DEFINING SUSTAINABLE BUSINESS—BEYOND GREENWASHING

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I. INTRODUCTION

Consumers are increasingly prioritizing the "sustainability" of their purchases, even when products labeled as "sustainable" sometimes are more expensive than their ostensibly unsustainable counterparts.[1] Businesses have responded to this trend by promoting a wide range of fair trade and "sustainable" services and products,[2] from items packed in bio-degradable, post-consumer recyclable paper[3] to those supplied by companies seeking to reduce their carbon footprints, water use, paper consumption, and waste generation.[4]

There are not, however, agreed criteria for what makes a business "sustainable," nor is there a precise, authoritative definition of sustainability or of the products, practices, or services that the term includes and excludes.[5] This lack of a consistent, clear definition, combined with the proliferation of services and products being marketed as "sustainable," exposes businesses to accusations of "greenwashing" arising from the exploitation of ambiguity and consumer confusion.[6] An increase in consumer interest in, and awareness of, specific company

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1 *See* Nick Feinstein, Learning from Past Mistakes: Future Regulation to Prevent Greenwashing, 40 B.C. ENVTL. AFF. L. REV. 229, 230–32 (2013); Bradley D. Medcalf, Marketing Green to Grab Green: FTC More Aggressive in Pursuit of Unsubstantiated "Environmental" Marketing Claims, 21 J. ENVTL. & SUSTAINABILITY L. 435, 435–37 (2015).

2 *Cf.* Medcalf, *supra* note 1, at 436 ("Consumers want products that are environmentally friendly, and companies are trying to satiate that desire.").

3 *See* Marc Gunther, Hershey's Uses More Certified Sustainable Cocoa, But Farmers May Not Be Seeing the Benefits, THE GUARDIAN (July 6, 2015), https://www.theguardian.com/sustainable-business/2015/jul/06/hersheys-mars-ferrero-cocoa-farming-fair-trade-global-exchange; Sustainability, GOO GOO CLUSTER, https://googoo.com/about/sustainability/ (last visited Apr. 18, 2019); Trending: Cocoa Giants Embrace Sustainability, But Consumers Remain Key to Lasting Progress, SUSTAINABLE BRANDS (Dec. 12, 2017), http://www.sustainablebrands.com/news_and_views/supply_chain/sustainable_brands/trending_cocoa_giants_stride_towards_sustainability_c.

4 *See, e.g.,* AMADEUS, GLOBAL REPORT 2016 100–13 (2016), http://www.amadeus.com/msite/global-report/2016/en/pdf/amadeus-global-report-2016.pdf.

5 See Alex Davidson, What's a Sustainable Company? It's Hard to Define, WALL ST. J. (Apr. 3, 2016), https://www.wsj.com/articles/whats-a-sustainable-company-its-hard-to-define-1459735511.

6 *See, e.g.,* Feinstein, *supra* note 1, at 232, 234, 248–49, 255–56; Gerlinde Berger-Walliser & Paul Shrivastava, Beyond Compliance: Sustainable Development, Business, and Proactive Law, 46 GEO. J. INT'L L. 417, 450–51 (2015).

sustainability practices also creates an environment in which companies may alienate their consumer base by making what some might view as misleading or false claims.[7]

This article focuses on the numerous definitions of sustainability, on their similarities and differences, on their use by the business community, and on the threat that the lack of a uniform definition poses to a generally positive and important trend. In Part I, the article explores the various sustainability ranking and rating systems and the key metrics and/or performance indicators used by these systems. This section also briefly discusses the impact of this vast array of systems and definitions on key stakeholders. Part II surveys recent initiatives seeking to improve sustainability-related corporate disclosures. Finally, Part III analyzes the multitude of recent actions that individuals, organizations, and government entities have taken to promote the corporate use of sustainable practices and considers the risks and rewards for companies labeling their products and services as "sustainable." By surveying such efforts, this article endeavors to underscore the importance of a precise and unambiguous definition of "sustainability" to maximize the benefits of the sustainability trend.

II. SUSTAINABILITY—DEFINITIONS, RANKINGS, AND RATINGS

A. "Sustainability" in the Current Business Community

The concept of sustainability is an increasingly important one within the business community.[8] As more consumers seek to support, purchase, and use products and services from companies with sustainable practices, this already prevalent concept has become more popular in the marketplace.[9] From formation, companies face a variety of choices that

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7 *See* Bruce Watson, The Troubling Evolution of Corporate Greenwashing, THE GUARDIAN (Aug. 20, 2016), https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies. *Cf.* Nina Chestney, G20 Task Force Issues Framework for Climate-Related Financial Disclosure, REUTERS (June 29, 2017), https://www.reuters.com/article/us-climatechange-financial-disclosure/g20-task-force-issues-framework-for-climate-related-financial-disclosure-idUSKBN19K0JW; Green Generation: Millennials Say Sustainability is a Shopping Priority, NIELSEN (Nov. 5, 2015), http://www.nielsen.com/us/en/insights/news/2015/green-generation-millennials-say-sustainability-is-a-shopping-priority.html; Press Release, Unilever, Report Shows a Third of Consumers Prefer Sustainable Brands (May 1, 2017), https://www.unilever.com/news/press-releases/2017/report-shows-a-third-of-consumers-prefer-sustainable-brands.html.

8 Berger-Walliser & Shrivastava, *supra* note 6, at 419–20.

9 *See* Ryan Rudominer, Corporate Social Responsibility Matters: Ignore Millennials at Your Peril, HUFFINGTON POST (Feb. 5, 2016), available at [https://perma.cc/95E4-PUXZ]; Green Generation, *supra* note 7; Press Release, Unilever, *supra* note 7.

relate to sustainability,[10] but the influence of an association with "sustainability" continues well past entity creation. Many companies allocate considerable resources for consumers to perceive them as sustainable, or green, good actors.[11]

In addition to the traditional formation options such as C-corporations and Limited Liability Companies, many companies have strategically incorporated under less-traditional models that provide, or supposedly provide, them with more flexibility to consider factors other than maximizing shareholder gains, such as various sustainability concerns.[12] These new social enterprise entity forms, benefit corporations and B-corporations were developed in response to demands for more socially-responsible business entities.[13]

Further incentivizing companies to establish themselves under one of these new social enterprise entity forms is the fact that shareholders are increasingly concerned with issues related to sustainability,[14] which can bring about unique challenges for traditional corporations.[15] Specifically, there is some debate about whether directors of traditional corporations, particularly those incorporated in Delaware, may consider issues beyond maximizing shareholder wealth, such as those associated with sustainability, without breaching their fiduciary duties.[16]

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10 *See* J. Haskell Murray, Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes, 2 AM. U. BUS. L. REV. 1, 20–25 (2012); Ben Schiller, Should Your Company be a Benefit Corporation, a B Corp, or What?, FAST COMPANY (Mar. 27, 2017), https://www.fastcompany.com/3069192/should-my-company-be-a-benefit-corporation-a-b-corp-or-what.

11 *See generally* Paul Rissman & Diana Kearney, Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility, 49 ENVTL. L. REP. NEWS & ANALYSIS 10155, 10157, 10159 (2019); Spotlight on the 2016 Global 100, CORP. KNIGHTS (Jan. 20, 2016), http://www.corporateknights.com/reports/2016-global-100/spotlight-on-the-2016-global-100.

12 *See generally* Murray, *supra* note 10; Schiller, *supra* note 10.

13 Murray, *supra* note 10, at 543–55.

14 *See* EY Ctr. Bd. Matters, 2015 Proxy Season Insights: Shareholder Proposal Landscape (Ernst & Young LLP, Apr. 2015), https://www.ey.com/Publication/vwLUAssets/EY-shareholder-proposal-landscape/$FILE/EY-shareholder-proposal-landscape.pdf.

15 Murray, *supra* note 10, at 5–17.

16 *Id.* "While, as . . . Joan Heminway so succinctly notes, 'none of [the relevant] statutory frameworks regarding officer and director management or conduct mention—no less require—management action in a manner that maximizes shareholder wealth or value or compels shareholder primacy[,]' shareholder primacy and the maximization of shareholder wealth are axiomatic corporate governance objectives. Even if it has not been codified, SWM [shareholder wealth maximization] is the mantra by which most corporate lawyers and MBAs are indoctrinated and how they frame their advice to directors . . . ." Becky L. Jacobs, Milton Friedman Has A Lot to Answer For: A Response to Joshua Fershee's "Long Live Director Primacy: Social Benefit Entities and the Downfall of Social Responsibility," 19 TRANSACTIONS: TENN. J. BUS. L. 391, 392 (2017) (citations omitted). In Delaware, the courts have not minced words on their interpretation of the law. In 2010, Chancellor Chandler held that "[d]irectors of a for-profit Delaware corporation

In addition to formation choices, companies have chosen sustainability strategies that are incredibly varied, ranging from disregarding sustainability concerns entirely to devoting significant resources to sustainable transformation.[17] Solar and wind companies, energy auditors, various indices, magazines, and clothing companies have taken an all-in approach towards sustainability.[18] For example, Recreational Equipment Incorporated ("REI"), the retail chain selling outdoor-oriented clothing and gear, approaches sustainability with ambitious goals.[19] REI "operate[s] with a total view of [its] environmental impact," and its sustainability concerns do not end with the environment.[20] Rather, REI is mindful of sustainability issues "in all [its] business activities,"[21] including "everything from how [it] move[s] products" to how its employees commute and how it operates its stores and facilities.[22]

There are other industries and specific companies that, although not one-hundred percent committed, are still very proactive in their approach towards sustainability.[23] Consider the car manufacturer Bavarian Motor Works ("BMW"), which is widely recognized for its environmental initiatives.[24] The company reports that it is mindful regarding its waste management practices and that more than fifty percent of its electrical energy worldwide is produced from renewable sources.[25] BMW also has been lauded for other so-called "sustainability" endeavors such as its

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cannot . . . defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law." eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010).

17 *See, e.g.,* 2018 Stewardship Report, RECREATIONAL EQUIPMENT, INC., https://www.rei.com/stewardship; Eight Companies That Cause More Pollution than the Entire U.S., AGWEB (Mar. 8, 2017), https://www.agweb.com/article/the-8-companies-that-cause-more-pollution-than-the-entire-us-blmg; Spotlight on the 2016 Global 100, *supra* note 11.

18 *See* Jo Confino, Best Practices In Sustainability: Ford, Starbucks and More, THE GUARDIAN (Apr. 30, 2014), https://www.theguardian.com/sustainable-business/blog/best-practices-sustainability-us-corporations-ceres; Jeff Kauflin, The World's Most Sustainable Companies 2017, FORBES (Jan. 17, 2017), https://www.forbes.com/sites/jeffkauflin/2017/01/17/the-worlds-most-sustainable-companies-2017/#69c1e1b74e9d; 2017 Global 100 Results, CORP. KNIGHTS (Jan. 16, 2017), http://www.corporateknights.com/magazines/2017-global-100-issue/2017-global-100-results-14846083/.

19 2018 Stewardship Report, *supra* note 17.

20 2017 Stewardship Report, RECREATIONAL EQUIPMENT, INC., https://www.rei.com/stewardship/report/2017.pdf (last visited Apr. 29, 2019).

21 *Id.*

22 *Id.*

23 *See* Confino, *supra* note 18; Kauflin, *supra* note 18; 2017 Global 100 Results, *supra* note 18.

24 *See* Kathryn Dill, The World's Most Sustainable Companies 2016, FORBES (Jan. 22, 2016), https://www.forbes.com/sites/kathryndill/2016/01/22/the-worlds-most-sustainable-companies-2016/#143908cc2380; Brenda Bouw, Top Company Profile: BMW, CORP. KNIGHTS (Jan. 20, 2016), http://www.corporateknights.com/magazines/2016-global-100-issue/top-company-profile-bmw-14533332/.

25 Bouw, *supra* note 24.

"responsible approach to paying taxes" as well as its "low employee turnover, and low CEO-to-average-worker pay ratio."[26]

Starbucks is another company that takes a very active approach to sustainability, as evidenced by its focus on environmental issues, such as investing in renewable energy and LEED certified stores, and on social issues, such as hiring veterans and refugees.[27] The coffee giant focuses on both internal sustainability matters, e.g., improving the recyclability of its cups, and contributing to the dialogue on broader issues with a greater impact,[28] exemplified by the company's public support of the Obama Administration's EPA's Clean Power Plan.[29]

In the energy sector, coal and nuclear industry members have attempted to take a neutral public stance on the issue of sustainability. There are, however, some sector members that appear completely deaf to public sustainability concerns.[30] The fossil fuel industry and its products accounted for over ninety percent of global industrial greenhouse gases in 2015;[31] more than fifty percent of global industrial emissions since anthropogenic climate change was officially recognized in 1988 have been traced to just twenty-five fossil fuel companies.[32]

B. Variations in the Definition of Sustainability

Given that sustainable business practices are in vogue and that companies, large and small, tout various business practices as "sustainable,"[33] what, then, is a "sustainable" business practice? In the business community, there is no universally-accepted definition of "sustainability" or of a "sustainable business practice."[34] Instead, there

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26 Dill, *supra* note 24.

27 *See* STARBUCKS, GLOBAL SOCIAL IMPACT 2017 PERFORMANCE REPORT 3–21 (June 2018), https://globalassets.starbucks.com/assets/8c1f8c07efde407e9d48bfaf518c0b45.pdf.

28 *Id.* at 3–9, 12–18, 21, 23.

29 *See* Marc Gunther, Corporate America's Position on the EPA's Clean Power Act, THE GUARDIAN (Apr. 2, 2015), https://www.theguardian.com/sustainable-business/2015/apr/02/corporate-america-climate-change-position-epa.

30 *See* Paul Barrett & Matthew Philips, Can ExxonMobil Be Found Liable for Misleading the Public on Climate Change?, BLOOMBERG (Sept. 7, 2016), https://www.bloomberg.com/news/articles/2016-09-07/will-exxonmobil-have-to-pay-for-misleading-the-public-on-climate-change; Jessica Shankleman, Peabody Strikes Deal with New York Attorney General over Climate Risk Filings, THE GUARDIAN (Nov. 12, 2015), https://www.theguardian.com/environment/2015/nov/12/peabody-strikes-deal-with-new-york-attorney-general-over-climate-risk-filings.

31 PAUL GRIFFIN, CDP, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 2017, at 7 (July 2017).

32 *Id.* at 8.

33 *See* Kurt Strasser, Business Environmentalism: Good Works and Greenwash, 42 ENVTL. L. REP. NEWS & ANALYSIS 10216, 10218–21.

34 *See* Berger-Walliser & Shrivastava, *supra* note 6, at 422.

are numerous rankings and rating systems that measure corporate environmental, social, and governance ("ESG") performance, the "triple bottom line," or corporate social responsibility ("CSR") that purport to set sustainability standards.[35] Yet the sheer volume of definitions, rankings, and rating systems complicates any attempt to discern uniform metrics.[36] This section provides an overview of the factors considered in sustainability rating and ranking systems as well as the businesses and products evaluated under those systems, and it briefly summarizes some of the efforts to consolidate and streamline the many systems.

1. Variability of Factors Considered When Defining Sustainability

In general, sustainability comprises five dimensions: environmental, employment, social, financial, and governance. One of the primary distinctions among the competing definitions of sustainability is whether the term encompasses all five of these dimensions; whether it measures some partial combination of the five; or alternatively, whether it addresses only one of the five.[37] Because these five performance indicators reflect different concerns, the differences among these competing definitions are vast, making comparisons difficult.[38] Although some may argue that the term derives power and creativity from its very ambiguity, allowing it to evolve and adapt, consumers, investors, and the public easily may be confused as to what a designation of sustainability truly denotes.[39]

Moreover, many of the most popular and easily identifiable sustainability designations consider only one of the five performance indicators. On occasion, sustainability may even refer to a specific aspect of a singular dimension.[40] Yet many communications that publicize the "sustainable" designation do not clarify its narrow focus, and the

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35 *See* Davidson, *supra* note 5; Certification, FOREST STEWARDSHIP COUNCIL, https://us.fsc.org/en-us/certification (last visited Apr. 18, 2019); Energy Star Overview, ENERGY STAR, https://www.energystar.gov/about (last visited Apr. 18, 2019); Key Performance Indicators, CORP. KNIGHTS (Jan. 22, 2014), http://www.corporateknights.com/reports/2015-global-100/key-performance-indicators/; LEED Is Green Building, U.S. GREEN BUILDING COUNCIL, https://new.usgbc.org/leed (last visited Apr. 18, 2019); Newsweek Green Rankings 2017 Methodology, NEWSWEEK (Dec. 7, 2017), http://www.newsweek.com/newsweek-green-rankings-2017-methodology-739761; *see also* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1997).

36 Davidson, *supra* note 5.

37 *Id.*

38 *Id.*

39 *Id.*

40 *See* Energy Star Overview, *supra* note 35; Key Performance Indicators, *supra* note 35; LEED Is Green Building, *supra* note 35; Newsweek Green Rankings 2017 Methodology, *supra* note 35.

designation itself does not necessarily mean that all of the company's practices are sustainable.[41]

Several specific examples illustrate the diversity of sustainability criteria utilized by the various external rating and indices. The first, the Global 100, is compiled by Canadian-based publisher and investment research group Corporate Knights and defines sustainability comprehensively, measuring multiple key performance indicators ("KPIs").[42] Its quantitative analysis results in a list that ranks the world's most sustainable companies by using a quantitative methodology comprised of KPIs related to environmental sustainability, i.e., energy and waste productivity, as well as those pertaining to governance sustainability, i.e., leadership diversity, employee turnover, safety performance, and CEO-employee pay ratio.[43] The Global 100 also measures the financial sustainably of companies by examining KPIs such as the amount of tax paid and the performance of the company's pension plan.[44]

On the other end of the scale, *Newsweek*'s annual Green Rankings considers only environmental indicators.[45] Specifically, the KPIs include energy productivity, greenhouse gas emissions, and the percentage of a company's revenue that is derived from "green" business.[46] *Newsweek*'s assessment also evaluates whether a company maintains a board-equivalent committee dedicated to the company's environmental sustainability.[47] Notably absent are any KPIs related to social or governance concerns not associated with the environment.[48]

Energy Star is another system that is even more specifically focused.[49] Backed by the U.S. Environmental Protection Agency ("EPA"), Energy Star is a designation that indicates an individual product, home, industrial plant, company, or organization uses energy efficiently.[50] Although there

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41 *Id.*

42 About Us, CORP. KNIGHTS, http://www.corporateknights.com/us/about-us/ (last visited Mar. 11, 2019).

43 *See* Key Performance Indicators, *supra* note 35.

44 *Id.*

45 Newsweek Green Rankings 2017 Methodology, *supra* note 35.

46 *See id.*

47 *See id.*

48 *Id.*

49 *See* Clothes Dryers Key Product Criteria, ENERGY STAR, https://www.energystar.gov/products/appliances/clothes_dryers/key_product_criteria (last visited Apr. 18, 2019); Energy Star Overview, *supra* note 35; Product Specification Development Process Description, ENERGY STAR, https://www.energystar.gov/partner_resources/product_specification_development_process; Televisions Key Product Criteria, ENERGY STAR, https://www.energystar.gov/products/electronics/televisions/key_product_criteria.i (last visited Apr. 18, 2019).

50 Energy Star Overview, *supra* note 35.

is some variance among products, all of the metrics used by the EPA to determine whether a product merits the designation relate to the product's energy consumption.[51] For example, a clothes dryer must have a maximum cycle time of eighty minutes to receive the Energy Star designation, and a television must consume less than 0.51 watts in standby mode.[52]

2. Variability of Businesses and Products

Sustainability performance systems also differ according to the extensive universe of products and businesses that they evaluate. For example, the U.S. Green Building Council's Leadership in Energy and Environmental Design ("LEED") offers green building certifications for "all building, community and home project types" and claims to be the most widely used sustainability rating system of its type in the world.[53] A LEED-certified building complies with all of the requirements for its "type," including requirements related to design, material, construction, and other characteristics of the building or its surrounding environment.[54] For example, points accrue for access to quality transit, for bicycle facilities, and for rainwater management systems.[55]

Consider also the Forest Stewardship Council, which certifies that specific paper-based products are sourced from forests that are "responsibly managed,"[56] applying a set of general principles and specific criteria with which forests around the world must comply to qualify for and maintain certification.[57] These social and environmental principles include the recognition of rights and access for indigenous peoples[58] and a requirement that a forest's managing organization maintain the "biological diversity and its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and, by so doing, maintain the ecological functions and the integrity of the forest."[59]

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51 *Id.*

52 Clothes Dryers Key Product Criteria, *supra* note 49; Televisions Key Product Criteria, *supra* note 49.

53 LEED Is Green Building, *supra* note 35.

54 *See* Credits, U.S. GREEN BUILDING COUNCIL, https://www.usgbc.org/credits (last visited Apr. 18, 2019); Guide to LEED Certification: Commercial, U.S. GREEN BUILDING COUNCIL (Sept. 25, 2017), https://new.usgbc.org/cert-guide/commercial; LEED Is Green Building, *supra* note 35.

55 *See* Credits, *supra* note 54.

56 Certification, FOREST STEWARDSHIP COUNCIL, *supra* note 35.

57 Mission and Vision, FOREST STEWARDSHIP COUNCIL, https://us.fsc.org/en-us/what-we-do/mission-and-vision (last visited Apr. 18, 2019).

58 *Id.*

59 *Id.*

And it is not only consumer products, buildings, and forests that receive designations related to sustainable business practices.[60] Institutional investors also compete for and receive sustainability-related certifications.[61] There are several widely-publicized rankings and ratings of institutional investors that analyze the sustainability of each institution's investments, the climate and/or environmental risk exposure of those investments, and the institutional response to such risk.[62] For example, the Asset Owners Disclosure Project ("AODP") analyzes and ranks the five hundred largest institutional investors globally with regard to each investor's "disclosure and management of climate risk."[63] More specifically, this ranking is based on KPIs such as the "[d]egree of integration of climate risk principles in the [organization's] policies and processes[,]" the "variety and effectiveness of tools and approaches used to evaluate and manage climate change related financial risks and opportunities[,]" and the "[k]ey metrics used to measure, monitor and compare portfolio climate risk management performance."[64] Similarly, Morningstar and Morgan Stanley Capital International have each developed a separate rating system of mutual funds based on each fund's particular exposure to and management of risks caused by ESG issues.[65] Although both of these rating systems consider risks beyond those environmental, they are concerned only with mutual funds sustaining a return on investment.[66]

To improve clarity regarding the definitions used by the various ranking and rating systems as well as to improve these systems' transparency, efforts have been made to "rate the raters." [67] These

[60] *See* Davidson, *supra* note 5; ASSET OWNERS DISCLOSURE PROJECT, GLOBAL CLIMATE INDEX 2017 1, 2, 73–74 (Apr. 23, 2017), http://aodproject.net/wp-content/uploads/2017/04/AODP-GLOBAL-INDEX-REPORT-2017_FINAL_VIEW.pdf; Morningstar Sustainability Rating, MORNINGSTAR (Aug. 24, 2016), http://news.morningstar.com/articlenet/article.aspx?id=745467; MSCI, MSCI ESG RATINGS 1, 5–6 (July 19, 2018), https://www.msci.com/documents/1296102/1636401/MSCI+ESG+Rating+Brochure-V3.pdf.

[61] *See* ASSET OWNERS DISCLOSURE PROJECT, *supra* note 60, at 1, 2, 73–74; Morningstar Sustainability Rating, *supra* note 60.

[62] *See* ASSET OWNERS DISCLOSURE PROJECT, *supra* note 60, at 1, 2, 73–74; Morningstar Sustainability Rating, *supra* note 60.

[63] ASSET OWNERS DISCLOSURE PROJECT, *supra* note 60, at 2.

[64] *Id*. at 73.

[65] *See* Davidson, *supra* note 5; Morningstar Sustainability Rating, *supra* note 60; MSCI, supra note 60, at 1, 5–6.

[66] Morningstar Sustainability Rating, *supra* note 60; MSCI, *supra* note 60, at 1, 5–6.

[67] Michael Sadowski, What is the Value of Corporate Sustainability Ratings?, THE GUARDIAN (Sept. 11, 2012), https://www.theguardian.com/sustainable-business/blog/value-corporate-sustainability-ratings-rankings (describing SustainAbility's Rate the Rater research initiative). The Global Initiative for Sustainability Ratings ("GISR"), a co-venture of Ceres and the Tellus Institute that appears to be defunct, was another "rate the rater." *See* GISR, SUSTAINABILITY RATINGS STANDARD COMPONENT 1: PRINCIPLES 1, 17 (Dec. 2013), available at

analyses seek to evaluate quality, effectiveness, and impact and to provide guidance to corporations, investors, and consumers overwhelmed by the hundreds of corporate sustainability rating and ranking tools and standard-setting organizations world-wide.

The above examples are certainly not exhaustive of the profusion of definitions, rankings, ratings, and indices.[68] Clearly, there are various definitions of sustainability, and many of these definitions focus on completely different performance indicators.[69] While these tools provide companies with numerous opportunities to tout a wide variety of sustainable products and practices, they also increase opportunities for sophisticated greenwashing, e.g., claims that may be confusing and misleading to consumers rather than explicitly fraudulent.[70]

C. The Impact of Varying Definitions on Stakeholders

The proliferation of sustainability rankings and ratings and the vast differences among them exacerbate the potential that this definitional diversity has to create confusion for consumers, investors, and the general public regarding the scope of the sustainability concept.[71] For example, a study conducted by Nielsen Holdings Inc. of over thirty-thousand people in approximately sixty countries indicates that many people view sustainability as comprising a combination of sustainable environmental, social, employment, and governance practices.[72] However, many of the definitions, rankings, and ratings of sustainability do not require a company to take such broad and in-depth actions to receive a "certification" of sustainability."[73] A company could, for instance, conceivably receive the designation of the most sustainable company in

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https://www.db.com/cr/en/docs/gisr-component1-principles-16dec13.pdf. GISR did not itself produce rankings or ratings, but rather accredited the various corporate sustainability ratings, rankings, and indices, such as the ones discussed in this article, on the basis of their alignment with GISR's Principles, Issues, and Indicators. *Id.* at 17. GISR's principles include transparency, impartiality, inclusiveness, assurability, materiality, comprehensiveness, long-term horizon, balance, and comparability. *Id.* at 9.

68 *See*, e.g., Energy Star Overview, *supra* note 35; ASSET OWNERS DISCLOSURE PROJECT, *supra* note 60, at 2, 74–76; Key Performance Indicators, *supra* note 35; LEED Is Green Building, *supra* note 35; Newsweek Green Rankings 2017 Methodology, *supra* note 35.

69 Compare LEED Is Green Building, *supra* note 35 with Newsweek Green Rankings 2017 Methodology, *supra* note 35.

70 Chris MacDonald, Sustainability Rankings, The Global 100, and Greenwashing, BUS. ETHICS BLOG, (Feb. 1, 2011), https://businessethicsblog.com/2011/02/01/sustainability-global-100-greenwashing/.

71 *Id.*

72 Green Generation, *supra* note 7.

73 *See* Energy Star Overview, *supra* note 35; ASSET OWNERS DISCLOSURE PROJECT, *supra* note 60, at 2; Key Performance Indicators, *supra* note 35; LEED Is Green Building, *supra* note 35; Newsweek Green Rankings 2017 Methodology, *supra* note 35.

the world from Newsweek's Green Rankings while maintaining an unsafe work environment, compensating employees with low wages, and refusing to hire qualified diverse people in positions of leadership.[74]

Whether intentional or not, this confusion provides companies with an opportunity to promote their supposed sustainable practices and products while not always meeting consumer or investor expectations.[75] Although not necessarily indicative of the practices of all companies, one study regarding sustainability marketing found that company claims of sustainability are inaccurate on a regular basis.[76] Specifically, this study reported that almost all of the environmental claims made about the more-than-1,000 products investigated were some form of greenwashing, i.e., they were not supported by actual sustainable practices, were ambiguous, or were not specific enough to verify.[77] Additionally, even if a company is accurate in promoting its sustainability pertaining to one performance indicator, consumers, investors, and the general public may perceive the company's practices to be more extensive and more environmentally or socially responsible than those actually maintained due to the breadth and variability of definitions among rankings.[78]

While companies are not defining the term or developing the rating systems,[79] it may appear disingenuous to exploit consumer perceptions and confusion by using ambiguously defined "sustainable" marketing claims.[80] This possibility should concern the business community as there has been a marked increase in the willingness of governmental agencies, consumers, investors, and the general public to take action against companies that make misleading claims regarding the sustainability of their business practices or products.[81] There are numerous examples of

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74 *See* Newsweek Green Rankings 2017 Methodology, *supra* note 35.

75 *See* Eco-Friendly Product Claims Often Misleading, NPR (Nov. 30, 2007), https://www.npr.org/templates/story/story.php?storyId=16754919.

76 *See* TERRACHOICE ENVTL. MARKETING INC., THE 'SIX SINS OF GREENWASHING™' 1, 2 (Nov. 2007), http://sinsofgreenwashing.com/index6b90.pdf.

77 *Id.*

78 *Id.* This situation is analogous to the greenwashing Sin of the Hidden Trade-Off, which is committed by implying that a product is "green" based on a single environmental attribute while ignoring other, sometimes more significant qualities that might impact the environment negatively.

79 *See* Energy Star Overview, *supra* note 35; ASSET OWNERS DISCLOSURE PROJECT, *supra* note 60, at 2; Key Performance Indicators, *supra* note 35; LEED Is Green Building, *supra* note 35; Newsweek Green Rankings 2017 Methodology, *supra* note 35.

80 *See* generally Feinstein, *supra* note 1.

81 *See, e.g.,* Taylor Telford, SEC Sues Volkswagen, Alleging It Misled Investors in Emissions Scandal, WASH. POST (Mar. 15, 2019), https://www.washingtonpost.com/business/2019/03/15/sec-sues-volkswagen-alleging-it-misled-investors-emissions-scandal/?noredirect=on&utm_term=.568f9024eab7; Damian Carrington & Emma Howard, Institutions Worth $2.6 Trillion Have Now Pulled Investments Out of Fossil Fuels, THE GUARDIAN (Sept. 22, 2015), https://www.theguardian.com/environment/2015/sep/22/leonardo-dicaprio-joins-

this trend at both the federal and state level, from greenwashing claims to those involving environmental catastrophes. In one federal example pertinent to greenwashing, the Federal Trade Commission took action against K-Mart and others for making false and unsubstantiated statements by labeling and marketing of paper products as "biodegradable."[82] States also pursue deceptive environmental claims,[83] some pursuant to state laws specifically regulating "green" marketing claims that make improper use of terms associated with the environment, such as biodegradable, compostable, or recyclable.[84]

Private citizens too seek to punish corporate greenwashing or unsustainable activity. One example is a class action suit in California

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26tn-fossil-fuel-divestment-movement; Companies Pay Out More Than £1.5m For Breaking Environment Laws, THE GUARDIAN (Jan. 30, 2017), https://www.theguardian.com/environment/2017/jan/30/companies-pay-out-more-than-15m-for-breaking-environment-laws; Green Generation, *supra* note 7; Press Release, U.S. Dep't of Justice, U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill (Oct. 5, 2015) https://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater.

82 In the Matter of Kmart Corp., Order, Docket No. C-4263, 2009 WL 2189691, at *3 (F.T.C. July 15, 2009); *see also* In the Matter of Kmart Corp., Complaint, Docket No. C-4263, 2009 WL 2189691, at *1 (F.T.C. July 15, 2009); In the Matter of Tender Corp., Complaint, Docket No. C-4261, 2009 WL 2189692 (F.T.C. July 13, 2009); In the Matter of Dyna-E Int'l, Inc., Complaint, Docket No. 9336, 2009 WL 2810351 (F.T.C. May 20, 2009). These matters resulted in a consent agreement that barred them from making deceptive biodegradable claims and required them to have competent and reliable evidence to support their environmental product claims. Pursuant to Section 5 of the Federal Trade Commission Act, the FTC is authorized to take enforcement action against deceptive claims, which may result in orders prohibiting deceptive advertising and marketing and in fines if those orders are violated. 15 U.S.C. § 45 (2018). The FTC's Green Guides, first issued in 1992 and revised in 1996, 1998, and 2012, describe the types of environmental claims the FTC may or may not find deceptive under Section 5. FTC Guides for the use of Environmental Marketing Claims, 16 C.F.R. Pt. 260 (2012) ("Green Guides").

83 *See* Complaint, California v. Enso Plastics, Case No. 30-2011-00518091-CU-MC-CJC, 2011 WL 5103052 (Cal. Super. Ct. Oct. 26, 2011) (filed pursuant to the California Business and Professions Code, which prohibits untruthful, deceptive, or misleading environmental marketing claims and the FTC's Green Guides, and resolved by settlement, *see* http://columbiaclimatelaw.com/files/2017/05/Enso-Plastic-Settlement.pdf). As this case illustrates, states also have consumer protection statutes, commonly referred to as "Little FTC Acts." Many of these supplement the FTC Act by providing a private cause of action, a vehicle not available in the federal statute. Henry N. Butler & Joshua D. Wright, Are State Consumer Protection Acts Really Little-FTC Acts?, 63 FLA. L. REV. 163, 163, 173–76 (2011).

84 *See, e.g.*, Cal. Bus. & Prof. Code §§ 17508.5, 17580; Ind. Code Ann. § 24-5-17; N.Y. Comp. Codes R. & Reg., Tit. 6, §§ 368.1–368.6; R.I. Gen. Law § 6-13.3-2. There are examples of state action even before the promulgation of specific statutes, e.g., Minnesota and six other states investigated whether Mobil Chemical Corp.'s Hefty degradable bag claims were deceptive. The bags, however, were photodegradable, requiring sustained direct sunlight for disintegration, and, accordingly, Mobil settled its claims and stopped using the degradable label on the bags because of the confusion over the meaning of the term. Mobil Settles on Hefty Bags, N.Y. TIMES, June 28, 1991, at D4; *see also* Carol Jouzaitis, Mobil to Drop 'Degradable' Claim on Bags, CHI. TRIB. (Mar. 30, 1990), http://articles.chicagotribune.com/1990-03-30/business/9001260345_1_degradable-plasticsmobil-officials-hefty.

against S.C. Johnson & Son, Inc. ("SCJ"), the manufacturer of Windex.[85] Here, the plaintiff alleged that the "Greenlist" seal of approval on the Windex packaging was deceptively designed to look like a third-party seal of approval when, in fact, SCJ had actually created the seal and placed it on a product that was not environmentally friendly.[86] In another example, a consumer survived a motion to dismiss claims involving allegations that several cosmetic companies defrauded American consumers by marketing and advertising their products as being free from animal testing.[87]

It is the disasters, however, that garner the headlines, e.g., news of the $ 20.8 billion Deepwater Horizon settlement.[88] The Deepwater Horizon spill and BP's actions in the aftermath starkly contrasted with the eco-friendly image that the company intended to project in its 'Beyond Petroleum' advertising campaign.[89] In the lawsuit, the federal government, five Gulf states—Alabama, Florida, Louisiana, Mississippi, and Texas—and local governments resolved their civil claims against BP under the Clean Water Act, their natural resource damage claims under the Oil Pollution Act, and their claims for economic losses arising from the offshore well blowout that resulted in an environmentally-catastrophic oil spill in the Gulf of Mexico.[90] These examples demonstrate that companies making vague, misleading, or fraudulent claims regarding sustainable products or practices or that engage in unsustainable activities may experience negative, consequential backlash.[91]

85 Koh v. S.C. Johnson & Son, Inc., C–09–00927 RMW, 2010 WL 94265, at *3 (N.D. Cal Jan. 6, 2010).

86 *Id.*

87 Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1221 (C.D. Cal. 2012).

88 Press Release, U.S. Dept. of Justice, *supra* note 81.

89 *Cf.* Peter D. Hart & Dan McGinn, Advice for BP's Reputation Crisis, WALL ST. J., May 27, 2010, at A19.

90 *Id.*

91 Lawsuits and administrative actions are not the only threats to the reputation of a business posed by greenwashing claims. *See*, *e.g.*, SAY NO TO PALM OIL, http://www.saynotopalmoil.com (last visited August 23, 2018). As one commentator notes, "Social media tools further enable the aggregation of individual views into a global force for change . . . .Likewise, every person with a smartphone is a potential watchdog on environmental misbehavior—positioned to capture with a picture or video pollution threats. Companies (as well as governments and individuals) have come to recognize that such videos may go viral—creating a whole new structure of discipline against those whose pollution or resource consumption violates community standards." Daniel C. Esty, Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability, 47 ENVTL. L. 1, 52 (2017) (citations omitted).

III. THE RISKS AND REWARDS OF SUSTAINABILITY

Environmental advocates, green-oriented non-profit organizations, conservationists, and others have long hoped that the public-at-large would take action against companies with unsustainable business practices.[92] While for the last several decades, these hopes inspired little but aspirations, individuals, organizations, and government entities now are seeking to hold corporations accountable for greenwashing and for the social and environmental consequences of their operations.[93]

This increased willingness to act is exemplified in various forms of activity.[94] Organizations like the Task Force on Climate-Related Financial Disclosures ("TCFD") are advocating for and implementing standardized and comparable sustainability reporting guidelines for companies.[95] Investors, at both the individual and institutional levels, are divesting large sums of capital from companies that maintain unsustainable practices.[96] Similarly, financial institutions are refusing to fund unsustainable projects and companies and are creating financial products linked to sustainability metrics to meet increased investor demand for such investments.[97] Additionally, shareholders are submitting record numbers of proxy proposals that pertain to sustainability

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92 *See, e.g.*, 10 Ways People Power Can Change the World, MOBLAB, https://mobilisationlab.org/resources/10-ways-people-power-can-change-the-world/ (last visited Apr. 29, 2019).

93 *See generally* Feinstein, *supra* note 1. *See also* Brian V. Breheny et al., Considerations for the 2018 Proxy Season: Part 3, LAW360 (Jan. 12, 2018), https://www.law360.com/articles/1000617/considerations-for-the-2018-proxy-season-part-3; Carrington & Howard, *supra* note 81; Institutions Worth $2.6 Trillion Have Now Pulled Investments Out of Fossil Fuels, *supra* note 81; Companies Pay Out More Than £1.5m For Breaking Environment Laws, *supra* note 81; Green Generation, *supra* note 7; Press Release, U.S. Dep't of Justice, *supra* note 81.

94 *See, e.g.*, Breheny et al., *supra* note 93; Carrington & Howard, *supra* note 81; Institutions Worth $2.6 Trillion Have Now Pulled Investments Out of Fossil Fuels, *supra* note 81.

95 *See* Chestney, *supra* note 7; Huw Jones, Global Regulators Eye Climate Risk Disclosure For Listed Companies, REUTERS (Apr. 1, 2016), https://www.reuters.com/article/us-g20-climatechange-accounts/global-regulators-eye-climate-risk-disclosure-for-listed-companies-idUSKCN0WY4Y9; Press Release, Joe Perry, Financial Stability Board, Task Force Publishes Recommendations On Climate-Related Financial Disclosures (June 29, 2017), http://www.fsb.org/2017/06/task-force-publishes-recommendations-on-climate-related-financial-disclosures/.

96 *See* Carrington & Howard, *supra* note 81.

97 *See* Sarah Landrum, Why Millennials Care About Social Impact Investing, FORBES (Nov. 4, 2016), https://www.forbes.com/sites/sarahlandrum/2016/11/04/why-millennials-care-about-social-impact-investing/#5368827a59c0; George Serafeim, Can Index Funds Be a Force for Sustainable Capitalism?, HARV. BUS. REV. (Dec. 7, 2017), https://hbr.org/2017/12/can-index-funds-be-a-force-for-sustainable-capitalism; Taylor Tepper, How to Be a Socially Conscious Investor in the Trump Era, TIME (June 28, 2017), http://time.com/money/4273556/trump-esg-environment-socially-responsible/; FTSE4Good Index Series, FTSE RUSSELL, http://www.ftse.com/products/indices/FTSE4Good (last visited Apr. 13, 2019).

concerns.[98] While the Department of Labor is cautioning ERISA fiduciaries against putting ESG factors ahead of economic interests of a retirement plan, it acknowledges that a "prudently selected, well-managed and properly diversified ESG-themed investment alternative could be added to the available investment options on a 401(k) plan platform" consistent with fiduciaries' responsibilities.[99] Finally, various government entities have pursued several high-profile criminal and civil cases due to the unsustainable business practices of several prominent companies.[100]

As a result of the increasing activity surrounding sustainable business practices, companies face a multitude of risks and rewards regarding these issues.[101] The U.S. government's criminal investigation of BP for its conduct relating to the Deepwater Horizon explosion, oil spill, and response is evidence of one of those risks,[102] as is the related civil fine, the largest ever of its kind, meted out by the government to BP for the injuries the spill caused to the environment.[103] There is also great risk for companies that claim to engage in, but that do not actually maintain, sustainable practices as consumers are increasingly informed about measures and indicators of sustainability.[104] Individuals, organizations,

98 *See* EY Ctr. Bd. Matters, *supra* note 14.

99 *See* U.S. Dep't of Labor, Field Assistance Bulletin (FAB) 2018-01 (Apr. 23, 2018). *But see* Megan K. Jackson & Keith L. Johnson, Application of Fiduciary Duty to Sustainable Investment Practices, REINHART LAW (Sept. 13, 2016), https://www.reinhartlaw.com/knowledge/application-of-fiduciary-duty-to-sustainable-investment-practices/.

100 *See* Susan Heavey et al., U.S. Says BP to Pay $20 Billion In Fines For 2010 Oil Spill, REUTERS (Oct. 5, 2015), https://www.reuters.com/article/us-bp-usa/u-s-says-bp-to-pay-20-billion-in-fines-for-2010-oil-spill-idUSKCN0RZ14A2015100; Valerie Volcovici & Sarah N. Lynch, Probe of Exxon's Climate Change Disclosures Expands, REUTERS (Mar. 29, 2016), https://www.reuters.com/article/us-massachusetts-climatechange-exxon-mob/probe-of-exxons-climate-change-disclosures-expands-idUSKCN0WV24K; Superfund: CERCLA Overview, EPA (June 4, 2018), https://www.epa.gov/superfund/superfund-cercla-overview.

101 *See* Breheny et al., *supra* note 93; Carrington & Howard, *supra* note 81; Companies Pay Out More Than £1.5m For Breaking Environment Laws, *supra* note 81; Green Generation, *supra* note 7; Press Release, U.S. Dep't of Justice, *supra* note 81.

102 Guilty Plea Agreement, United States v. BP Expl. & Prod., NO. 2:12-cr-292 (E.D. La. Nov. 15, 2012), ECF No. 2. As part of the agreement, BP agreed to pay $4.5 billion in fines and other penalties and to plead guilty to 14 criminal charges related to the rig explosion that resulted in eleven deaths and in an unprecedented oil spill in the Gulf of Mexico. *Id.* para. 4; *see also* Clifford Krauss & John Schwartz, BP Will Plead Guilty and Pay Over $4 Billion, N.Y. TIMES (Nov. 15, 2012), https://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html.

103 Press Release, U.S. Dep't of Justice, *supra* note 81. The total value of BP's civil settlement with the federal, state, and local plaintiffs arising from Deepwater Horizon disaster was valued at $20.8 billion. Claimed to be "the largest settlement with a single entity in the [Justice Department's] history." *Id.* In addition, BP also agreed to pay the Securities and Exchange Commission $525 million to settle civil charges regarding its allegedly misleading statements to investors about the rate of oil flow from the well. *See* Krauss & Schwartz, *supra* note 102.

104 *See* Charles E. Merrill, The SEC Revisits Sustainability: Will Sustainability Reporting Become Mandatory for Publicly-Traded U.S. Corporations?, LEXOLOGY (Oct. 7, 2016),

and government entities all appear to be increasingly willing to challenge companies that greenwash their practices or products.[105]

Conversely, individuals, organizations, and government entities are also willing to reward companies that engage in sustainable practices.[106] Government entities can provide lucrative tax incentives, trading credits, and other economic benefits to companies that commit to specific sustainability achievements.[107] Moreover, companies conducting sustainable business will often see increases in consumer demand for their products, increases in the amount capital investors are willing to invest, and increases in the company's overall value.[108] The following will provide specific examples of these rewards, and of the risks, confronting the business community as a result of the heightened focus on sustainability, further illustrating the importance of transparency and consistency in how the term is defined.

A. Consumer Trends

Shopping trends and consumer preferences are quite varied and change constantly. However, over the last several years, consumers have made it clear that sustainability is a top priority when deciding what products to buy.[109] This trend appears unlikely to change as Millennials and younger generations are driving the trend toward sustainability.[110]

A number of studies indicate that a majority of Millennials are extremely concerned with using their consumer power to support companies that engage in sustainable practices.[111] In fact, one recent study

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https://www.lexology.com/library/detail.aspx?g=8148a821-b3d0-4e23-b7de-55b06f9ed7da; Che Odom, Investors Want Sustainability Disclosures in SEC Overhaul, BLOOMBERG BNA (July 21, 2016), https://www.bna.com/investors-sustainability-disclosures-n73014445099/; About GRI, GRI, https://www.globalreporting.org/information/about-gri/Pages/default.aspx (last visited Apr. 29, 2019).

105 *See, e.g.*, Telford, *supra* note 81; Carrington & Howard, *supra* note 81; Companies Pay Out More Than £1.5m For Breaking Environment Laws, *supra* note 81; Press Release, U.S. Dep't of Justice, *supra* note 81.

106 *See* GEORGE C. HOMSY ET AL., BINGHAMTON U., INCENTIVE ZONING: UNDERSTANDING A MARKET-BASED PLANNING TOOL 1–4 (June 2015), https://orb.binghamton.edu/cgi/viewcontent.cgi?article=1000&context=public_admin_fac; Landrum, supra note 97; George Serafeim, *supra* note 97; Taylor Tepper, *supra* note 97; EPA, 560-F-11-003, A GUIDE TO FEDERAL TAX INCENTIVES FOR BROWNFIELDS REDEVELOPMENT 1, 2–3 (Apr. 2011) [hereinafter EPA, BROWNFIELDS TAX INCENTIVES]; Mitigation Banking Factsheet, EPA (Oct. 26, 2018), https://www.epa.gov/cwa-404/mitigation-banking-factsheet; Overview of EPA's Brownfields Program, EPA (Apr. 15, 2019), https://www.epa.gov/brownfields/overview-brownfields-program.

107 *See, e.g.*, EPA, BROWNFIELDS TAX INCENTIVES, *supra* note 106.

108 *See* Green Generation, *supra* note 7.

109 *See* Rudominer, *supra* note 9; Green Generation, *supra* note 7; Press Release, Unilever, *supra* note 7.

110 Green Generation, *supra* note 7.

111 *Id.*

concluded that approximately seventy-five percent of Millennials were willing to pay more for products produced by such companies.[112] The study also reported almost identical results for generations younger than Millennials.[113] Older generations also prefer to purchase products from sustainable companies; however, those percentages are lower than those of younger generations.[114] Although the exact numbers from various studies differ somewhat, it appears that consumers prefer products from sustainable companies.[115]

Companies assert that consumer opinions are critical to "accelerating progress towards a sustainable economy[,]"[116] but they also note that it is far from clear that these opinions influence consumer purchasing behavior. As most studies explicitly caution, "[s]urvey responses are based on claimed behavior rather than actual observed behavior[,]"[117] and there are data suggesting that consumers *report* that they prefer sustainable products more often than they actually purchase them.[118] Definitional clarity could assist consumers and companies align their expectations for sustainable products and services and provide a more transparent risk/reward profile for the business community.

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112 *See* NIELSEN, THE SUSTAINABILITY IMPERATIVE: NEW INSIGHTS ON CONSUMER EXPECTATIONS 1–9 (Oct. 2015), https://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2015-reports/global-sustainability-report-oct-2015.pdf.

113 *Id.* at 9.

114 *Id.*

115 *Id.*

116 Peter Lacy, It's Complicated: Consumers, Companies and Sustainability, THE GUARDIAN (July 20, 2013), https://www.theguardian.com/sustainable-business/complicated-consumers-companies-sustainability.

117 *See* NIELSEN, *supra* note 112, at 3.

118 *See*, *e.g.*, Luna Atamian Hahn-Petersen, Opinion, Millennials Say They Care About Sustainability. So, Why Don't They Shop This Way?, BOF (Apr. 21, 2018), https://www.businessoffashion.com/articles/opinion/op-ed-millennials-say-they-care-about-sustainability-so-why-dont-they-dont-shop-this-way.

B. Regulatory Risks and Rewards

1. Risks of Unsustainability

Many government entities have the power to levy extremely onerous civil penalties[119] on companies engaging in unsustainable activities.[120] Despite the change in federal administrations, it is likely that some levels of government entities are likely to continue to impose large fines for those activities as more individuals and organizations increase their awareness and concern for sustainability issues.[121] These entities are able

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119 Many companies not only face increased pressure from consumers, shareholders, and regulatory agencies but also from an increase in criminal investigations relating to their transparency concerning the risk that their activities or products pose to the environment. *See* Volcovici & Lynch, *supra* note 100. In 2016, twenty attorneys general offices announced a joint effort to investigate several fossil fuel companies for fraud and suppression of climate science. 20 Attorneys General Launch Climate Fraud Investigation of Exxon, ECOWATCH (Mar. 30, 2016), https://www.ecowatch.com/20-attorneys-general-launch-climate-fraud-investigation-of-exxon-1882200092.html. As part of that and similar investigations, ExxonMobil ("Exxon") was scrutinized in particular as to whether the company attempted to mislead investors regarding associations between their product, greater CO2 concentrations and the climate. Volcovici & Lynch, *supra* note 100. In response to this investigation, Exxon produced a February 2018 report that ostensibly was intended to explain the potential risks posed by changes in the environment and the impact thereof on the company's success, but instead focused on decreases in global oil demand. *See* 2018 Outlook for Energy: A View to 2040, EXXONMOBIL (Feb. 2018), https://corporate.exxonmobil.com/en/Energy-and-environment/Energy-resources/Outlook-for-Energy/2018-Outlook-for-Energy-A-View-to-2040#aViewTo2040. While expressing support for the information that Exxon disclosed, critics remarked that its report contained "too many generalizations and too few specifics on how it plans to participate in a low carbon economy." New Exxon Report Is a Step Forward for Investor Disclosure on Climate Change, but Falls Short on Detail, CERES (Feb. 5, 2018), https://3blmedia.com/News/New-Exxon-Report-Step-Forward-Investor-Disclosure-Climate-Change-Falls-Short-Detail. In a separate criminal investigation, Peabody Energy ("Peabody"), the largest coal company in the world, was investigated for similar allegations by the New York Attorney General. *See* William Pentland, Peabody, N.Y. Attorney General Reach Underwhelming Settlement on Climate Change Disclosures, FORBES (Nov. 9, 2015), https://www.forbes.com/sites/williampentland/2015/11/09/coal-giant-and-new-york-attorney-general-settle-investigation-over-climate-change-disclosures/#4430835d6b9b; Shankleman, *supra* note 30. The allegations included claims that the company was publishing incorrect statements regarding financial risks to the company associated with climate change and other environmental issues, including changes in environmental law. Shankleman, *supra* note 30. Previously, Peabody had proclaimed that it could not properly predict the potential financial impact posed by these risks. *Id.* However, investigators discovered that the company had, in fact, already made predictions that strict regulations could decrease the company's U.S. revenues by over thirty percent, but Peabody had not released those findings publicly. *Id.* The eight-year investigation ended with Peabody agreeing to amend its public filings to reflect the company's predicted risk exposure from potential environmental regulation. *Id.*

120 *See* Heavey et al., *supra* note 100; Companies Pay Out More Than £1.5m For Breaking Environment Laws, *supra* note 81; Press Release, U.S. Dep't of Justice, *supra* note 81.

121 *See* Breheny et al., *supra* note 93; Carrington & Howard, *supra* note 81; Green Generation, *supra* note 7.

to impose penalties on companies through various mechanisms, including legislative actions that authorize civil fines.[122]

Consider the Deepwater Horizon oil spill that severely damaged the Gulf Coast by releasing over three million barrels of oil into the ocean; it resulted in severe financial recourse against BP, the corporate responsible party.[123] The U.S. Government alone levied a $20 billion fine—the largest civil fine paid by a company in U.S. history—against BP.[124] BP had to conduct a mass selloff of many of its most valuable assets to pay this fine and other expenses related to the spill, resulting in the company losing approximately twenty percent of its pre-spill value.[125]

Various statutes provide the government with authority to penalize companies for environmental harms. One such example is the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), enacted by the U.S. Congress in 1980 to provide the federal government with authority to respond to the release of pollutants that may harm people, companies, and the environment.[126] Through CERCLA, the federal government has the authority to establish specific clean-up requirements for waste sites that companies have abandoned or plan to abandon.[127] Additionally, this legislation allows the government to hold parties responsible for their polluting activities.[128]

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122 *See* Heavey et al., *supra* note 100; Superfund Amendments and Reauthorization Act (SARA), EPA (June 4, 2018), https://www.epa.gov/superfund/superfund-amendments-and-reauthorization-act-sara; Superfund: CERCLA Overview, *supra* note 100.

123 *See* Heavey et al., *supra* note 100; Del Quentin Wilber, How the Government Got BP To Pay the Biggest Environmental Penalty in History, L.A. TIMES (May 3, 2016), http://www.latimes.com/nation/la-na-bp-settlement-backstory-20160501-snap-story.html; Press Release, U.S. Dep't of Justice, *supra* note 81.

124 Press Release, U.S. Dep't of Justice, *supra* note 81.

125 *See* Heavey et al., *supra* note 100. Today, however, BP is thriving once more, if in a somewhat more compact form. "Since the blowout, BP has sold off $75 billion of assets to cover unprecedented government fines, private damage claims and legal bills. It has retooled facilities, ousted two top executives and been lucky with the ups and downs of oil prices. Now it is once again investing profitably in massive oil and natural gas projects, including a Caspian gas pipeline, wells offshore Egypt and the fracturing of shale gas rock formations in east Texas." Steve Mufson, The Oil Giant that was 'Forced to Shrink to Greatness,' WASH. POST (July 13, 2018), https://www.washingtonpost.com/business/economy/the-oil-giant-that-was-forced-to-shrink-to-greatness/2018/07/13/1be775e0-8159-11e8-b9a5-7e1c013f8c33_story.html?.

126 42 U.S.C. §§ 9601–9675 (2016).

127 42 U.S.C. §§ 9603(a), 9606(a) (2012). *See also* Superfund Amendments and Reauthorization Act (SARA), *supra* note 122; Superfund: CERCLA Overview, *supra* note 100.

128 42 U.S.C. §§ 9607, 9622 (2012). *See also* Superfund Amendments and Reauthorization Act (SARA), *supra* note 122.

2. Rewards for Sustainable Practices and Products

a. Tax Incentives

Government entities around the world provide tax incentives for companies to engage in particular activities related to sustainability.[129] These incentives offer financial motivation for companies to offset any increased costs from such activities by decreasing tax expenses.[130]

One example of this is the federal Brownfields Program that incentivizes the revitalization of particular areas in which development or use has been restricted by the presence of hazardous substances and pollutants.[131] Upon completing the restoration of such an area, individuals and companies can reduce their taxable income by the total cost of cleanup and restoration.[132] To further incentivize this type of redevelopment, this deduction is not spread over several years, but instead is fully deductible in the year that the expenses were incurred.[133]

The U.S. Government also provides significant incentives for companies in the renewable energy industry, including tax credits for production and investment.[134] Although there was concern that these would be cut under the Trump administration, a number of credits, including the production tax credit and investment tax credit for wind, solar, and other renewable energy resources, have been restored, retained, and even extended.[135]

b. Zoning Incentives

Many local government entities also provide favorable zoning as an incentive for companies and developers to use sustainable practices.[136] For example, although the city of Asheville, North Carolina, is barred by state legislation from mandating that buildings abide by specific

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129 *See* Brad Plumer, Tax Bill Largely Preserves Incentives for Wind and Solar Power, N.Y. TIMES (Dec. 16, 2017), https://www.nytimes.com/2017/12/16/climate/tax-bill-wind-solar.html; Valerie Volcovici, U.S. Renewable Energy Industry Relieved as Republicans Keep Tax Credits, REUTERS (Dec. 16, 2017), https://www.reuters.com/article/us-usa-tax-renewables/u-s-renewable-energy-industry-relieved-as-republicans-keep-tax-credits-idUSKBN1EA0P2. *See generally* EPA, BROWNFIELDS TAX INCENTIVES, *supra* note 106.

130 *See, e.g.*, EPA, BROWNFIELDS TAX INCENTIVES, *supra* note 106, at 1.

131 *Id.* at 1–3.

132 *Id.* at 2.

133 *Id.*

134 Plumer, *supra* note 129; Volcovici, *supra* note 129.

135 *See*, *e.g.*, Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 40409, 132 Stat. 64 (2018) (to be codified at 26 U.S.C. § 4943(g)); *see also* Tax Reform Extends Credits for Renewable Energy Companies, MOSSADAMS (Apr. 2018), https://mossadams.com/articles/2018/april/extended-tax-credits-for-renewable-energy.

136 *See* HOMSY ET AL., *supra* note 106, at 1–2.

environmental sustainability rules,[137] it provides specific and meaningful benefits to entice corporations and developers to conform to such rules voluntarily.[138] Some incentives include increased density bonuses and tax rebates for green building and/or energy standards certification.[139]

c. Development Trading Credits

Development trading credits have also become increasingly popular as awareness of sustainability issues expands among individuals, organizations, and government entities.[140] Development trading credits require that a party using an environmental resource restore, or pay to restore, an area of land, a body of water, a wetland, and/or a natural habitat that the party damaged through its use.[141] A federal and/or state agency typically regulates, oversees, and provides the restoring party with the trading credits once the regulatory body ensures that the proper environmental restoration has occurred.[142] Once a party possesses these trading credits, it may sell them to other parties, both public and private, that are engaged in any projects or developments that will negatively impact the environment in the area.[143]

C. Risks and Rewards in Financial Markets

1. The Divestment Movement[144]

Since 2012, the number of institutions that have committed to fossil fuel divestment has increased from 181 institutions and $50 billion of

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137 N.C. Gen. Stat. § 143-138(e) (2018).

138 CITY OF ASHVILLE, PLANNING & DEVELOPMENT INCENTIVES (Feb. 2014), https://www.ashevillenc.gov/civicax/filebank/blobdload.aspx?BlobID=23087.

139 *Id.*

140 James Boyd et al., Trading Cases: Is Trading Credits in Created Markets a Better Way to Reduce Pollution and Protect Natural Resources?, 37 ENVTL. SCI. & TECH., no. 11, 2003, at 217A.

141 *See* Vikram Jhawar, Understanding the Basics of Mitigation Banking, INVESTOPEDIA (Mar. 16, 2015), https://www.investopedia.com/articles/dictionary/031615/understanding-basics-mitigation-banking.asp; Miranda R. Yost & Thomas J. Mascia, Environmental Credits: The Building Blocks of a Restorative Economy, 60 VA. LAW., June/July 2011, at 36, 36–39; Partnership Agreement between USDA Nat. Resource Conservation Serv., USDOI Fish & Wildlife Serv., and the Assoc. of Fish & Wildlife Agencies 4–5 (Apr. 13, 2007), https://www.fws.gov/endangered/esa-library/pdf/Credit_Trading_MOU.pdf.

142 Yost & Mascia, *supra* note 141, at 36.

143 *Id.*

144 This is not to be confused with the Global Divestment Mobilisation, a project of the environmental nonprofit 350.org that began lobbying for divestment at the university level in the United States in 2012. *See* Divestment Went Global, GLOBAL DIVESTMENT MOBILISATION 2017, https://globaldivestmentmobilisation.org/ (last visited Feb. 27, 2019). There was in fact a "Global Divestment Mobilisation" event in May 2017 that attracted thousands of people to rallies in thirty-nine countries on six continents to support divestment from fossil fuels in favor of renewable

assets to more than 1000 institutions with approximately $8 trillion in divestment-committed assets in 2018.[145] The divestment movement is so dynamic that some have calculated that it has the potential, in association with other social movements and policy instruments, to contribute to the decarbonization of society away from a fossil-fuel based economy.[146]

All manner of institutions are making divestiture commitments, including governmental entities, health-related organizations, faith-based groups, nonprofits, foundations, educational institutions, insurance companies, and pension funds.[147] This section will describe a few of those commitments.

a. Legislative Action Regarding Divestiture

Several governmental entities have pursued and passed legislation regarding the divestment of investments in companies that maintain unsustainable practices.[148] In 2018, Ireland enacted the Fossil Fuel Divestment Bill, making it the first nation to commit to divesting public funds from fossil fuel companies.[149] The law requires the Ireland Strategic Investment Fund, valued at approximately €8.9 billion, to divest direct investments in fossil fuel undertakings and prohibits it from making future investments in the industry.[150]

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energy. Irene Banos Ruiz, Global Voices Call for Fossil Fuels Divestment, DW (May 5, 2017), https://www.dw.com/en/global-voices-call-for-fossil-fuels-divestment/a-38716716 (DW, or Deutsche Welle, is Germany's international broadcaster). 350.org was co-founded by author and environmental activist Bill McKibben, the author of The End of Nature, one of the first books about climate change accessible to a common audience. BILL MCKIBBIN, THE END OF NATURE (1989).

145 LOUISE HAZAN ET AL., FOSSIL FREE, 1000 DIVESTMENT COMMITMENTS AND COUNTING (2018), https://gofossilfree.org/wp-content/uploads/2018/12/1000divest-WEB-.pdf.

146 *See, e.g.*, Birte Ewers et al., Divestment May Burst the Carbon Bubble if Investors' Beliefs Tip to Anticipating Strong Future Climate Policy, arXiv:1902.07481 (arXiv.org, Feb 20. 2019), https://arxiv.org/pdf/1902.07481.pdf.

147 HAZEN ET AL., *supra* note 145.

148 *See* S. 28, 2015–2016 Sess. (Vt. 2015); S. 4596, 2017–2018 Reg. Sess. (N.Y. 2017); Ben Chipman, Chipman Bill Would Divest Maine From Banks Funding DAPL, ME. S. DEMOCRATS (Apr. 24, 2017), http://www.mainesenate.org/chipman-bill-divest-maine-banks-funding-dapl/; Jamie Henn, Divestment Commitments Pass the $3.4 trillion Mark at COP21: 500+ Institutions Have Now Joined the Movement, Campaigners Urge Governments to Follow Suit, 350.ORG (Dec. 2, 2015), https://350.org/cop21-divestment/; Chris Megerian, California Pension Funds To Drop Coal-Mining Companies, L.A. TIMES (Oct. 8, 2015), http://www.latimes.com/politics/la-pol-sac-california-pension-divest-coal-20150930-story.html; In the Space of Just 10 Weeks, 350.ORG (Dec. 2, 2015), http://gofossilfree.org/usa/in-the-space-of-just-10-weeks/.

149 Fossil Fuel Divestment Act 2018 (Act No. 29/2018) (Ir.), http://www.irishstatutebook.ie/eli/2018/act/29/enacted/en/print.html (amending the National Treasury Management Agency (Amendment) Act 2014).

150 *Id*. The Act defines 'fossil fuel' as "coal, oil, natural gas, peat or any derivative thereof intended for use in the production of energy by combustion[,]" and it describes a 'fossil fuel undertaking' as one that is engaged in "the exploration for or extraction or refinement of a fossil fuel where such activity accounts for 20 per cent or more of the turnover of that undertaking[.]" *Id.*

The French national legislature also has taken action encouraging investors, including individuals, government entities, and financial institutions, to cease their investment in companies related to the fossil fuel industry.[151] Numerous local French authorities, including Paris, also passed motions concerning divestment of public funds from fossil fuels.[152]

Although no federal divestiture legislation has been enacted in the United States,[153] individual U.S. states have pursued legislative action requiring or encouraging divestiture of companies with unsustainable practices.[154] In October 2015, the California state legislature passed the first piece of divestment legislation in the country, requiring its two largest public pension funds to divest from all coal-related companies.[155] California's legislation set a precedent that other states have attempted to follow. In the last three years, four states and the District of Columbia had some form of pending or enacted fossil fuel divestment legislation, most with a limited scope, i.e., Hawaii's bill singled out coal company investments.[156]

b. Voluntary Government Divestment

The onslaught of legislative action surrounding the divestiture of investments in companies maintaining unsustainable practices has resulted in voluntary divestment by many government entities, even when not required by law.[157] For example, the Caisse des Dépôts et

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151 *See* In the Space of Just 10 Weeks, *supra* note 148.

152 *Id.*

153 In September 2018, however, Senator Jeff Merkley of Oregon introduced the Retirement Investments for a Sustainable Economy (RISE) Act, the first federal-level fossil fuel divestment bill. *See* Retirement Investments for a Sustainable Economy Act of 2018, S. 3424, 115th Cong. (2018).

154 *See* S.P. 320, 128th Leg., 1st Reg. Sess. (Me. 2017); S. 4596, 2017–2018 Reg. Sess. (N.Y. 2017); S. 28, 2015–2016 Sess. (Vt. 2015); Chipman, *supra* note 148; Megerian, *supra* note 148.

155 *See* Megerian, *supra* note 148; Press Release, Betty T. Yee, Cal. St. Controller, Controller Leads CalPERS' Move to Seek Climate Change Expertise on Corporate Boards (Mar. 14, 2016), https://www.sco.ca.gov/PDF-Var/eo_pressrel_17109.pdf.

156 Bills in Maine, New York, Vermont, Massachusetts, and Hawaii were proposed, and in some cases passed, that require divestiture of state owned or controlled investments in companies maintaining unsustainable practices, primarily related to fossil fuel investments. *See* S.P. 320, 128th Leg., 1st Reg. Sess. (Me. 2017); H. 3281, 190th Gen. Ct. (Mass. 2017); S. 4596, 2017–2018 Reg. Sess. (N.Y. 2017); H.B 1511 H.D. 1, 28th Leg. (Haw. 2016); S. 28, 2015–2016 Sess. (Vt. 2015); Chipman, *supra* note 148.

157 *See* Liam Denning, Saudi Aramco Gets Some Bad News From Norway, BLOOMBERG (Nov. 16, 2017), https://www.bloomberg.com/gadfly/articles/2017-11-16/norway-sovereign-wealth-fund-sells-oil-and-gas-stocks; Toby Sterling, Update 1-Dutch Fund PFZW to Divest from High Carbon Companies, REUTERS (Nov. 17, 2015), https://www.reuters.com/article/netherlands-pension-fund-emissions/update-1-dutch-fund-pfzw-to-divest-from-high-carbon-companies-idUSL8N13C1DU20151117; About the Fund, NORGES BANK (Feb. 27, 2019),

Consignations, manager of France's public sector funds, announced in November 2018 that it would no longer invest in companies that generate more than ten percent of their business from coal.[158] In 2016, Norway's Sovereign Wealth Fund, its pension fund and the largest fund of this type in the world,[159] divested ownership in a number of companies based upon conduct-based criterion authorizing the exclusion of companies from fund investment if they pose an unacceptable risk for "acts or omissions that, on an aggregate company level, are severely harmful to the climate."[160]

Many European cities owning or controlling investments in companies that engage in unsustainable activities also have chosen to divest their funds, including Oslo and Uppsala.[161] Cities and local authorities in the United States have taken similar action.[162] In 2016, the District of Columbia divested over $6 billion of fossil fuel investments in the District's largest public pension fund, which manages the retirement funds of its employees, including police officers and teachers.[163]

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https://www.nbim.no/en/the-fund/about-the-fund; Allianz To Cut Investments in Companies Using Coal in Favour of Renewable Energy, THE GUARDIAN (Nov. 24, 2015), https://www.theguardian.com/environment/2015/nov/24/allianz-to-cut-investments-in-companies-using-coal-in-favour-of-renewable-energy; As Norway Sells Out of Oil, Suddenly Fossil Fuels Are Starting to Look Risky, THE GUARDIAN (Nov. 19, 2017), https://www.theguardian.com/business/2017/nov/19/norway-fund-sells-out-of-oil-fossil-fuels-starting-to-look-risky-norges-bank; Zahra Hirji, Washington D.C. Pension Fund Announces Full Fossil Fuel Divestment, INSIDE CLIMATE NEWS (June 6, 2016), https://insideclimatenews.org/news/06062016/washington-dc-pension-fund-announces-divestment.

158 Communiqué de Presse, Groupe Caisse des Dépôts, Climat: la Caisse des Dépôts accélère sa stratégie bas-carbone (Nov. 28, 2018), https://www.caissedesdepots.fr/sites/default/files/medias/cp_et_dp/pr_climate_committments_ok.pdf.

159 *See* About the Fund, *supra* note 157.

160 Ministry of Finance, Meld St. 21, The Management of the Government Pension Fund in 2014 Ch. 5 (2014–2015) (Norway), https://www.regjeringen.no/contentassets/48bb4314d6f14d23aff45960dc3eaace/en-gb/pdfs/stm201420150021000engpdfs.pdf; *see also* Denning, *supra* note 157; Stine Jacobsen, Norway's $863 Billion Wealth Fund Bans 52 Coal-Linked Firms, REUTERS (Apr. 14, 2016), https://uk.reuters.com/article/uk-norway-swf-coal/norways-863-billion-wealth-fund-bans-52-coal-linked-firms-idUKKCN0XB114; As Norway Sells Out of Oil, *supra* note 157.

161 *See* In the Space of Just 10 Weeks, *supra* note 148; Oslo's $9.3 Billion Pension Fund to Pull Out from Oil, Gas Firms, REUTERS (Oct. 19, 2015), https://www.reuters.com/article/norway-divestiture/oslos-9-3-bln-pension-fund-to-pull-out-from-oil-gas-firms-idUSL8N12J2LG20151019.

162 *See* Robert Steyer, NYC Issues RFP for Help with Fossil Fuel Divestment, PENSIONS & INVESTMENTS (Dec. 18, 2018), https://www.pionline.com/article/20181218/ONLINE/181219762/nyc-issues-rfp-for-help-with-fossil-fuel-divestment; Washington D.C. Pension Fund Announces Full Fossil Fuel Divestment, *supra* note 157.

163 Washington D.C. Pension Fund Announces Full Fossil Fuel Divestment, *supra* note 157.

c. Private Fund Divestment

It is not only government entities that are divesting,[164] private funds also have begun divestiture of investments in unsustainable companies. For example, two of the largest private Dutch pension funds have divested to limit their exposure to fossil fuel-related investments.[165] Allianz, one of the largest asset managers and insurance companies in the world, announced in 2015 that it would begin divesting its holdings in companies that derived more than thirty percent of their revenue from coal mining.[166] In January 2018, Lloyd's of London joined Allianz in taking a stance on coal by committing to cease investing in the coal industry.[167] Following the actions of these two large and influential insurance companies, approximately fifteen additional European insurance companies, including Aviva, Axa, and SCOR, have divested approximately $18.6 billion.[168]

Equally influential in a different sector, the Guardian Media Group ("GMG"), the owner of several media organizations such as the United Kingdom's *Guardian* and *Observer*, has committed to divesting all of its investments relating to the fossil fuel industry, explaining that the industry did not align with the values of the company.[169] The GMG, using its clout in the media, also publicly requested that the Bill and Melinda Gates Foundation and the Wellcome Trust, two of the largest and most prominent charities in the world, divest their investments in any company within the fossil fuel industry.[170]

d. Charitable Organization Divestment

Following GMG's challenge, the Bill and Melinda Gates Foundation completed a total divestiture of its investments in the fossil fuel industry

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164 *See* Sterling, *supra* note 157; Allianz To Cut Investments in Companies Using Coal in Favour of Renewable Energy, *supra* note 157.

165 *See* Sterling, *supra* note 157.

166 *See* Allianz To Cut Investments in Companies Using Coal in Favour of Renewable Energy, *supra* note 157.

167 *See* Julia Kollewe, Lloyd's of London to Divest from Coal Over Climate Change, THE GUARDIAN (Jan. 21, 2018), https://www.theguardian.com/business/2018/jan/21/lloyds-of-london-to-divest-from-coal-over-climate-change.

168 *Id.*

169 *See* Damian Carrington, Guardian Media Group to Divest Its £800m Fund from Fossil Fuels, THE GUARDIAN (Apr. 1, 2015), https://www.theguardian.com/environment/2015/apr/01/guardian-media-group-to-divest-its-800m-fund-from-fossil-fuels; Carrington & Howard, *supra* note 81; Company Overview of Guardian Media Group, BLOOMBERG, https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=3658406 (last visited Apr. 18, 2019).

170 Guardian Media Group to Divest Its £800m Fund from Fossil Fuels, *supra* note 169.

by May 2016.[171] It appears that the Wellcome Trust has not taken any action to divest its investments,[172] and, in 2015 alone, the Wellcome Trust lost approximately $200 million in its investments in the fossil fuel industry due to a sharp decline in the share prices, particularly those of mining conglomerate BHP Billiton.[173]

An influential charitable fund established by the Rockefeller family likewise announced in 2016 that it would divest from all fossil fuel-related companies.[174] Interestingly, the fund founded by members of the Rockefeller family further declared that the actions of Exxon were "morally reprehensible."[175] The decision to divest and this public declaration are exceptionally notable given that the Rockefeller family made its fortune from Standard Oil, the company which is now Exxon.[176]

Just a few final examples: in October 2017, approximately forty Catholic institutions and organizations publicized their agreement to engage in what is "the largest ever faith-based divestment from fossil fuels."[177] This followed an announcement in 2013 by the United Church of Christ that it was the first denomination "to pass a resolution endorsing both divestment from fossil fuel companies and other strategies such as shareholder activism"[178] The Episcopal Church made its announcement in 2015, stating that it was divesting its holdings of approximately $380 million in fossil fuel investments and that it was requesting its congregations and members, whose combined assets far exceed those of

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171 *See* Krista Watson, The Gates Foundation Divested from Fossil Fuels—And You Should Too, GLOBAL CITIZEN (May 26, 2016), https://www.globalcitizen.org/en/content/gates-divest-fossil-fuels/.

172 *See* Damian Carrington, Wellcome Trust Defies Campaigners to Increase Fossil Fuel Investment, THE GUARDIAN (Dec. 28, 2015), https://www.theguardian.com/environment/2015/dec/28/wellcome-trust-defies-campaigners-to-increase-investment-in-fossil-fuels.

173 Damian Carrington, Wellcome Trust Loses Millions as its Fossil Fuel Investments Plunge in Value, THE GUARDIAN (Aug. 20, 2015), https://www.theguardian.com/environment/2015/aug/20/wellcome-trust-loses-millions-as-its-fossil-fuel-investments-plunge-in-value; *see also* Carrington & Howard, *supra* note 81.

174 Rupert Neate, Rockefeller Family Charity to Withdraw All Investments in Fossil Fuel Companies, THE GUARDIAN (Mar. 23, 2016), https://www.theguardian.com/environment/2016/mar/23/rockefeller-fund-divestment-fossil-fuel-companies-oil-coal-climate-change.

175 *Id.*

176 *Id.*

177 Arthur Neslen, Catholic Church to Make Record Divestment from Fossil Fuels, THE GUARDIAN (Oct. 3, 2017), https://www.theguardian.com/environment/2017/oct/03/catholic-church-to-make-record-divestment-from-fossil-fuels.

178 *See* Divesting from Fossil Fuel Companies and Shareholder Activism, UNITED CHURCH OF CHRIST, http://www.ucc.org/divesting_from_fossil_fuel_companies_and_shareholder_activism (last visited Feb. 28, 2019).

the Church itself, to divest as well.[179] The United Church of Canada also has committed to divesting its investments in fossil fuels, as have countless other churches and faith-based organizations.[180]

e. University Divestment

Following the lead of other non-profit organizations, many universities have divested their investments in "unsustainable" companies over the last several years.[181] Notable universities such as the entire University of California system, the University of Oxford, the London School of Economics, Georgetown University, Syracuse University, Columbia University, and Dartmouth College have made commitments to divest from the fossil fuel industry.[182] In February 2018, as a result of a student-led campaign, Edinburgh University agreed to divest fossil fuel investments from its $1 billion+ endowment fund.[183] With Edinburgh University's divestiture, over sixty universities in the United Kingdom alone have committed to divest from fossil fuels.[184]

Overall, it is estimated that more than 1,000 organizations and 58,000 individuals have committed to divesting from fossil fuel companies.[185] With a total value of divested investments estimated to be approximately $8 trillion,[186] some have opined that the indirect impacts of the divestment movement are challenging the very foundation of that industry and of the carbon economy in civil society and public policy.[187] Others, however, dismiss divestiture as having very little financial impact of on the fossil fuel industry and promote engagement with corporate actors over

179 *See* Suzanne Goldenberg, Episcopal Church Votes to Divest from Fossil Fuels: 'This is a Moral Issue,' THE GUARDIAN (July 3, 2015), https://www.theguardian.com/world/2015/jul/03/episcopal-church-fossil-fuel-divestment.

180 Fram Dinshaw, United Church of Canada Cuts Ties with Big Oil, NAT'L OBSERVER (Aug. 11, 2015), https://www.nationalobserver.com/2015/08/11/news/united-church-canada-divests-fossil-fuel-assets. For a list of entities with divestment commitments, *see* 1000+ Divestment Commitments, FOSSIL FREE: DIVESTMENT, https://gofossilfree.org/divestment/commitments/ (last visited Feb. 28, 2019).

181 *See* Damian Carrington, Edinburgh University Divests from All Fossil Fuels, THE GUARDIAN (Feb. 6, 2018), https://www.theguardian.com/environment/2018/feb/06/edinburgh-university-divests-from-all-fossil-fuels; Carrington & Howard, *supra* note 81.

182 *See* Carrington & Howard, *supra* note 81; Britain's LSE to Reduce Investments in Coal, Tar Sands, REUTERS (Nov. 26, 2015), https://www.reuters.com/article/coal-divestment-britain/britains-lse-to-reduce-investments-in-coal-tar-sands-idUSL8N13L2GP20151126; Georgetown Divests from Direct Investments in Coal Companies, GEO. U. (June 4, 2015), https://www.georgetown.edu/news/sustainability-policy-regarding-investments.html.

183 *See, e.g.*, Carrington, *supra* note 181.

184 *Id.*

185 *See* 1000+ Divestment Commitments, *supra* note 180.

186 *Id.*

187 *Cf.* Ewers et al., *supra* note 146.

divestment on the grounds that divestiture puts assets into the hands of investors with less ambitious sustainability goals.[188] The next section will review just a few of the ownership strategies that activist investors are implementing to advance the cause of sustainability in sustainable and unsustainable business sectors.

2. Increasing Investment in "Sustainable" Companies

As investors have divested large amounts of capital due to the unsustainable practices of businesses, interest from investors has significantly increased in companies that operate sustainably.[189] For example, one survey conducted by Morgan Stanley found that approximately seventy-five percent of active investors and nearly ninety percent of active Millennial investors are interested in investing in companies with sustainable practices.[190] The same survey also indicated that the vast majority of active investors believe that companies engaging in sustainable business practices are less volatile, more profitable, and overall better long-term investments than their unsustainable counterparts.[191] This survey helps explain why the demand has increased for sustainable investments and why organizations are establishing a number of new sustainable investment opportunities.[192]

a. Vehicles for Direct Investment in Sustainable Companies

Many organizations have recently established or are in the process of establishing new sustainable index funds/indices to meet the growing demand.[193] As a managing director of one of the largest money managers in the world, State Street Global Advisors ("State Street"), has remarked, the company's clients are expressing concern about climate risks now

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188 *See*, *e.g.*, Jeff Tollefson, Reality Check for Fossil-Fuel Divestment, NATURE vol. 521, May 7, 2015, at 16–17; *see also* Ministry of Finance, *supra* note 160, at 41–54.

189 *See* Press Release, Morgan Stanley, Morgan Stanley Survey Finds Interest in Sustainable Investing Stronger than Ever (Aug. 9, 2017), https://www.morganstanley.com/press-releases/morgan-stanley-survey-finds-interest-in-sustainable-investing-st.

190 *Id.*

191 *Id.*

192 Landrum, *supra* note 97; Serafeim, *supra* note 97; FTSE4Good Index Series, *supra* note 97.

193 *See* Tim Gray, Funds That Can Put Your Investments on a Low-Carbon Diet, N.Y. TIMES (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/business/mutfund/mutual-funds-low-carbon.html; Fidelity Launches First Two Sustainability-Focused Index Funds, FIDELITY INV. (May 15, 2017), https://www.fidelity.com/about-fidelity/institutional-investment-management/first-two-sustainability-focused-index-funds; State Street Global Advisors Launches First S&P 500 Fossil Fuel Free ETF, ST. STREET GLOBAL ADVISORS (Dec. 2, 2015), http://newsroom.statestreet.com/press-release/corporate/state-street-global-advisors-launches-first-sp-500-fossil-fuel-free-etf.

more than ever before.[194] As a result, State Street established an exchange-traded fund that holds investments in S&P 500 companies that do not own fossil fuel reserves.[195] Likewise, in May 2017, Fidelity Investments announced the launch of two new index funds comprised entirely of companies that maintain sustainable business practices related to ESG issues.[196]

There are similar financial instruments available to investors incorporating sustainability into their investment decision-making process. For example, the FTSE4Good Index Series allows investors to invest in "companies demonstrating strong [sustainability] practices[,]" as defined by the fund, which assesses companies in which to invest.[197] Specifically, "to be included in the FTSE4Good Indexes[,] companies must: support human rights[,] . . . be making progress to become environmentally sustainable, ensure good labor standards[,] not only for their own company but for companies that supply them as well, and fight bribery and corruption."[198] Additionally, due to strong investor demand, the same financial organization offering the FTSE4Good Index Series also provides at least seven similar alternative index funds focusing on companies demonstrating strong sustainable practices.[199]

The Dow Jones Sustainability Indices ("DJSI") offer investors similar opportunities by providing several diversified index funds of sustainable companies.[200] The company behind the DJSI performs an annual evaluation of nearly four thousand companies that includes "between 80-120 industry-specific [inquiries] focusing on economic, environmental and social factors that are relevant to the companies' success."[201] An entirely separate assessment is then made concerning each company's sustainability.[202] The evaluation and the assessment are then both used to

194 State Street Global Advisors Launches First S&P 500 Fossil Fuel Free ETF, *supra* note 193.

195 *Id.*

196 *See* Fidelity Launches First Two Sustainability-Focused Index Funds, *supra* note 193.

197 FTSE4Good Index Series, *supra* note 97.

198 FTSE4Good Index Series, INVESTOPEDIA (Apr. 30, 2018), https://www.investopedia.com/terms/f/ftse4good-index.asp.

199 *Id.*

200 *See* About Us, ROBECOSAM, https://www.sustainability-indices.com/about-us/ (last visited Apr. 18, 2019); Dow Jones Sustainability World Index, INVESTOPEDIA (Mar. 16, 2018), https://www.investopedia.com/terms/d/djones-sustainability-world.asp.

201 ROBECOSAM, DJSI FAMILY (Sept. 2013), https://www.sustainability-indices.com/media/0/8/7/087ddbca1710245ef9c176e1e205f361_djsi-family-e-web-301013_tcm10-13249.pdf.

202 *See* About Us, *supra* note 200; Dow Jones Sustainability World Index, *supra* note 200; ROBECOSAM, MEASURING INTANGIBLES: ROBECOSAM'S CORPORATE SUSTAINABILITY ASSESSMENT METHODOLOGY 1–15 (Sept. 2018), https://assessments.robecosam.com/documents/measuring_intangibles_csa-methodology.pdf.

select the companies to be included in the DJSI.[203] Another index, the Global 100 Index, correlates with the ranking of the previously-mentioned Global 100 that ranks the one hundred most sustainable companies in the world.[204] The index is recalibrated every year to reflect the results of the annual Global 100 ranking.[205]

Although one might assume that investing in only sustainable companies requires a financial tradeoff in the form of diminished returns, many studies indicate that sustainability trends positively for the financial returns and economic values of firms.[206] For investors, these data suggest that sustainable investing does not create additional risks and can provide solid financial returns. For example, Corporate Knights recently reported that its "Global 100 index . . . outperform[ed] the benchmark, [providing] a net investment return of 127.35%, compared to 118.27% . . . ."[207] A study performed in 2017 by Nuveen, the asset manager of the Teachers Insurance and Annuity Association of America (TIAA), also found that socially-responsible indices performed just as well as similar indices that did not consider such concerns.[208] Oxford University data, based upon an analysis of available meta-studies and review papers on the topic, support these findings, reporting that companies with sustainable practices performed better than comparable competitors that did not maintain such practices and that a "high-sustainability" portfolio outperforms a "low-sustainability" portfolio by 4.8% on an annual basis.[209]

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203 ROBECOSAM, *supra* note 202, at 2.

204 *See* 2018 Global 100 Results, CORP. KNIGHTS (Jan. 22, 2018), http://www.corporateknights.com/magazines/2018-global-100-issue/2018-global-100-results-15166618/; Sandvik Included in 2018 Global 100 Most Sustainable Corporations in the World, BUS. INSIDER (Jan. 23, 2018), http://markets.businessinsider.com/news/stocks/Sandvik-Included-in-2018-Global-100-Most-Sustainable-Corporations-in-the-World-1013708466.

205 Mike Scott, The Global 100 Difference, CORP. KNIGHTS (Jan. 22, 2019), https://www.corporateknights.com/reports/2019-global-100/global-100-difference-15481154/.

206 *See, e.g.*, Kyungbok Kim & Sang-Myung Lee, Does Sustainability Affect Corporate Performance and Economic Development? Evidence from the Asia-Pacific region and North America, 10 SUSTAINABILITY, issue 4, art. 909, 2018, at 2, 15–16. Of course, other data report negative-to-no relationship between financial or economic returns and sustainable corporate behavior. *Id*. at 3–5.

207 Scott, *supra* note 205.

208 *See* AMY O'BRIEN ET AL., NUVEEN TIAA INVESTMENTS, RESPONSIBLE INVESTING: DELIVERING COMPETITIVE PERFORMANCE 1–3, 6 (July 2017), https://www.tiaa.org/public/pdf/ri_delivering_competitive_performance.pdf.

209 *See* GORDON L. CLARK ET AL., FROM THE STOCKHOLDER TO THE STAKEHOLDER: HOW SUSTAINABILITY CAN DRIVE FINANCIAL OUTPERFORMANCE 6, 13–14 (U. Oxford, revised Mar. 2015), http://www.sustainablefinance.ch/upload/cms/user/2015_03_SSEE_Oxford_Arabesque_How_Sustainability_Can_Drive_Financial_Outperformance.pdf.

b. Other Sustainable Investment Initiatives

In addition to sustainable index funds, other sustainable investment initiatives have been announced, including several backed by government entities. For example, at the 2014 United Nations Climate Summit, the Catalytic Finance Initiative was launched to stimulate investment from the private sector in clean energy projects.[210] This initiative eventually involved approximately $8 billion in capital from a consortium of partners with financial expertise in clean energy infrastructure finance, green bonds, emerging market and project finance, asset-backed securities, and advisory services, including, to name just a few, Bank of America, the European Investment Bank, Babson Capital Management, and the International Finance Corporation, a member of the World Bank Group.[211] Many banks also have curtailed their financing of coal or other carbon intensive projects.[212]

3. Increased Investor Activism Related to Sustainability

a. Shareholder Initiatives and Proxy Proposals

In addition to growing demand from investors for sustainable investments, there is increasing pressure from within publicly-traded companies for more transparency and more action relating to sustainability concerns.[213] Over the last several years, shareholder proxy proposals relating to climate change and/or energy have dramatically increased.[214] Significantly, the proxy voting guidelines of two major proxy advisory firms, Institutional Shareholder Services ("ISS") and Glass Lewis, support proposals addressing ESG issues that threaten shareholder value,[215] which is just one strong indication of this trend.

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210 *See* Press Release, Bank of America, Bank of America Announces $10 Billion Catalytic Finance Initiative to Accelerate Clean Energy Investments That Reduce Carbon Emissions (Sept. 23, 2014), http://newsroom.bankofamerica.com/press-releases/corporate-and-investment-banking-sales-and-trading-treasury-services/bank-america-ann; Press Release, Int'l Fin. Corp., Catalytic Finance Initiative Directs $8 Billion in Capital for High-Impact Sustainable Projects (Dec. 31, 2015), http://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/catalytic-finance-initiative.

211 Press Release, Int'l Fin. Corp., *supra* note 210.

212 Nor are hedge funds and private equity firms investing in coal projects. *See* Michael Corkery, As Coal's Future Grows Murkier, Banks Pull Financing, N.Y. TIMES (Mar. 20, 2016), https://www.nytimes.com/2016/03/21/business/dealbook/as-coals-future-grows-murkier-banks-pull-financing.html.

213 *See* EY Ctr. Bd. Matters, *supra* note 14.

214 *Id.*

215 *See*, *e.g.*, INSTITUTIONAL SHAREHOLDER SERV., UNITED STATES PROXY VOTING GUIDELINES 1, 57–67 (Dec. 2018), https://www.issgovernance.com/file/policy/active/americas/

And shareholders have been making such proposals. In 2017, 43.2% of proposals brought to a vote during the proxy season related to ESG issues, and ESG-related issues were the topic of the largest category of shareholder proposals on proxy ballots in 2018.[216] It was headline news that proposals seeking climate-related risk management disclosures by Exxon Mobil, Occidental Petroleum and PPL Corporation received majority shareholder votes.[217] Influential asset managers BlackRock and Vanguard also waded into the fray by voting in favor of such climate-related proposals for the first time that year. [218]

These shareholder preferences appear to have made an impact. According to one analysis,

> the biggest story of the 2018 proxy season is just how few shareholder proposals are going to a vote . . . After last year's majority votes, companies now know that they will face a public

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US-Voting-Guidelines.pdf; GLASS LEWIS, 2018 PROXY PAPER GUIDELINES: UNITED STATES 16 (2018), https://www.glasslewis.com/wp-content/uploads/2017/11/US_Guidelines_2018.pdf.

216 Thomas Singer, Environmental and Social Proposals in the 2017 Proxy Season, HARV. L.S.F. CORP. GOVERNANCE & FIN. REG. (Oct. 26, 2017), https://corpgov.law.harvard.edu/2017/10/26/environmental-and-social-proposals-in-the-2017-proxy-season/; PROXYPULSE, 2018 PROXY SEASON REVIEW 1, 5 (Broadridge + PwC, Oct. 2018), https://www.broadridge.com/_assets/pdf/broadridge-2018-proxy-season-review.pdf.

217 Andrew Logan, The Hidden Story of Climate Proposals in the 2018 Proxy Season, CERES (May 29, 2018), https://www.ceres.org/news-center/blog/hidden-story-climate-proposals-2018-proxy-season.

218 *Id.* In 2017, BlackRock's CEO sent an open letter to CEO's of companies invested in by BackRock alerting them that BlackRock considered ESG factors relevant to a company's business and management effectiveness and that it would not hesitate to exercise its right to vote the shares held with its nearly $6 trillion is assets against incumbent directors if the companies were insufficiently responsive or did not demonstrate progress despite ongoing engagement. Larry Fink's 2017 Letter to CEOs, BLACKROCK (2017), https://www.blackrock.com/corporate/investor-relations/2017-larry-fink-ceo-letter. The BlackRock CEO sent letters in 2018 and 2019 reinforcing this message. *See* Larry Fink's 2019 Letter to CEOs, BLACKROCK (2019), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter; Larry Fink's 2018 Letter to CEOs, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter. Behind BlackRock's change of heart on ESG, however, is another tale of shareholder activism. In late 2016, Walden Asset Management, a smaller socially-conscious asset management firm, filed shareholder resolutions with the larger companies BlackRock, Vanguard, J.P. Morgan, and T. Rowe Price calling upon them to review their proxy voting process on climate change for the 2017 proxy season. Walden Asset Mgmt., Research & Engagement Brief, Second Quarter 2017 (2017), https://waldenassetmgmt.com/wp-content/uploads/2017/10/R26EBriefQ2-2017.pdf; *see also* Walden Asset Mgmt., Statement in Response to BlackRock Post on Its Website on Climate Change (Mar. 13, 2017), http://waldenassetmgmt.com/wp-content/uploads/2017/10/StatementBlackRock3-13-17.pdf. At the same time, the Seattle City Employees' Retirement System ("SCERS"), a large investor with BlackRock, placed it on a watch list due to its poor proxy voting record on ESG issues. *See* Board Minutes, SCERS, Board of Administration Meeting 4 (Dec. 8, 2016), https://www.seattle.gov/Documents/Departments/Retirement/Board/Minutes/Minutes_2016_12.pdf. BlackRock's engagement with these investors appears to have strongly influenced its actions during the 2017 proxy season.

> rebuke from shareholders if they don't . . . articulate a strategy to manage the coming low-carbon transition . . . It is no longer necessary for investors to rely principally on shareholder proposals to move companies forward. Their deepened engagement efforts have brought companies to recognize the imperative to plan for change.[219]

This analysis, that shareholder proposals are no longer necessary, may be a bit premature, but it does reflect the growing influence of investor initiatives such as the Climate Action 100+ on large corporate actors. The Climate Action 100+ represents more than 320 multinational investors that collectively manage more than $33 trillion in assets with a mission to engage with companies to improve governance, reduce emissions, and strengthen climate-related financial disclosures.[220] It has wielded its clout effectively, securing BP's Board of Directors to support its shareholder resolution that the company commit to a more climate change-oriented business strategy[221] and acquiring mining giant Glencore's commitment to limit its coal production capacity.[222]

b. Fiduciary Duty Rule

As large-scale divestiture of unsustainable companies has become more common, many individuals, organizations, and government entities have advocated for a corresponding change in the interpretation of the Fiduciary Duty Rule as a means for further divestiture.[223] The Fiduciary Duty Rule generally requires that an investment manager act in the best interest of the investors.[224] The Obama-era Department of Labor published guidance regarding the interpretation of the rule explicitly recognizing that

219 Andrew Logan, *supra* note 217.

220 *See* Frequently Asked Questions, CLIMATE ACTION 100+, https://climateaction100.wordpress.com/about-us/ (last visited Feb. 28, 2019).

221 BP Supports Climate Action 100+ Investor Call to Align its Business Strategy with the Goals of the Paris Agreement, CLIMATE ACTION 100+, https://climateaction100.wordpress.com/news-and-events-2/ (last visited Feb. 28, 2019).

222 Climate Action 100+ Welcomes Glencore Climate Change Commitments, CLIMATE ACTION 100+, https://climateaction100.wordpress.com/news-and-events-2/ (last visited Feb. 28, 2019); *see also* David Iaconangelo, Investors Call on Utilities to Commit to Net-Zero Plans, ENERGYWIRE (Mar. 1, 2019), https://www.eenews.net/energywire/stories/1060122749.

223 *See* Jackson & Johnson, *supra* note 99; DOL Fiduciary Rule Explained as of August 31, 2017, INVESTOPEDIA (Aug. 31, 2017), https://www.investopedia.com/updates/dol-fiduciary-rule/; Press Release, U.S. Dep't of Labor, U.S. Department of Labor Extends Transition Period for Fiduciary Rule Exemptions (Nov. 27, 2017), https://www.dol.gov/newsroom/releases/ebsa/ebsa20171127-0.

224 DOL Fiduciary Rule Explained as of August 31, 2017, *supra* note 223.

> [e]nvironmental, social, and governance issues may have a direct relationship to the economic value of the plan's investment [and, as such,] are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices . . . .Fiduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other such factors.[225]

Not surprisingly, however, the Trump administration's Department of Labor has issued new guidance that appears to back away from this approach, warning that fiduciaries "must always put first the economic interests of the plan in providing retirement benefits."[226]

The European Union has incorporated ESG concerns into its pension governance regulatory framework.[227] The European Directive on the Activities and Supervision of Institutions for Occupational Retirement Provision ("IORPD II") has requirements related to risk management that address ESG factors in investment decisions.[228]

The material in this section represents the magnitude of interest in the sustainability of business products and practices, from direct consumer advertising to sophisticated financial product creation and management. In response to this interest and the concomitant frustration with a lack of consistent standards or definitions by which to evaluate the ever-expanding universe of products, investments, practices, etc., entire systems have been devised that collate data in an attempt to provide guidance and clarity. A number of these will be considered in the section that follows.

IV. Growth and Impact of Sustainability Disclosures

According to a survey by accounting firm KPMG, 78% of the world's largest companies included corporate sustainability data in their annual reports in 2017.[229] This reflects the mounting pressure for greater corporate transparency on ESG issues, as has the development of multiple public and private reporting systems. There are both mandatory and

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225 Dep't of Labor, Interpretive Bulletin (IB) 2015-01, 80 Fed. Reg. 65135 (Oct. 26, 2015); *see also* Jackson & Johnson, *supra* note 99.

226 *See* Jackson & Johnson, *supra* note 99; Press Release, U.S. Dep't of Labor, *supra* note 223.

227 Directive 2016/2341, On the Activities and Supervision of Institutions for Occupational Retirement Provision, 2016 O.J. (L 354) 37.

228 *Id.*

229 *See* José Luis Blasco & Adrian King, KPMG, The Road Ahead: KPMG Survey of Corporate Responsibility Reporting 2017, at 8 (Oct. 2017), https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf.

voluntary sustainability disclosures, each of which will be considered herein.

A. Mandatory Sustainability Disclosures

In the mandatory category, several supra-national and national governments have adopted or are strongly considering introducing regulations that require the disclosure of non-financial information relating to sustainability. For example, the EU Non-Financial Reporting Directive (the "EU NFR Directive") mandates that large companies with more than 500 employees, including exchange-listed companies, banks, insurance companies, and other companies designated by national authorities as public-interest entities, disclose social, environmental and diversity information.[230]

The EU NFR Directive is slowly being implemented in its Member States. In December 2018, Spain announced that it was the first EU member to transpose the Directive into its national law.[231] However, several EU member countries already had minimal reporting requirements in place. For example, France legislated on mandatory reporting in the 1970s, requiring that certain companies provide the government with a document known as a *bilan social* that disclosed employment-related performance information.[232] The scope of the reporting obligation was increased in France with legislation in 2001 requiring that all listed companies publish their annual reports with disclosures regarding the ESG impact of their activities.[233] France implemented the EU's Directive into national law in 2017, modifying the already-existing requirement to produce an ESG report.[234] In the U.K.,

230 Directive 2014/95, Amending Directive 2013/34 as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1.

231 Ley 11/2018, de 28 de Diciembre, por la que se modifica el Código de Comercio, el texto refundido de la Ley de Sociedades de Capital aprobado por el Real Decreto Legislativo 1/2010, de 2 de julio, y la Ley 22/2015, de 20 de julio, de Auditoría de Cuentas, en materia de información no financiera y diversidad (B.O.E. 2018, 17989).

232 *See* Loi 77-769 du 12 juillet 1977 relative au bilan social de l'entreprise.

233 *See* Décret 2012-557 du 24 avril 2012 relatif aux obligations de transparence des entreprises en matière sociale et environnementale [Law 2012-557 of April 24, 2012 Concerning Corporate Transparency Requirements Relating to Social and Environmental Matters], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 26, 2012, p. 7439, art. 1.

234 *See* Ordonnance 2017-1180 du 19 juillet 2017 relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises [Ordonnance 2017-1180 of July 19, 2017 on the Publication of Non-Financial Information by Certain Large Enterprises and Groups of Enterprises], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 19, 2017, p. 169; Décret 2017-1265 du 9 août 2017 pris pour l'application de l'ordonnance n° 2017-1180 du 19 juillet 2017 relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises

listed companies have been required to include ESG information in their annual strategic reports since 2013; the UK's implementation of the EU Non-Financial Reporting Directive required that companies include a "non-financial information statement" in that report.[235]

In the United States, the existing regulatory regime requires corporate disclosure of sustainability-related information only when the information is material to informed investment or corporate decision-making.[236] Excluding statute-specific disclosure,[237] corporate annual filings must describe any known trends or uncertainties that have had or may reasonably be expected to have a material impact on net sales, revenues, or income and must disclose the most significant risk factors.[238] Companies, however, make these determinations at their discretion, and investors have become increasingly critical of the quality of mandated disclosures, pressing both the U.S. Securities and Exchange Commission ("SEC") and the business community for change.

The SEC responded to this criticism as recently as 2016, when it weighed changing Regulation S-K, a key regulation on non-financial disclosure requirements.[239] This proposed change would have required publicly-traded companies to disclose information related to climate change and environmental concerns.[240] While considering this change, the SEC acknowledged the increasingly important role of sustainability issues, specifically environmental, social, and governance concerns, in shareholders' voting and investment decisions.[241]

Following President Trump's election, the SEC has taken no action to finalize any changes to its disclosure requirements,[242] so investors will be forced to tolerate unsatisfactory mandated disclosures. Even parts of the

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[Law 2017-1265 of August 9, 2017 Adopted for the Application of Ordonnance 2017-1180 of July 19, 2017 Relating to the Publication of Non-Financial Information by Certain Large Companies and Certain Groups of Enterprises], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], August 9, 2017, p. 187.

235 *See* The Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016, SI 2016/1245 (UK); Companies Act 2006, c. 46, §§ 414A, 414(C) (UK). Germany transposed the EU NFR Directive into national law in April 2017, but it did not come into effect until January 2019. CSR Umsetzungsgesetz [CSR Implementation Act], April 18, 2017 BGBL I at 802.

236 *See, e.g.*, Securities and Exchange Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6293–97 (Feb. 8, 2010).

237 *See, e.g.*, 15 U.S.C. § 78m-2 (mine safety reporting requirements enacted by the Dodd-Frank Act, Pub. L. 111-203, § 1503, 124 Stat 1376 (2010)).

238 17 C.F.R. §§ 229.303(a)(3)(ii), 229.503(c) (2018).

239 Merrill, *supra* note 104; Odom, *supra* note 104.

240 Merrill, *supra* note 104; Odom, *supra* note 104.

241 *See* Concept Release, Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916 (Apr. 22, 2016); Merrill, *supra* note 104; Odom, *supra* note 104.

242 *See* Breheny et al., *supra* note 93.

government have acknowledged that current U.S. disclosure requirements may be inadequate for investor needs. In 2017, the Government Accountability Office ("GAO") examined the:

> (1) steps SEC ha[d] taken to help companies understand disclosure requirements for climate-related risks, (2) steps SEC ha[d] taken to examine changes companies may have made to their climate-related disclosures since the release of its 2010 Guidance, and (3) constraints SEC faces when reviewing climate-related disclosures and stakeholders' views of those disclosures.[243]

Its examination concluded that the SEC faces constraints in reviewing climate-related and other disclosures because it primarily relies on information that companies provide and that it does "not have the authority to subpoena companies' information."[244] Additionally, it noted that companies report climate-related disclosures in different sections of the filings, make very generic climate-related disclosures, and often do not include quantitative metrics, all of which make analyses and comparisons difficult.[245] And, while investor groups and asset management firms believe that more climate-related disclosures are necessary—contrary to representatives of industry associations—these groups do not agree on the priority or format of these climate-related disclosures.[246] Despite this report, several industry experts have stated that a change from the SEC requiring sustainability-based disclosures is very unlikely at this time.[247]

However, other government bodies have continued to explore and produce guidelines for non-financial disclosures relating to sustainability concerns.[248] In December 2015, the G20 established the Task Force on Climate-Related Financial Disclosures ("TCFD"), a global task force with the goal of developing guidelines and processes for companies to report the specific financial risks posed thereto from climate events.[249] The TCFD is co-chaired by former New York City Mayor Michael Bloomberg and by Mary Schapiro, the former chair of the SEC and special advisor to Mr. Bloomberg.[250] In June 2017, the TCFD produced a comprehensive and detailed set of voluntary guidelines to assist

243 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-188, CLIMATE-RELATED RISKS: SEC HAS TAKEN STEPS TO CLARIFY DISCLOSURE REQUIREMENTS 3 (2018).
244 *Id.* at 16–17.
245 *Id.* at 19.
246 *Id.* at 18.
247 *Id.* at 25.
248 *See* Chestney, *supra* note 7; Jones, *supra* note 95; Press Release, Joe Perry, *supra* note 95.
249 About the Task Force, TCFD (Sept. 2, 2018), https://www.fsb-tcfd.org/about/#.
250 *Id.*

companies in disclosing their exposure to present and future climate risk.[251]

1. Voluntary Initiatives

Currently, numerous frameworks have been developed regarding "voluntary" corporate sustainability disclosures. None, however, appear to have become the dominant model. Indeed, assorted very credible organizations are competing to become the consensus standards in a number of different settings.

One example: non-governmental organizations have taken steps to persuade stock exchanges to encourage sustainability-related disclosures from their listed companies.[252] The Sustainable Stock Exchanges Initiative ("SSEI"), organized in association with the United Nations, partners with stock exchanges around the world to promote more disclosures related to sustainable investment and ESG among the companies listed on each exchange.[253] The SSEI has partnered with some of the largest and most influential stock exchanges in the world, including the New York Stock Exchange, Nasdaq, the Deutsche Börse AG, and the Shanghai and Shenzhen Stock Exchanges.[254]

The Global Reporting Initiative ("GRI"), another independent, non-governmental organization, is taking action to stimulate similar change by "[helping] businesses and governments worldwide understand and communicate their impact on critical sustainability issues such as climate change, human rights, governance and social well-being."[255] The GRI seeks to achieves this by publishing a standardized framework of sustainability reporting guidelines.[256] The GRI's framework may contain the first such sustainability reporting standards, and the organization claims that they are the "most widely adopted global standards" of their kind, with "93% of the world's largest 250 corporations report[ing] on their sustainability performance."[257]

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251 *See* generally TCFD, FINAL REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (June 2017), https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf.

252 *See* About the SSE, SUSTAINABLE STOCK EXCHANGES INITIATIVE, http://www.sseinitiative.org/about/about-the-sse/ (last visited Apr. 18, 2019).

253 *Id.*

254 *See* List of Partner Exchanges, SUSTAINABLE STOCK EXCHANGES INITIATIVE, http://www.sseinitiative.org/sse-partner-exchanges/list-of-partner-exchanges/ (last visited Apr. 18, 2019).

255 About GRI, *supra* note 104.

256 *Id.*

257 *Id.*

The U.S.-based Sustainability Accounting Standards Board ("SASB") is a newer entrant to the field, but its efforts have received broad support from both the corporate and investor communities.[258] Its industry-specific standards, published in November 2018, apply across eleven sectors and seventy-nine industries, and they encourage companies to disclose ESG information in existing SEC filings.[259] The SASB's standards may be uniquely appealing to the business community for several reasons: they were designed to reflect existing understandings of materiality consistent with the SEC requirements, and they promote disclosure consistency in substance and form in already-required SEC filings.[260]

As more companies report on their sustainability metrics and performance, savvy financial services companies have implemented investment tools to make it easier for investors to identify sustainable investment opportunities.[261] Specifically, several financial system and network companies have implemented features within their systems that detail, filter, and analyze environmental factors as they relate to specific industries and companies.[262] For example, one of the most popular trading technology systems, Bloomberg Terminals, automatically provides numerous environmental performance indicators for specific companies and index funds.[263]

Ceres, a Boston based non-profit, also works with many of the largest and most influential financial institutions to address the investment opportunities and risks that those institutions encounter due to sustainability issues.[264] One of the tools that Ceres developed for those financial institutions is a search instrument that "scours the text of SEC annual filings (10-Ks, 20-Fs and 40-Fs) and automatically identifies relevant disclosure[s]."[265] This tool analyzes these data and provides "an easily digestible report."[266] Financial institutions partnering with Ceres are able to use this report to better evaluate specific sustainability risks

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258 Supporters, SASB, https://www.sasb.org/investor-use/supporters/ (last visited Mar. 1, 2019).

259 The SASB standards can be downloaded at its website, https://www.sasb.org/standards-overview/download-current-standards/ (last visited Mar. 1, 2019).

260 *See generally* Rissman & Kearney, *supra* note 11.

261 *See*, *e.g.*, About Us, CERES, https://www.ceres.org/about-us (last visited Apr. 29, 2019); SEC Sustainability Disclosure Search Tool, CERES (May 31, 2018), https://www.ceres.org/resources/tools/sec-sustainability-disclosure-search-tool.

262 *See*, *e.g.*, SEC Sustainability Disclosure Search Tool, *supra* note 261.

263 *See*, *e.g.*, Products: ESG Data, BLOOMBERG, https://www.bloomberg.com/impact/impact/esg-data/ (last visited Apr. 29, 2019); *see also* Benjamin Hulac, Investors Bemoan Weak, 'Useless' Climate Disclosures, E&E NEWS (May 5, 2016), http://www.eenews.net/climatewire/2016/05/05/stories/1060036752.

264 About Us, *supra* note 261; SEC Sustainability Disclosure Search Tool, *supra* note 261.

265 SEC Sustainability Disclosure Search Tool, *supra* note 261.

266 *Id.*

and opportunities, resulting in greater insight regarding sustainable investments.[267]

Sustainability reporting is not only used by investors to assess financial risks, but is also used by the disclosing organization or entity, as well as other similarly situated organizations or entities, to assess and make better decisions regarding the ESG/environmental issues they face.[268] The Carbon Disclosure Project ("CDP"), for example, is a nonprofit that requests annual sustainability and environmental performance reports from companies and government entities.[269] The CDP analyzes each report and publishes a detailed evaluation of the consequences and opportunities confronting reporting entities regarding their environmental impact.[270] These evaluations not only help disclosing entities improve their own performance, but they also help similarly-situated businesses or governmental units make more informed ESG assessments.[271]

V. CONCLUSION

This article has analyzed the many and varied definitions of sustainability and how they have been used in the business community as well as evaluated, rated, and ranked by investors and by equally diverse sustainability performance standards. This discussion hopefully accentuates the importance of developing a consensus around the definition of "sustainability." The term's broad contours encompass many, disparate dimensions, including all, or some combination of, environmental, employment, social, financial, and governance concerns.[272] This definitional ambiguity poses many risks for businesses, e.g., the risk of inconsistencies, consumer and investor confusion and misunderstanding, and claims of greenwashing.[273] Further, individuals, organizations, and government entities are increasingly willing to take action against companies that conduct business in a manner deemed unsustainable or that are misleading about their practices; they conversely

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267 *Id.*
268 *See* About Us, CDP, https://www.cdp.net/en/info/about-us (last visited Apr.18, 2019).
269 *Id.*
270 *Id.*
271 *Id.*
272 *See* Davidson, *supra* note 5; Certification, *supra* note 35; Energy Star Overview, *supra* note 35; Key Performance Indicators, *supra* note 35; LEED Is Green Building, *supra* note 35; Newsweek Green Rankings 2017 Methodology, *supra* note 35.
273 *Id.*

are willing to reward companies with proactive and transparent sustainable practices.[274]

This begs the question: what is the optimal definition of the term? In its most abstract sense, the Brundtland Commission's definition of sustainable development, "development that meets the needs of the present without compromising the ability of future generations to meet their own needs[,]" is one with which there is broad consensus.[275] This may be useful as a guiding principle, but it does not directly translate into all business contexts, and its abstraction makes it impractical, if not rendering it virtually useless, for substantiating corporate claims related to sustainability or for identifying specific sustainability-related activities or impacts. If the goal is more consistency among corporate ESG communications, it would prove far more useful for interested parties to have access to a common set of much more specific and detailed performance indicators. The opportunity to identify the definition of a particular term, "recyclable," or indicators of particular interest, i.e., climate change-related factors or more social impacts, and the ability to compare peer performance would provide benefits for all stakeholders. Corporations could more accurately evaluate their performance and that of their peers and communicate more transparently with other stakeholders. The public, including consumers, investors, and regulators, would have more confidence in business claims and disclosures.

Accordingly, "sustainability," or ESG, may actually be better conceptualized, or recharacterized, as a guiding principle elaborated by a set of detailed standards. The precise standards are still evolving, but the work of the SASB and the GRI, among others, is moving this evolution forward at a fast pace.[276] It is imperative that these efforts continue as, even without a clear or consistent definition of sustainability or a uniform set of communication or disclosure standards, individuals, organizations, and government entities are taking consequential actions based on their

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274 *See* Breheny et al., *supra* note 93; Carrington & Howard, *supra* note 81; Companies Pay Out More Than £1.5m For Breaking Environment Laws, *supra* note 81; Green Generation, *supra* note 7; Press Release, U.S. Dep't of Justice, *supra* note 81.

275 WORLD COMMISSION ON ENV'T & DEV., OUR COMMON FUTURE 41 (1987), http://www.un-documents.net/our-common-future.pdf. But *see* Jan Thomas Frecè & Deane L Harder, Organisations Beyond Brundtland: A Definition of Corporate Sustainability Based on Corporate Values, 11 J. SUSTAINABLE DEV. 184, 184 (2018) ("Transposing this definition from a socio-political context to a corporate context, however, reveals its inappropriateness for businesses. Moreover, companies' sustainable development activities are subsequently not based on a sound theoretical foundation, or, to look at it another way, the concept of sustainable development in a corporate context becomes somewhat arbitrary.")

276 *See supra* Part III.B.

individual definitions of sustainable practices,[277] i.e., divesting investments in companies,[278] demanding more information,[279] and using new indices to identify companies with products or practices that satisfy their personal criteria.[280] The movement towards increased sustainability is evident in every aspect of commerce, from consumer products and government incentives to shareholder demands.[281]

The business community has a window of opportunity to work with stakeholders to refine their mutual interactions with the concept of "sustainability." Without a consensus within the business community and an understanding among other stakeholders, it will be difficult for companies to accurately assess, avoid, or manage risks of greenwashing or other sustainability-related business impacts, or to fully realize the rewards of their genuine sustainability efforts.

277 *See* Breheny et al., *supra* note 93; Carrington & Howard, *supra* note 81; Companies Pay Out More Than £1.5m For Breaking Environment Laws, *supra* note 81; Green Generation, *supra* note 7; Press Release, U.S. Dep't of Justice, *supra* note 81.

278 *See* Carrington & Howard, *supra* note 81.

279 *See* Chestney, *supra* note 7; Jones, *supra* note 95; Merrill, *supra* note 104; Odom, *supra* note 104.

280 *See* Landrum, *supra* note 97; Serafeim, *supra* note 97; Taylor Tepper, *supra* note 97; FTSE4Good Index Series, *supra* note 97.

281 *See* Breheny et al., *supra* note 93; Carrington & Howard, *supra* note 81; Companies Pay Out More Than £1.5m For Breaking Environment Laws, *supra* note 81; Green Generation, *supra* note 7; Press Release, U.S. Dep't of Justice, *supra* note 81.