacea to all of the harms that corporations inflict on affected communities and individuals. Indeed, the fact that the SEC, an agency whose tripartite mission includes protecting investors (rather than victims), is viewed as the best defender of business- and human rights-related harms in the United States is, in itself, problematic for several reasons. For instance, as we have previously discussed in another article,[225] the SEC's disclosure-based framework is not an adequate tool for complying with the United States' professed human rights obligation under the UN Guiding Principles on Business and Human Rights (UNGPs)—a key business and human rights tool.

Second, given that the SEC's current focus on ESG is being pushed as an agency agenda (rather than embedded in the law), it can easily be de-prioritized or worse, ignored, as the agency's priorities or the composition in the SEC's Commissioners' office changes. However, notwithstanding these two

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223 Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains], § 19 (Ger.).

224 Norwegian Transparency Act, *supra* note 198.

225 *See generally* Jena Martin & Rachel Chambers, *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence*, 18 N.Y.U. L. & BUS. 773 (2022) (analysing the inadequacy of various accountability models, including disclosure). *See also* Jena Martin, *Hiding in the Light*, *supra* note 30, 566-75.

challenges, we believe that the SEC's recent enforcement action is still the best option for those who would like to increase corporate accountability in the business and human rights field in the United States. Moreover, as we also discuss in this section, despite the perils in changing Commission composition or priorities, the SEC might have given others a significant tool by potentially changing the jurisprudential landscape. Specifically, if the agency's enforcement action leads to a favorable court ruling on the issue of materiality and how it applies to ESG harm, then this will effectively embed and expand the standard of materiality as it relates to disclosing human rights abuses. As such, we believe that until such time as there is the political will or desire to create an agency that focuses on BHR abuses in the United States, the SEC's role in enforcing ESG-related actions is a welcome development for the United States and the world.

A. The Perils of Disclosure

The SEC's regulatory heft is based on a disclosure-based paradigm. Rather than providing recommendations on the value of a corporation and its substance, the SEC primarily requires corporations to truthfully disclose material information.[226] Should a corporation do so, the SEC largely has no jurisdiction over what the corporation says as long as the information is truthful. Similarly, in private action litigation, if defendants successfully proffer evidence that certain key information was disclosed, then they will not be found liable—even if what they disclose is terrible, terrible news. In a previous article, one of us has described this method of regulation as a *laissez faire* approach in that "[r]ather than directly intervene in the corporate governance of a company, the SEC primarily uses a disclosure paradigm [which] … rests on the premise that 'an educated investor is a protected investor.'"[227] As such, and specifically

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[226] Martin, *Changing the Rules of the Game: Beyond a Disclosure Framework for Securities Regulation*, *supra* note 111, at 60.

[227] *Id.* In the context of her earlier research, Martin felt like this was problematic primarily because most of the major players in the market (i.e., institutional investors and high frequency traders) do **not** rely on corporate filings and information in the way that retail shareholders traditionally did. As such, Martin noted that this marked a shift from an investor paradigm to a consumer paradigm where the price of the stock was disaggregated from the value of the company. Since Martin wrote that article, some significant plays in the market have borne out her perspective. *See, e.g.*, Jena Martin, *Why GameStop Shares Stopped Trading: 5 Questions Answered*, THE CONVERSATION (Jan. 28, 2021), https://theconversation.com/why-gamestop-shares-stopped-trading-5-questions-answered-154255. While Martin's initial assessment bore true with regard to HFTs, since

within a business and human rights framework, there is little incentive for corporations to engage substantively with business and human rights issues unless doing so is part of a specific, calculated, reputational advantage that the corporation would like to promote. For instance, if a corporation cares little about its impact on surrounding communities, or human rights issues, or the environment, there is no downside to engaging in activities or relationships with others that might not be the best for these communities or individuals as long as the corporation accurately discloses what it is (or is not) doing. So, for instance, if you are a large multi-national corporation that derives the bulk of its income from the extractive industry—with coal, oil, and gas operations around the world—and you operate within the bounds of the law, then there may be no incentive for you to pretend to engage in either environmental or human rights issues. Indeed, under a disclosure paradigm, there may even be disincentives if you make any material misstatements on the subject.[228] Under this scenario, presumably investors in your company know what kind of company you are, have made an educated cost-benefit analysis regarding the perils of pollution versus the profits that might be gained from investing in your company and have decided that they would rather have the profits now. In this scenario, there is nothing the SEC could do even if there was a later showing that the company's actions inflicted environmental harm. So long as the company disclosed that this might be a risk of their operations, there is no cause of action under 10b-5. Moreover, even if the corporation were found to have actively polluted an area or, for instance, somehow discriminated against a class of workers (thereby violating these workers' rights to be free from discrimination under IHRL), if the company or its executives did so without

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then, another category of "socially conscious" institutional investor (such as BlackRock) has also come into play that has actually made the best of a disclosure-based framework by engaging with corporations directly, often times on the issues of human rights and the corporation's overall environmental footprint. Despite these developments, Martin still finds the overall disclosure paradigm to be problematic for a number of reasons, including that: (1) most of the disclosure-based laws do not provide a direct access to remedies for the victims and (2) "there is a growing unease that disclosure is nothing more than a government-mandated public relations campaign," and (3) "rather than illuminate an issue, disclosure can actually obfuscate matters for its intended target. For instance, in the U.S securities regulatory framework, corporations must file volumes of reports that, in practice, amount to hundreds of pages of boilerplate text with little substantive information." Jena Martin, *Hiding in the Light*, *supra* note 30, at 575-76.

228 In fact, one of the hallmarks of securities regulation here in the United States is that not everything must be disclosed, but if you choose to disclose it, you must tell the whole truth. In other words, if an omission essentially makes your statement a half-truth, that alone is enough to bring you within the fraud ambit of Rule 10b-5. *See supra* Section I.A for more details.

scienter there would still be no recourse under securities fraud claims even if individuals or communities were negatively impacted.[229]

B. Shifting Agency Priorities

Another challenge that may endanger the progression of the business and human rights movement is not specific to the SEC itself but rather could affect all agencies in a political environment—namely shifting agency priorities. Right now, the agency seems to have taken a great interest in ESG-related matters. However, a closer examination shows that while the ESG mantle still exists, the actual genesis for this current push may have come at the hands of the previous SEC Chairman rather than its current leader, Gary Gensler. This has many potential consequences. First, as Gensler begins to define his own tenure at the SEC, it is entirely possible that he may relegate ESG to second-class status. In addition, (as mentioned earlier) the agency itself is facing significant push-back from politically conservative state administrations who view the SEC's stance on ESG to be antithetical to the way the SEC should behave.[230] In addition, even though the SEC is an independent agency,[231] it may nonetheless be subject to the political winds of the time. So, while now the Biden administration's current push regarding "responsible business conduct"[232] may align well with the agency's stance on ESG, should the administration's priorities change, it is not a leap to think that this may also impact the agency. More directly, should a Republican take the White House in the next election cycle, this would have an immediate impact on composition of the agency. Under Congressional mandate, whichever political party

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229 Indeed, outside the human rights context, the Supreme Court has made it very clear that an action for 10b-5 cannot stand if a company or its executives only acted negligently. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 185-86 (1976).

230 *See* Patrick Morrisey, *supra* note 101.

231 Cornell L. Sch. Legal Info. Inst., *Securities and Exchange Commission*, https://www.law.cornell.edu/wex/securities_and_exchange_commission_(sec) (last visited Feb. 8, 2023).

232 In June 2021, the Biden Administration announced that it would update its National Action Plan on Responsible Business Conduct (largely viewed as the Administration's primary method of engaging with business and human rights related issues). As part of their work in that area, representatives from the Administration attended numerous stakeholder consultations on various issues implicating the National Action Plan including one organized by Martin on May 23, 2022 regarding ESG related issues. *See* U.S. Dept. of State, *National Action Plan on Responsible Business Conduct*, https://www.state.gov/responsible-business-conduct-national-action-plan/# (last visited Dec. 3, 2023) (discussing stakeholder engagements on, among other things, "ESG investing."); Jena Martin, Comment Letter for NAP on Responsible Business Conduct (May 31, 2022), https://www.regulations.gov/comment/DOS-2022-0002-0030.

occupies the White House, that same political party will make up a majority of the five-member Commission.[233] So, if a Republican becomes president before the agency has solidified its actions on ESG, then this could likely mean the death of this endeavor by the agency as a whole.

However, despite both of these challenges, we remain cautiously optimistic regarding the SEC's legacy on ESG and its impact in the BHR field. Specifically, while the SEC's current enforcement portfolio on this matter is made up entirely of either settled or pending actions, all it would take is one litigated action to transform an agenda item into embedded case law. We discuss how this could happen in the following section.

C. Bringing in the Reasonable Investor

As we mentioned earlier, the heart of materiality under Rule 10b-5 relates to the reasonable investor standard. Specifically, to meet the materiality standard, the plaintiff (either the SEC or an investor) must show that the information "is material if there is a substantial likelihood that a reasonable shareholder would consider it important."[234]

But who exactly is the reasonable investor? Well, apparently, that seems to be changing. For instance, the reasonable investor of today seems to care much more about social justice issues and the environment than their older counterparts from the baby boomer generation.[235] The number of investors who state that they care about ESG issues has increased dramatically and is the subject of discussion and commentary.[236] At a minimum, there are enough changes in the manner and focus of today's investors to truly challenge the notion that these investors only care about financial misstatements.

As discussed earlier, when Larry Fink of BlackRock made his first declaration that investors care about more than money and corporations should too, this was significant enough deviation to make national news.[237] Here was the world's biggest investor telling corporations that they could not only be profit-centered. News articles were replete with speculation about what could

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233 *Id.* (noting that "so that the SEC would remain independent and apolitical, Congress requires that no more than three commissioners may be members of the same political party").

234 TSC Indus., Inc. v. N.way, 426 U.S. 438, 449 (1976). While the standard was first articulated within the context of a proxy statement regulated under Section 14(a) of the Securities Exchange Act, it has since been applied to Rule 10b-5 actions as well. *See, e.g.*, Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 38-39 (2011).

235 *See* Robinson, *supra* note 134, at 6.

236 *See supra* Section III.A-B and surrounding footnotes. *But see* Jebe, *supra* note 78, at 693.

237 *See supra* Section III.A.1 and surrounding footnotes.

have motivated him. In light of the trend of millennial and generation Z investors just highlighted, Fink's missives do not seem as radical as first seemed to be the case.

1. Adding long-term materiality standards discussion

Related to the reasonable investor is the issue of short-term versus long-term profitability. Taking human rights into consideration in the investment processes hinges upon the argument that human rights risks affect a company's operations and profits, and therefore its share price and return to investors. This argument depends on the investor taking a long-term approach to profitability and investing accordingly. The message from Larry Fink is that long-term profitability is the measure by which markets will ultimately determine a company's success. The Social Accounting Standards Board (SASB), an initiative to create financially material ESG standards, has also explicitly linked long-term profitability to financial materiality, stating that "information is financially material if omitting, misstating, or obscuring it could reasonably be expected to influence investment or lending decisions that users make on the basis of their assessments of short-, medium-, and long-term financial performance and enterprise value." [238] Thus, we see convergence around this viewpoint, but the open question is whether investors are integrating this viewpoint into their investment decisions.

D. Current SEC Enforcement Actions: The Evolving Nature of Fraud?

Since the SEC launched its ESG taskforce in 2021, the Division of Enforcement has brought several significant actions that could be classified as ESG-related enforcement actions.[239] Notably, many of these actions were brought outside of the SEC's specific ESG taskforce mandate and, instead, focused more on traditional notions of fraud and the reasonable investor (as discussed earlier). However, unpacking some of these lesser-known actions shows that the shifting standard of materiality and what a reasonable investor

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238 SASB, PROPOSED CHANGES TO THE SASB CONCEPTUAL FRAMEWORK & RULES OF PROCEDURE 30 (2020), https://www.sasb.org/wp-content/uploads/2021/07/PCP-package_vF.pdf; Int'l Fin. Reporting Standards Found., *SASB Standards*, https://www.ifrs.org/issued-standards/sasb-standards/ (last visited Dec. 3, 2023). SASB has been incorporated into the IFRS Foundation's International Sustainability Standards Board (ISSB), which is expected to take the same approach to materiality as SASB did.

239 U.S. Sec. & Exch. Comm'n, *Enforcement Task Force Focused on Climate and ESG Issues* (Apr. 11, 2023), https://www.sec.gov/spotlight/enforcement-task-force-focused-climate-esg-issues.

might think is important may already be happening. As such, in this section, we take note of the SEC's known (as well as lesser known) cases in this area to distill what this may bode for in terms of future 10b-5 actions, either ones brought by the SEC or ones brought by private plaintiffs.

An action under 10b-5 of the Securities Exchange Act is, at its heart, an action for fraud. As such, a key SEC enforcement strategy is to prove up the magnitude and nature of the fraud. In addition, given the fact that what the SEC must prove is significantly narrower in scope than a private plaintiff's cause of action, the SEC's case will almost always be designed to highlight the fraud at issue. As such, examining what the SEC chooses to focus on in its complaint can serve as a useful method for understanding the evolving nature of two of the three key elements that it must prove, namely: the nature of the fraud (i.e., the nature of the relevant misstatement or omission in the case of a garden-variety fraud); and why that statement is material.[240]

To that end, it seems that while the SEC may slowly be moving toward taking a position that highlights ESG-related matters as part of the fraud, in the end, the SEC is still relying on its standard playbook for determining whether an individual's or company's actions amounted to a violation of 10b-5. For instance, in 2020, the SEC brought an action against Thunderbird Power Corp., et. al.[241] In that case, the misleading statement related to parties' claims that they were developing an energy-efficient wind turbine technology; statements touting this as an alternative, cleaner, energy source were likely the reason why many investors chose to buy securities in the company.[242] This is in contrast to many of the previous cases that the SEC brought in this industry, where the nature of the fraud was unrelated to the actual industry itself.[243]

Other cases brought by the SEC in the era of the ESG taskforce seem to bear this out. For instance, the SEC currently maintains a section on its site

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240 In cases that involve other types of fraud, the SEC's tactic may be a little different. For instance, in accounting fraud, the SEC will frequently focus on the overall scheme and its intention to deceive. To that end, the SEC's case against Enron Energy Corporation still remains emblematic of these types of cases.

241 SEC v. Thunderbird Power Corp., SEC Litigation Release No. 24853 (July 14, 2020), https://www.sec.gov/litigation/litreleases/2020/lr24853.htm.

242 *Id.*

243 For instance, the SEC has traditionally brought cases against a company that implicated ESG issues (*i.e.*, because it was an oil and gas company); however, often the actual fraud itself was unrelated to the industry (for instance, fraud actions that the SEC brought because the executives lied about what they were doing with investors' funds, not because the company lied about the technology). *See, e.g.*, SEC v. Kevin T. Carney, SEC Litigation Release No. 25107 (June 2, 2021), https://www.sec.gov/litigation/litreleases/2021/lr25107.htm.

entitled "Enforcement Task Force Focused on Climate and ESG Issues."[244] To that end, the page purportedly lists a "non-exhaustive list" of matters related to the SEC's ESG priorities.[245] Significantly, of the sixteen[246] cases currently listed on the site by the SEC, ten of them pre-date the SEC's official launch of the ESG taskforce, some by over a decade.[247] Indeed, a closer examination of the older SEC cases listed shows that there was little change in the way the SEC went about showing elements of fraud under 10b-5, (perhaps leading a more cynical commentator to conclude that the only thing that changed was how the SEC marketed its enforcement actions before and after the announcement of the taskforce).

1. Vale

Despite the SEC's increased rhetoric and focus on ESG issues, by and large, the agency's modus operandi—the focal point of their investigations—remains the same. For instance, the Commission's case against Vale, is widely seen as the most notable (if not the first) case that falls within the Division of Enforcement's ESG era.[248] And yet, a closer reading of the SEC's complaint in the matter ties the underlying facts related to materiality to events and occurrences that could be justified under a breach of financial materiality—i.e., issues that would directly impact the company's revenue stream and position on the securities market, rather than something that would be considered a material impact to other stakeholders. In other words, the fact that the misleading statements and omissions happened to be in the ESG space is almost incidental to the nature of the fraud. The SEC could have made the same allegations if, for instance, the false and misleading statements were related to lies Vale told in order to falsely recognize revenue in an earlier

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[244] U.S. Sec. & Exch. Comm'n, *Enforcement Task Force Focused on Climate and ESG Issues*, *supra* note 239.

[245] *Id.*

[246] *Id.* (this particular webpage seems to be updated with cases as the Division of Enforcement brings them).

[247] *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Mutual Fund Manager for Violating Socially Responsible Investing Restrictions (July 30, 2008), https://www.sec.gov/news/press/2008/2008-157.htm [hereinafter SEC Release for Mutual Fund Manager Violation].

[248] In fact, many commentators have billed this case as the SEC's first ESG case, a claim that the Commission itself disputes. Kevin B. Muhlendorf & Martha E. Marrapese, *SEC's First ESG Enforcement Action Is Latest Move in Agency's ESG Efforts*, WILEY (May 17, 2022), https://www.wiley.law/alert-SECs-First-ESG-Enforcement-Action-Is-Latest-Move-In-Agencys-ESG-Efforts. However, certainly the SEC's case was highlighted (by both the agency and other commentators) as a prime example of the SEC's focus on ESG issues.

quarter. In both of these scenarios, the SEC would be under the aegis of 10b-5 of the Securities Exchange Act—trying to prove that the false and misleading statements are tied to a materiality standard that, in the end, is determined by what issues an *investor* (rather than a community) thinks are important.

Nonetheless, this is still an important development for materiality jurisprudence. Specifically, by enforcing an increasing number of cases that relate to ESG-related statements, the SEC is creating an iterative process that will help subsequent cases (brought by both private litigants and the SEC) regarding what issues a reasonable investor feels are important. As such, it may be that the cases that the SEC subsequently brings could fit within the definition of materiality *even if* there is no financial impact to the company or its stock.

However, a comparison of the SEC's oldest case listed on the site and the newest case listed on the site is illuminating. In many ways the two cases serve as synergistic bookends that highlight that, despite the language and the increased focus of the SEC on ESG issues, little has changed in the way that the SEC brings its cases.

2. Bookend Actions

On July 30, 2008, the SEC announced that it had charged a New Hampshire-based investment advisor with defrauding investors by "violating investment restrictions in socially responsible mutual funds."[249] According to the SEC's Order Instituting Administrative Cease and Desist Proceedings against Pax, the company (an investment advisor under the '40 Act) represented to investors that the fund would not invest in "securities issued by companies that derived revenue from the manufacture of weapons, alcohol, tobacco or gambling products."[250]

Now, nearly fifteen years later, on November 22, 2022, the SEC once again charged a company with not living up to its ESG-related standards for

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249 SEC Release for Mutual Fund Manager Violation, *supra* note 247.

250 Pax World Mgmt. Corp., Inv. Adv. Act Rel. Nos. 2761, 28344 (July 30, 2008), https://www.sec.gov/litigation/admin/2008/ia-2761.pdf. Because the entity at issue was an investment advisor under the '40 Act (rather than a publicly traded corporation) the relevant statute used by the Division of Enforcement was Section 34(b) of the Investment Company Act rather than Section 10(b) and Rule 10b-5 of the Securities Exchange Act. However, the underlying elements between the two causes of action are largely the same—they both prohibit materially misleading statements. *Id.* at 8 (discussing how Section 34(b) prohibits materially misleading statements).

investors.[251] In this instance, the SEC charged Goldman Sachs Asset Management "for [f]ailing to [f]ollow its [p]olicies and [p]rocedures [i]nvolving ESG [i]nvestments."[252] Specifically, according to the Commission's order instituting and settling the proceedings, the Commission noted that Goldman Sachs had made statements to its Fund investors stating that it would maintain an ESG "materiality matrix," in essence a checklist for ensuring that the companies in which it was investing were in keeping with the Fund's stated ESG protocol.[253] However, according to the SEC's order, the "investment teams did not routinely follow the policies and procedures and description of its ESG investment process."[254]

CONCLUSION

This article has analyzed whether the SEC's Division of Enforcement—as the country's leading financial markets enforcer— has begun broadening its focus to include BHR issues; whether it should do so, and; with what consequences.

To the first point, it seems clear that the SEC has begun to make the shift both with regulation and enforcement, towards considering ESG related issues. While it is unclear whether this trend will continue (given potentially shifting agency priorities) the agency's stated actions on this point, at a minimum have created a record aligning the SEC with an ESG-as-fraud stance that others, particularly shareholder litigants, may be able to use in the future. Clearly, the SEC has not acted in a vacuum in this regard. Indeed, the trends around shareholder litigation (at both the state and federal level) and the increased level of shareholder proposals related to ESG may already be changing crucial aspects of corporate governance in the United States. More broadly, the dual trends in other countries of (1) double materiality and (2) human rights due

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[251] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Goldman Sachs Asset Management for Failing to Follow its Policies and Procedures Involving ESG Investments (Nov. 22, 2022), https://www.sec.gov/news/press-release/2022-209.

[252] *Id.*

[253] *Id.*

[254] *Id.* at 2. While the final cause of action in this instance seemingly amounted to a lesser violation than that alleged against Pax (in that there were no specific allegations of fraud, rather the harm alleged was a failure to follow policies and protocols) the crux of case—a failure to align its practices with its representations—remains the same. In this instance, the seeming differences are not the acts in question but rather the level of scienter (and, as such, culpability) ascribed to these actions. Specifically, it would seem that the SEC's action against Goldman Sachs sounds more in negligence. In contrast, the SEC's action against Pax World sounds in deception. But, to be clear, the crux of the fund's actions remains the same.

diligence seems to show that this shift—from merely considering corporate financial impacts to considering corporate communitarian impacts—will likely remain for some time.

Moreover, while not without reservations, we do find that the SEC could serve as a crucial gap-filler in the search for corporate accountability for human rights violations. Specifically, by using tools like Rule 10b-5,[255] the SEC can tie a corporation's actions and statements to larger societal harms and, in doing so, begin changing the discussion regarding what matters to a reasonable investor—a crucial element in a corporate fraud charge—to include BHR issues. Finally, we believe that this change to the reasonable investor standard, in the absence of any currently viable alternatives, gives the SEC a vital role to play.[256]

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[255] Rule 10b-5 of the Exchange Act is the primary fraud tool used by the agency to hold corporations and other individuals liable for fraudulent misstatements and omissions. *See supra* Section I.A for more details.

[256] Further empirical research on the SEC ESG enforcement actions to date is needed in order to gain a complete picture of SEC activity in this area. Likewise, a fuller analysis of the different regulatory models for BHR that have been adopted in Europe, and how they compare and contrast to the SEC, is recommended. Lastly, a deeper dive into the SEC ESG rulemaking is another gap in the scholarship. We hope these lines of research in this important and contested field are pursued, with some urgency.