Record: 1

Title: The Unintended Consequences of Mandatory ESG Disclosures.

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Source: Business Lawyer. Summer2022, Vol. 77 Issue 3, p697-712. 16p. 1 Diagram.

Document Type: Article

Subject Terms: *Social responsibility of business
*Disclosure laws
*Stockholder wealth
*Business & the environment

Company/Entity: United States. Securities & Exchange Commission

NAICS/Industry Codes: 926150 Regulation, Licensing, and Inspection of Miscellaneous Commercial Sectors

Abstract: Corporate social responsibility ("CSR") is the notion that corporations should do more for society than simply earn profits for shareholders. This viewpoint is often juxtaposed against the theory that corporations should maximize social value through pure shareholder wealth maximization ("SWM"). Some proponents of CSR have proposed rules mandating "environmental, social, and governance" ("ESG") disclosures. Mandatory ESG disclosures would require corporations to file public reports regarding their activity concerning CSR, sustainability, and other ESG issues. The proposal to mandate ESG disclosures stems from the assumption that these disclosures will lead to more corporations engaging in more CSR activity instead of pure SWM. In other words, the normative goal is to encourage more CSR activity. However, the assumption that mandatory ESG disclosures will lead to more CSR activity is theoretically and empirically unsound. Instead of leading to more CSR, mandating ESG disclosures could lead to less CSR. This paper explains the theoretical mechanism for this counterintuitive result. It then reviews recent empirical studies that tend to show that ESG-related mandatory disclosures are not associated with beneficial real-world outcomes. Finally, it considers the cost of mandating ESG disclosures. The conclusion casts doubt upon that argument and argues that the Securities and Exchange Commission should theoretically and quantitatively consider costs and benefits before mandating ESG disclosures from public corporations. [ABSTRACT FROM AUTHOR]

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Full Text Word Count: 7727

ISSN: 0007-6899

Accession Number: 159203962

Database: Business Source Ultimate

The Unintended Consequences of Mandatory ESG Disclosures

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INTRODUCTION

The corporate social responsibility ("CSR") debate asks the fundamental question: what is the role of corporations in society? The debate over CSR has proceeded since at least 1932, when two attorneys, Adolf A. Berle, Jr. and E. Merrick Dodd, Jr., publicly debated the following question: to whom are corporations accountable?[1] Berle argued that corporations are accountable only to shareholders, who are a corporation's owners.[2] Berle's position was adopted by economist Milton Friedman in 1970, who argued in a New York Times article that "The Social Responsibility of Business Is to Increase Its Profits."[3] The Friedman Doctrine, as it came to be known, is also known as stockholder wealth maximization ("SWM") theory or simply stockholder theory.[4] Fifty years later, Richard A. Epstein continues to assert that anything but SWM theory would be untenable in practice.[5]

Dodd, on the other hand, argued that corporations are also accountable to society.[6] This position favors CSR and is also known as stakeholder theory. CSR scholars responded immediately to the Friedman Doctrine. In 1971, Hein Kroos and Klaus Schwab argued that corporations must serve all stakeholders.[7] Fifty years later, Lynn A. Stout continued to contest the SWM theory, writing, among other things, a book entitled The Shareholder Value Myth, [8] in which she argued that shareholders are diverse groups who cannot have but one value, making SWM theory just an untenable as Epstein claims CSR to be.

The Berle-Dodd SWM-CSR debate still frames today's ongoing discussion about the proper function of corporations. And now, the discussion includes the concept of mandatory environmental, social, and governance ("ESG") disclosure. Mandatory ESG disclosure would require corporations to publicly address ecology, culture, politics, and economics.[9] Proponents believe that mandatory ESG disclosure will make corporations more accountable to society, and thus increase CSR.[10] SWM proponents counter that corporations already are accountable to society, through consumer and supplier reputation and the stock market; moreover, ESG imposes a uniform view of what corporations should do about social issues, which destroys business diversity and may not focus efforts on the right issues.[11]

This paper does not contribute to the great debate of whether corporations should engage in CSR or SWM. Rather, it offers a narrower and more technical focus. Proponents of ESG believe that mandating

ESG disclosures will result in more ESG activity.[12] This theory is based on the notion that you get what you measure. However, mandating more disclosures about ESG activities may not lead to more ESG activities. Mandating ESG disclosures could actually lead to less CSR, at great cost to society.[13] This paper aims to prevent such an expensive regulatory blunder by cautioning against mandatory ESG disclosures.

This is not necessarily an anti-ESG or pro-CSR position. As this paper will show, opposing mandatory ESG disclosures makes sense from both a CSR and an SWM perspective. CSR proponents want more CSR. For the CSR proponents, this paper's theorical and empirical analysis of how mandatory ESG disclosures have unintended consequences that lower CSR activities might give CSR proponents pause before pushing on with mandatory ESG disclosure proposals.

SWM proponents generally want less CSR. For most SWM proponents, mandatory ESG disclosures make no sense already, because their goal is not to incentivize CSR anyway. Ironically, they may flip and support ESG mandates after reading this article. However, ESG mandates are costly. Such costs may exceed their benefits, contrary to the preferences of SWM and ESG proponents.

If neither side of this ninety-year war finds it gets what it wants through mandatory ESG disclosures, then the battle on mandatory ESG disclosures could end in a mutual surrender, with both sides abandoning the mandatory ESG disclosure regime. Efforts could then be spent elsewhere in a grand battle to define corporations under capitalism.

This paper proceeds in three parts. Part I explains the theoretical mechanism for the counterintuitive result that more ESG disclosure may yield less CSR activity. Part II analyzes the recent empirical studies on the effect of ESG disclosures on CSR activity, which tend to show that ESG-related mandatory disclosures are not associated with beneficial real-world outcomes. Part III considers the cost of mandating ESG disclosures. The conclusion casts doubt upon that argument that the Securities and Exchange Commission ("SEC") should mandate ESG disclosures from public corporations.

I. THEORETICAL MODEL

A corporation takes actions to attract investors. These actions include disclosing to the investor certain material facts about the corporation that help the investor decide whether to invest in the corporation.[14] For example, a corporation could disclose its quarterly earnings reports or how many trees it planted in Sri Lanka. Investors who care only about SWM might disregard the disclosures regarding the trees, while investors who care about CSR might find this information helps them decide to invest in the firm.

At the outset, it must be clear that disclosures from public corporations, whether about earnings or trees, must be made publicly.[15] Regulation Fair Disclosure ("Reg FD") saw to this in 2000.[16] Consequently, a company cannot selectively disclose earnings to SWM investors, then make a different selective disclosure about the trees to CSR investors. Both disclosures must be publicly filed where all can see and evaluate them.[17]

In 2005, Anil Arya, Jonathan Glover, Brian Mittendorf, and Ganapathi Narayanamoorthy published

Unintended Consequences of Regulating Disclosures: The Case of Regulation Fair Disclosure. [18] Their analysis concluded that Reg FD inhibited the very disclosures it was intended to widen.[19] It is useful to consider that counterintuitive result and to consider whether other disclosure regulations (such as mandatory ESG disclosures) may also inhibit what those regulations were intended to widen.[20]

In both the case of mandatory Reg FD disclosures and mandatory ESG disclosures, an investor faces a binary choice: to invest or not to invest in a given corporation.[21] To render this decision, the investor obtains information about the corporation in question.[22]

How that investor obtains information depends on how corporate information is disclosed, which in turn depends on whether there is a mandatory disclosure regime.[23] Without a mandatory disclosure regime, corporate information regarding ESG is either disclosed voluntarily or not disclosed at all.[24] Under a mandatory disclosure regime, the corporation has only one choice-disclose the ESG information pursuant to the regulatory mandate.[25]

Even though investors can access and analyze ESG information themselves, most investors generally rely on analyst reports when making investment decisions.[26] Each analyst chooses whether or not to analyze a given company, based on its prediction of how valuable the resulting report will be, and then sells reports to investors. The analyst thus plays a critical role in the dissemination of quality ESG information.

Note that, in the presence of regulatory mandates for ESG disclosures, this collapses the corporate decision matrix into a Hobson's choice: to make mandatory ESG disclosures, or to face regulatory fines and reputational penalties.[27] To put this another way, there is some lost information (regarding whether a corporation chooses to disclose or not) in the presence of a mandate to disclose, which contravenes some of the information gained from a mandate to disclose.[28] The essential question is: which regime produces higher quality information and better real-world results?

Extrapolating this essential question: How will the presence or absence of a corporate decision impact investor decisions? In particular, will this disclosure regime help investors decide whether to invest in CSR-focused corporations? Is the value of information gained through mandatory disclosure greater than the information lost by allowing corporations to choose whether to disclose?

A. THE INFORMATION PARADOX

Society is awash in information. Human attention spans appear to have dropped in the face of overwhelming streams of constant information. Not all this information is relevant or helpful, or even true. And humans have limited cognitive bandwidth. It becomes harder to discern fake news, and thus harder to trust real news, as the total volume of news increases. The result is an information paradox: A greater quantity of information eventually results in a lower-quality understanding of that information.[29]

This over-information effect is true even where there are a relatively infinite number of people. A rational person will analyze information only if it is likely that doing so will be marginally useful. Either raising the cost of analyzing a given set of information or lowering the value of the analysis will reduce the incentives

to analyze that information. When the value is negative, no rational analysts or investors will analyze that information. Thus, by dumping a large quantity of information onto the market, mandatory disclosure regimes can reduce the amount of quality analysis.

In particular, mandating all firms to disclose ESG information may result in a pooling equilibrium where firms with different characteristics regarding actual ESG and CSR behavior will choose the same action: disclosure pursuant to the mandate. When such a pooling equilibrium is efficient, it actually becomes harder to distinguish firms with different characteristics, because all firms are reporting the same information.

Charles Cadsby, Murray Frank, and Vojislav Maksimovic studied this topic empirically in their classic paper, Pooling, Separating, and Semiseparating Equilibria in Financial Markets: Some Experimental Evidence. [30] First, the authors sorted firms as type H (high) or type L (low).[31] Here, we might likewise separate corporations into type H for the "CSR true believers" and type L for the "greenwashers." [32] The researchers approached the problem theoretically, using only mathematical models, to predict how firms would behave.[33] But, according to their models, all three equilibria were theoretically sustainable.[34] So, the researchers paid a large group of subjects to make disclosure and investment decisions.[35] In these experiments, parties rapidly or immediately converged on a pooling equilibrium strategy. Even when the researchers disrupted the equilibrium by introducing asymmetric information, " [t]he more efficient pooling equilibrium was consistently chosen over both other available equilibria."[36]

When asked why the pooling equilibrium dominated the players' choices, the researchers suggested that investors come into markets with different prior expectations. Some expect a pooling equilibrium (meaning, they expect mandatory disclosures to produce low quality or no valuable information), while others expect a separating equilibrium (where "CSG true believer" firms will reveal themselves, while "greenwashing" firms will also show their true nature).[37] This is why, theoretically, all three types of equilibria are sub-game stable. But, in the dynamic real world, the investor who expects pooling is always willing to underpay relative to those who expect separating. In other words, the investors who believe the information is useless negatively price the value of the investment. So long as at least two investors who have prior beliefs in pooling are in the market, they will cooperate to drive the market price lower and lower, until all the separating investors are priced out of the market. Furthermore, in larger markets, where it is very likely that at least two investors have prior beliefs in a pooling equilibrium, the convergence around a pooling equilibrium occurs instantly and reliably.

B. THEORY OF OPTIONAL AND MANDATORY DISCLOSURE

Although it might initially appear that available information will remain the same no matter why it is disclosed, there are reasons to believe that corporations (which we presume to act rationally) will act differently when optionally-versus-mandatorily disclosing information. By mandatorily, I mean by government regulation or some other public fiat, as opposed to private ordering. Do rational entities have different incentives regarding the information to disclose under a mandatory disclosure regime versus a voluntary disclosure regime? Yes. As discussed above, mandatory disclosures tend to create a pooling equilibrium around the choice to disclose. Mandatory disclosures make it costly not to disclose

information; after all, the point of a mandatory disclosure regime is to force nearly all corporations to disclose information, and governments have the power to levy fines or shut down operations when corporations fail to comply with their regimes. Faced with this cost, more firms will disclose mandatory information. Knowing this, investors will value corporate information lower on the basis that the regime results in pooling of firms, not separating them. Any firms that continue to engage in separating behavior will find it increasingly costly, and ultimately not beneficial, to do so, until those firms flip to a pooling strategy or exit the market.

Thus, one risk of a mandatory disclosure regime is that, although there may be more information, the quality of that information-as well as the market's understanding of that information-may be less. Because all firms must disclose ESG information, it is hard to distinguish a "true believer" CSR firm from the many "greenwashing" SWM firms. This is what is meant by a pooling equilibrium. Corporations will find it overly costly to distinguish themselves from the rest of the pool, and therefore, analysts and ultimately investors will likewise be unable to distinguish true belief from greenwashing.

In other words, there is a theoretical risk that mandatory disclosure regimes will incept an information paradox; that is, requiring disclosure might result in more information but less quality information and ultimately less human understanding of that information. Thus, disclosure regimes must be carefully designed to require comparable and measurable information; otherwise, the result may be a net social cost and not overall real-world benefits.

II. EMPIRICAL APPLICATION

The simple model in Part I highlights a trade-off between the value of information gained from mandatory ESG disclosure and the value of information gained from observing corporations' choice whether to make ESG disclosures. For purposes of comparison, this Part attempts to quantify the respective values or at least their overall direction.

A. IMPACT OF MANDATORY ESG DISCLOSURES ON ESG INFORMATION

Fortunately, there is some good data regarding the impact of mandatory ESG disclosure rules on the quantity and quality of ESG information. A recent (December 2021) study by the European Corporate Governance Institute ("ECGI") measured and analyzed The Effects of Mandatory ESG Disclosure Around the World. [38] This study incorporated a massive dataset of all publicly listed firms in the Worldscope database between 2000 and 2017, which included fifty-two sample countries.[39] During the relevant period, twenty-nine out of the fifty-two sample countries required some form of mandatory ESG disclosure, and fifteen of the fifty-two countries required a comprehensive form of mandatory ESG disclosure all at once.[40] This provides some basis for comparison of ESG regimes through both longitudinal and cross-sectional analysis.

The first question regards whether ESG mandates increase ESG information quantity and availability. To measure this, the ECGI study examined the number of ESG reports filed in the Global Reporting Initiative ("GRI") database and the Asset4 database maintained by Thomson Reuters.[41] GRI, a non-profit organization, pioneered ESG reporting in 1997 and is today's most comprehensive ESG reporting database.[42] Asset4 is provided by a commercial data vendor that provides ESG reports to investors

and analysts on a subscription basis.[43] Both GRI and Asset4 provide value-added services including ranking and indexing of firms along dimensions of ESG activity.

ECGI measured the quantity of ESG reporting in sample countries before and after the introduction of ESG disclosure mandates. Perhaps unsurprisingly, ECGI found an increase in firms' ESG reporting in all countries after the introduction of ESG disclosure mandates.[44] Thus, there is little doubt that mandating ESG reporting increases the quantity of ESG information.[45] But does it increase the quality and utility of same?

To measure ESG information quality, ECGI examined "GRI compliance," which is a binary value coded for whether a given firm reports information that GRI can index and rank.[46] Non-compliant reports are difficult to review, compare, analyze, and evaluate. Analysts may choose not to analyze non-compliant reports because it is difficult or impossible to estimate or predict corporate ESG activity via a non-compliant report.[47] Investors, who are generally less equipped than analysts to made such inter-corporate comparisons, are even less able to discern meaningful information from non-compliant reports. The paper employed "GRI compliance" as a proxy for ESG information quality.[48] A corporation can comply with a country's ESG disclosure mandates while being GRI non-compliant.[49]

The ECGI study found no statistically significant evidence that mandatory ESG disclosure affects GRI compliance.[50] Hence, the study concludes, ECGI cannot detect that mandatory ESG disclosure regimes improve the quality of ESG information.[51] The results are consistent with the interpretation that the average corporation produces ESG reports that superficially comply with minimum standards of mandatory ESG disclosure, but the average corporation does not attempt to produce high-quality results that can be evaluated by analysts or investors.[52] The data, therefore, tend to show that mandatory ESG disclosure regimes do increase the quantity of ESG information, but do not increase the quality of that information, and, most critically, ESG mandates do not increase the availability of useful ESG information.[53]

B. IMPACT OF OPTIONAL ESG DISCLOSURE ON ESG INFORMATION

Optional ESG disclosure is a double-edged sword. On the one hand, optional ESG disclosure could invite greenwashing, which is the corporate practice of pretending to care about CSR while actually engaging in pure SWM.[54] Yet, optional disclosure means disclosure is relatively costly-where some firms are not spending anything on ESG disclosures, a disclosing firm bears a relatively higher cost. This could, in theory, have a positive impact on the quality of the ESG information that is optionally disclosed.

That theory is not supported by available data regarding the impact of optional ESG disclosure on investment information. The ECGI study counted the quantity and measured the quality of 45,281 ESG reports in the United States, which all occurred during a period where the United States did not mandate ESG disclosures.[55] All these disclosures, therefore, could be considered optional ESG disclosures, as they were not mandated by the government but rather incentivized by some other market pressure. The United States reports constituted 17.45 percent of the entire sample, making it the single largest reporting country in the sample, even though it was one of the few countries in the study that does not mandate ESG disclosure.[56] This shows, at least, there may be other factors driving ESG disclosure aside from

mandates. However, questions remain. Are optional ESG disclosures higher quality that mandatory ESG disclosures? Is the quality of optional ESG disclosures high enough to avoid a pooling equilibrium?

Unfortunately, there is presently less empirical study regarding the quality of ESG disclosures in the United States. However, some preliminary data provide a basis for further study. First, as mentioned above, the United States, which has no mandatory ESG reporting, produces the highest total number of ESG reports and Japan, which also has no mandatory ESG reporting, produces the second highest number of reports.[57] The simple fact that countries without mandatory ESG disclosure regimes are producing the highest volume of ESG information tends to show that there is some mechanism, other than government fiat, incentivizing the production and disclosure of ESG information. Nonetheless, questions remain: What is that mechanism? And, does that mechanism produce higher quality ESG information? These questions require further empirical research, which is beyond the scope of this paper, but this paper will make some effort to positively distinguish between high- and low-type ESG information. If future studies follow this framework to distinguish these types of ESG information, then those studies could also examine what regime produces better separation between the types.

1. CSR True Believers: High-Type ESG Information

CSR is perceived where corporations engage in social, environmental, and political actions that go beyond their profit interests.[58] First, it bears mentioning that many scholars believe SWM behavior produces the best outcome for society, as shareholders may redeploy those maximized corporate profits (whether received as dividends or capital gains) to further those social, environmental, and political interests,[59] making CSR a "myth."[60] On the other hand, some scholars believe that firms can obtain a competitive advantage by engaging in CSR.[61] A primary mechanism for CSR to create a competitive advantage is through a positive brand association.[62]

A recent (2020) study explored firms in Ghana to measure any correlation between CSR activities and positive brand association.[63] The study did indeed find a significant positive relationship between CSR, brand perception, and competitive advantage. However, the study has at least two major flaws. First, the study examined the developing nation of Ghana, and so its results may not be generally applicable to developed economies, like that of the United States. Second, and perhaps more troubling, the Ghana study measured CSR based on CSR reporting. In other words, the study conflated the chicken with the egg. While CSR reporting may result in socially beneficial action, it might also be a rotten egg that results in nothing socially beneficial-greenwashing.

In fact, the problem with many existing CSR studies is one of measurement. How does one identify and measure CSR behavior? How does one distinguish the limits of a firm's profit interests?

Therefore, even if there are theoretical reasons for firms in a competitive marketplace to engage in CSR, it is not yet clear how to identify and measure CSR contributions by those firms. As discussed above, increasing ESG disclosure does not necessarily increase CSR activity. ESG disclosures are not a proxy for CSR activity, especially where ESG disclosures are mandatory. Any future study that seeks to quantify the relationship between ESG disclosure and CSR activity will first have to establish a credible and reliable method for measuring CSR. Otherwise, the study might conflate true CSR activity with mere

greenwashing.

2. Greenwashing: Low-Type ESG Information

Greenwashing occurs when corporations disclose positive environmental and ecological activities that tend to obscure, mask, or distract from more significant negative activities.[64] As mentioned above, even CSR researchers seem to fall into the trap of conflating ESG disclosure with CSR activity. This is a problem because firms can use ESG disclosure to mask anti-CSR activities. Magali A. Delmas and Vanessa Cuerel Burbano developed the following matrix to explain how communication about CSR does not necessarily relate to CSR activity:[65]

Optional ESG disclosures-where firms decide whether, when, how, and how much to disclose about ESG activities-are rightly viewed through the skeptical lens of greenwashing. But how much greenwashing occurs as a direct result of the lack of mandatory ESG disclosure? Organization Science published a global study of greenwashing,[66] which, based on a study of thousands of public companies headquartered in forty-five countries, ultimately concluded that corporations that are more likely to cause environmental damage were less likely to make optional ESG disclosures.[67] This study, the largest scale to date, suggests that optional ESG disclosure does not necessarily lead to greenwashing, and, contrapositively, that mandatory ESG disclosure does not necessarily prevent greenwashing.[68]

A recent (2020) study, Greenwashing in Environmental, Social and Governance Disclosures, [69] examined the circumstances under which corporations engage in greenwashing. It defined "greenwashers" as "firms which seek to create a very transparent public image by revealing large quantities of ESG data but perform poorly in ESG aspects."[70] The definition alone belies the result: international researchers already associate over-disclosure with greenwashing.

The Greenwashing researchers measured greenwashing with a peer-relative greenwashing score, which is a normalized measure representing a firm's relative position to peers in terms of its Bloomberg ESG Score minus its Asset4 ESG Score as described above.[71] The Bloomberg ESG Score only reflects a firm's quantity of ESG information, whether positive or negative. The Bloomberg ESG Score is essentially a word count of ESG-related terms in public disclosures, as calculated by a proprietary algorithm.[72] Thus, it is a good proxy for how many "green" words a company produces. The Asset4 ESG Score, meanwhile, attempts to measure ESG activity, as opposed to mere verbiage.[73] The difference between the Bloomberg EST Score and the Asset4 ESG Score, therefore, represents a proxy for that firm's level of greenwashing (that is, the extent of the difference between how many ESG words the company issues versus how much ESG activity the company performs).[74] Although this proxy is imperfect on many levels-including the fact that Asset4, an algorithmic product of a for-profit corporation, determines what counts as ESG words and what counts as ESG actions-at least it provides a stable coefficient to evaluate relative performance along some metric that can be subject to regression analysis against others.

The study of 1,925 large-capitalization companies headquartered in forty-seven countries found no significant correlations between countries that mandated ESG disclosures and greenwashing.[75] In other words, the best empirical evidence to date shows no relationship between mandatory ESG disclosures and less greenwashing.

This makes sense theoretically. Given that greenwashing is, by definition, over-disclosure, is a disclosure regime likely to increase or decrease greenwashing? Theoretically, it seems that mandatory ESG disclosure regimes are more likely to produce ESG disclosures than to produce ESG activity. There is no empirical evidence yet that shows statistically significant relationships between mandatory ESG disclosures and increases in real-world beneficial activities. On balance, the theoretical argument runs against mandating ESG disclosures if the goal is to increase ESG activity-and that is without considering the cost of losing optional ESG disclosures.

III. ESG DISCLOSURE COST

Despite the significant scholarly interest in CSR activity and ESG disclosure, there is surprisingly little information about the costs of a mandatory ESG disclosure regime. This is a limiting problem, because the SEC is legally required to consider the costs and the benefits of any new regulation, including mandatory ESG regulation.

Cost-benefit analysis (CBA) is a standard and well-recognized approach to evaluating financial regulation.[76] While there is some debate as to whether CBA should be qualitative[77] or quantitative,[78] there appears to be few who argue that federal agencies should totally ignore the likely impact of proposed or current regulation. Regardless of whether agencies should take a conceptional or mathematical approach to CBA, federal law, including the Administrative Procedure Act,[79] prohibits any federal administrative agency, including the SEC, from producing any "arbitrary [or] capricious" regulation.[80] Any regulation promulgated by a federal agency, like the SEC, must be supported by "substantial evidence."[81] Such statutorily required evidence often comes in the form of a detailed final rule that includes detailed analysis.

The SEC is also specifically required by statute, when engaging in rulemaking, to consider or determine the public interest, the protection of investors, and whether the action will promote efficiency, competition, and capital formation.[82] Statutory law prohibits the SEC from making rules that impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Securities Exchange Act of 1934.[83] These statutes effectively require the SEC to evaluate the costs and benefits of any financial regulation it proposes or enforces.[84]

It is therefore beyond doubt that current law requires the SEC to conduct CBA, at least on a conceptual level, when promulgating financial regulations. Therefore, further research regarding mandatory ESG disclosure regulations should estimate the costs and benefits thereof.

As this paper has already shown, however, there are serious doubts as to whether mandatory ESG disclosure will have measurable benefits at all. Whether the benefits are defined as more quality information about CSR activity, more CSR activity, or greater ease for investors to distinguish between "CSR true believer" firms and "greenwashing" firms, none of the analysis so far has shown that the benefits are likely to be positive. Meanwhile, the costs of a new regulatory regime are not likely to be zero or negative. If there are no tangible social benefits to a new regulatory regime, then it would likely not pass CBA.

CONCLUSION

This paper reviewed the theoretical and empirical bases of mandating ESG disclosures. While there remains a normative debate about whether corporations should be required to engage in CSR or SWM, there is also the question of how CSR requirements could be implemented in the first place. This paper explored whether imposing a mandatory ESG disclosure regime is likely to generate more CSR activity and found there is not currently evidence showing this relationship is likely. It also provided a theoretical basis explaining why any such mandatory ESG disclosure regime could have the unintended consequence of reducing CSR activity and instead increase greenwashing.

It seems that significant additional research shall be required before imposing a mandatory ESG regime on all American public companies. First, scholars must agree on what CSR activity is and how to measure it-after all, it is the socially beneficial activity itself and not merely disclosure about that activity that most CSR proponents ultimately seek to bring about. CSR study thus needs some measurement of social benefit as its starting point. Second, scholars must analyze CSR activity as a function of mandatory ESG disclosure regimes. Because America and Japan do not currently have mandatory ESG disclosure regimes, while many other large economies do, there is a cross-sectional natural experiment waiting to be analyzed. Third, alternative mechanisms for ESG disclosures, such as reputational markets and greenwashing anti-fraud regimes, should be evaluated theoretically and empirically to see whether they are more or less prone to pooling equilibria. It may turn out to be the case that the public markets are already demanding and obtaining a more optimal level of ESG information and CSR activity through private ordering than would occur through a new regulatory regime. Fourth, scholars should estimate the cost of any proposed mandatory ESG regime to compare it with its benefits. Such cost is not just a matter of net dollars but also how such a regime might impact entry, innovation, and competition.

Although CSR has been a popular research topic for almost twenty years, during which time many nations created mandatory ESG disclosure regimes, the United States has mainly stayed on the sidelines. This wait-and-see approach appears, with 20/20 hindsight, to have been wise. Nations that have instituted mandatory ESG regimes have not necessarily produced social benefits, despite the costs of these regimes. Admittedly, it is counterintuitive that a mandatory disclosure regime can result in less useful information, but this paper has shown theoretically and empirically why more disclosure does not necessarily result in better information or, for that matter, social benefits. Accordingly, CSR should be studied more carefully before any new mandatory ESG disclosure regime is implemented in the United States.

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9. See Lois S. Mahoney, Standalone CSR Reports: A Canadian Analysis,6ISSUES SOC.&ENV'T ACCT. 4, 4-5 (2012) (defining CSR, discussing research on standalone CSR reports, and finding support for the proposition that firms issue such reports as a signal of their superior commitment to CSR).

10. See Jesús García-de-Madariaga & Fernando Rodríguez-de-Rivera-Cremades, Corporate Social Responsibility and the Classical Theory of the Firm: Are Both Theories Irreconcilable?, 20 REV. INNOVAR J. 5 (2010) [https://perma.cc/8E3Z-GXL6] (discussing factors stemming from the disclosure of CSR, including customer satisfaction and corporate reputation, which are viewed to increase CSR disclosure).

11. Matthew Lau, ESG Is Unnecessary and Harmful, FIN. POST (Oct. 13, 2021) [https://perma.cc/4KUH-VUJ3] (commenting that business diversity is destroyed as ESG disclosure seeks to impose a wide range of social views upon businesses, ultimately influencing businesses to view these social issues in the same light, e.g., global warming, which is detrimental).

12. See García-de-Madariaga & Rodríguez-de-Rivera-Cremades, supra note 10, at 7 (contrasting the view of SWM proponents-who believe it is not the individual corporation's responsibility to better society but rather the jobs of various social groups-with the view of proponents of CSR).

13. See Philipp Krueger et al., The Effects of Mandatory ESG Disclosure Around the World 1 (Eur. Corp. Governance Inst., Working Paper No. 754, 2021) [https://perma.cc/FG3D-BAVG] (discussing how mandating CSR disclosure may lead to less CSR as a whole).

14. Rehana Anwar & Jaleel A. Malik, When Does Corporate Social Responsibility Disclosure Affect

Investment Efficiency? A New Answer to an Old Question, 10 SAGE OPEN 1 (2020) (discussing the wide range of potential information that corporations may choose to disclose, such as the quality of their products and services, along with the social behavior of companies, because different investors prioritize those considerations differently).

15. Armando Gomes, Gary Gorton & Leonardo Madureira, SEC Regulation Fair Disclosure, Information, and the Cost of Capital, 13 J. CORP. FIN. 300, 301 (2007) (discussing Regulation Fair Disclosure, which requires public disclosure, rather than selective disclosure, of material nonpublic information).

16. See 17 C.F.R. §§ 243.100-243.103 (2022) ("Regulation FD").

17. See id. § 243.100(a) ("Whenever an issuer . . . [selectively] discloses any material nonpublic information to [one party], the issuer shall make public disclosure of that information . . . simultaneously, in the case of an intentional disclosure . . . ." (emphasis added)).

18. See Anil Arya et al., Unintended Consequences of Regulating Disclosures: The Case of Regulation Fair Disclosure, 24 J. ACCT.&PUB. POL'Y 243 (2005).

19. Id. at 244-45 (discussing empirical data collected to show that selective disclosure aids in limiting herd behavior among investors and also can give investors more information in the long run because, if all information has to be public, then corporations may not disclose it at all).

20. See id. at 251.

21. See id. at 245 (discussing the impact of a corporation's disclosure policies on an individual's decision to invest).

22. Id.

23. Id. at 245-46.

24. See id. at 246 (discussing the various disclosure policies a company may establish: no disclosure, voluntary public disclosure, voluntary selective disclosure).

25. Frank H. Easterbrook & Daniel R. Fischel, Mandatory Disclosure and the Protection of Investors, 70 VA. L. REV. 669, 680-81 (1984) (discussing how a mandatory disclosure regime would prohibit firms from staying silent along with setting guidelines for the timeframe and manner of disclosures).

26. See Arya et al., supra note 18, at 247 (discussing investors' likelihood to be drawn to analysts' reports despite the risk of herding).

27. See Easterbrook & Fischel, supra note 25, at 680-85, 708-09 (discussing how mandatory ESG reporting would limit any corporation's ability to stay silent on those ESG issues).

28. See Arya et al., supra note 18, at 251 (discussing how mandatory ESG disclosure can lead to analyst

herding behavior which results in overlooking some information that would have been acquired if there was not a mandatory disclosure regime).

29. Peter Gordon Roetzel, Information Overload in the Information Age: A Review of the Literature from Business Administration, Business Psychology, and Related Disciplines with a Bibliometric Approach and Framework Development, 12 BUS. RSCH. 479, 483 (2019) (noting that, as the information load increases, an individual's ability to understand and internalize that information decreases because individuals have a limited ability to process information past a certain point).

30. Charles B. Cadsby, Murray Frank & Vojislav Maksimovic, Pooling, Separating, and Semiseparating Equilibria in Financial Markets: Some Experimental Evidence,3REV. FIN. STUD. 315 (1990).

31. Id. at 319.

32. See infra Part II.B.2 (defining and discussing "greenwashing").

33. Cadsby, Frank & Maksimovic, supra note 30, at 319-22.

34. Id. at 321-22.

35. Id. at 323-24 (discussing the experiment where participants were separated into two groups: investors and firms; at the beginning of a round, each firm selected an envelope by which it was randomly appointed as type H or type L; once aware of their type, the firms then determined whether they would undertake the new available project; if they chose to undertake the project, they would raise the "necessary" funds from the investor).

36. Id. at 332.

37. Id. at 333.

38. Krueger et al., supra note 13.

39. Id. at 11-12.

40. Id. at 2, 5.

41. Id. at 15.

42. Id.

43. Id.

44. Id. at 23, 43 fig. 2 (discussing and charting the impact of mandatory disclosure regimes, which predictably increase the quantity of disclosure).

45. Id. at 24, 46 tbl. 3 (reporting that data reveal positive and statistically significant coefficients, which

ultimately show a positive relationship between mandatory disclosure and the propensity to file an ESG report).

46. *Id. at 3.*

47. *See id. at 1 (reporting that "institutional investors frequently complain that the availability and quality of firm-level ESG disclosures are insufficient to make informed investment decisions").*

48. *Id. at 24 ("GRI compliance [is] our proxy for the quality of the filed ESG reports.").*

49. *See id. at 1 ("[S]ome countries may issue disclosure requirements that contain low standards and loose guidelines," whereas the GRI may have high standards and tight guidelines.).*

50. *Id. at 2-3 & 23-24 (discussing how, on average, mandatory ESG reporting-while increasing the quantity and, to some extent, quality-does not increase GRI Compliance).*

51. *Id. at 24.*

52. *Id. ("[T]he average firm initiates an ESG report to 'superficially' comply with the minimum requirements of mandatory ESG disclosure regulation.").*

53. *Id. ("[M]andatory disclosure affects the propensity to file an ESG report, but it does not increase the average quality of such reports once they are filed.").*

54. *Magali A. Delmas & Vanessa Cuerel Burbano, The Drivers of Greenwashing, 54 CAL. MGMT. REV. 64 (2011).*

55. *Kreuger et al., supra note 13, at 56 tbl. 1.*

56. *Id. (reporting 45,281 observable samples for the United States).*

57. *Id. (reporting 37,892 observable samples for Japan).*

58. *See Mahoney, supra note 9, at 4.*

59. *See Friedman, supra note 3, at 32; Epstein, supra note 5.*

60. *Deborah Doane, The Myth of CSR: The Problem with Assuming that Companies Can Do Well While Also Doing Good Is that Markets Don't Really Work that Way, 2005 STAN. SOC. INNOVATION REV. 23 [https://perma.cc/57YW-6FA3].*

61. *Michael E. Porter & Mark R. Kramer, Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility, HARV. BUS. REV., Dec. 2006, at 78.*

62. *See DAVID A. AAKER, MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME (1991).*

63. George Kofi Amoako & Kwasi Dartey-Baah, Corporate Social Responsibiltiy: Strategy for Boosting Brand Perception and Competitive Advantage, in CSR AND SOCIALLY RESPONSIBLE INVESTING STRATEGIES IN TRANSITIONING AND EMERGING ECONOMIES 65 (Anetta Kuna-Marszatek & Agnieszka Ktysik-Uryszek, eds. 2020) [https://perma.cc/L4NP-NTEU].

64. Delmas & Cuerel Burbano, supra note 54, at 1 (discussing the increasingly typical behavior of a firm misleading consumers and investors regarding its carbon footprint in attempt to make it more appealing to consumers and investors).

65. Id. at 67 fig. 1.

66. See Christopher Marquis, Michael W. Toffel & Yanhua Zhou, Scrutiny, Norms, and Selective Disclosure: A Global Study of Greenwashing, 27 ORG. SCI. 483 (2016).

67. Id. at 483, 491 tbl. 1, 492 tbl. 2, 494 tbl. 3 (charting data that shows a statistically negative coefficient regarding environmental damage, which indicates that more environmental damage is done by firms that exhibit less disclosure).

68. Id. at 486, 491-93 (discussing the original hypothesis of more environmentally harmful firms will engage in less selective disclosure and the data to support it).

69. Ellen Pei-yi Yu, Bac Van Luu & Catherine Huirong Chen, Greenwashing in Environmental, Social and Governance Disclosures, 52 RSCH. INT'L BUS.&FIN. 1 (2020).

70. Id. at 5.

71. Id. (discussing the research model which essentially measures the firm's greenwashing behavior).

72. Id. (discussing the proprietary calculation, which accounts for over nine hundred key indicators, including CO2 emissions, hazardous waste, and total energy consumption).

73. Id.

74. Id.

75. See id. at 6-8.

76. John C. Coates IV, Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications, 124 YALE L.J. 882 (2015).

77. See, e.g., Nat'l Ass'n of Mfrs. v. SEC, 956 F. Supp. 2d 43 (D.D.C. 2013), aff 'd in part, 748 F.3d 359, 369-70 (D.C. Cir. 2014) (holding quantification of costs and benefits is not judicially mandated when the SEC adopts rules that are humanitarian and not economic), overruled on other grounds by Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc).

78. See, e.g., Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (holding that the SEC must quantify costs and benefits of proposed rules).

79. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559 (2018)).

80. 5 U.S.C. § 706 (2018).

81. Id. § 556(d); see NLRB v. Int'l Brotherhood of Elec. Workers, Loc. 48, 345 F.3d 1049, 1054 (9th Cir. 2003) (interpreting "substantial evidence" to mean more than a mere scintilla and less than a preponderance, and to also mean such evidence as a reasonable mind might accept as adequate to support a conclusion); De La Fuente II v. FDIC, 332 F.3d 1208, 1220 (9th Cir. 2003) (same).

82. 15 U.S.C. § 77b(b) (2018) (Securities Act of 1993); id. § 78c(f) (Securities Exchange Act of 1934); id. § 80a-2(c) (Investment Company Act of 1940).

83. Id. § 78w(a)(2).

84. COMM. ON CAP. MKTS. REGULATION,ABALANCED APPROACH TO COST-BENEFIT ANALYSIS REFORM 4 (2013) (arguing-based upon the text and the legislative history of the National Securities Markets Improvement Act of 1996. Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3416, 3424 (1996) (codified as amended in scattered sections of 15 U.S.C.) ("To amend the federal securities laws in order to promote efficiency . . . .")-that the SEC must conduct CBA based on the statutory requirement that the SEC consider "efficiency" as one of a number of factors in rulemaking).

DIAGRAM: Figure 1. Typology of Firms based on Environmental Performance and Communication

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