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Disclosing Corporate Diversity

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DISCLOSING CORPORATE DIVERSITY

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This Article's central claim is that disclosures can be used instrumentally to increase diversity in corporate America in terms of race, gender, sexual orientation, and disability. Until recently, scholars and policymakers have underappreciated this possibility because diversity was often omitted from the larger Environmental, Social, and Governance ("ESG") disclosures context, even though, as this Article empirically shows, public companies make diversity disclosures in that context.

Diversity disclosures are important not only for shareholders' interests in transparency, but also for the benefit of other stakeholders, including employees, customers, and the communities in which companies operate, who want to know whether companies are diverse to determine where to work, what brands to buy, and what companies value. The literature has yet to explore the significance of diversity disclosures for the benefit of all these stakeholders.

This Article argues that legal reform is needed to use disclosures to improve corporate diversity for the benefit of all stakeholders. Policymakers must go beyond the confines of the securities laws to translate disclosure into societal change. This Article examines contemporary law and policy approaches that fall short of having forward-looking

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provisions that would have an impact on improving diversity. It proposes disclosure rules with statistical and forward-looking provisions and mechanisms that shareholder and employee activists, and others, can use to pressure companies to improve diversity incrementally.

INTRODUCTION

Since 2020, diversity has become a central concern for companies and their leaders, prompting more companies to voluntarily incorporate diversity into their Environmental, Social, and Governance ("ESG") disclosures.[1] A 2021 survey showed that diversity, equity, and inclusion was the top focus—95% for public companies and 63% for private companies—in ESG reports that companies are currently disclosing or plan to disclose in the future.[2] Indeed, as the empirical research in this Article shows, there has been a significant increase in diversity disclosures in companies' ESG reports in the last five years. This Article defines corporate diversity as the representation and inclusion of employees, management, and board members in a company, by gender, race, ethnicity, LGBTQ+ status, and disability, and the provision of equal employment opportunity.

This Article makes three claims. The first is that disclosures can be used instrumentally to diversify corporate boardrooms and workplaces. The second is that while diversity disclosures are important for shareholders who want to know about diversity in the companies in which they invest, other stakeholders, including employees, suppliers, customers, community members, advocacy groups of various types, activists, reformers, and the public as a whole,[3] are also interested in

[1] ESG, which has its origins in the United Nations' environmental movement, is about integrating environmental, social, and governance issues into business. For an excellent discussion about the origins and ambiguity around the term ESG, see Elizabeth Pollman, The Making and Meaning of ESG 20–29 (Inst. L. & Econ., Working Paper No. 659, 2022).

[2] Thompson Hine, An ESG Snapshot: Survey Confirms Companies Are Responding to Increasing Expectations 5 (2021), https://admin.thompsonhine.com/wp-content/uploads/2022/04/An_ESG_Snapshot.pdf [https://perma.cc/VHV7-9SE8]. Public companies are more likely to disclose ESG matters than private companies. L. Emily Hickman, Information Asymmetry in CSR Reporting: Publicly-Traded Versus Privately-Held Firms, 11 Sustainability Acct., Mgmt. & Pol'y J. 207, 219 (2020).

[3] Survey after survey reveals that employees, customers, and the public all want companies to encourage or prioritize workplace diversity and inclusion. See, e.g., Susan Caminiti, Majority of Employees Want to Work for a Company that Values Diversity, Equity and Inclusion, Survey Shows, CNBC: Workforce Wire (Apr. 30, 2021, 3:12 PM), https://www.cnbc.com/2021/04/30/diversity-equity-and-inclusion-are-important-to-workers-survey-shows.html# [https://perma.cc/8NPJ-HZH8]; Shelby Jordan, 64% of Consumers Consider Making an Immediate Purchase After Seeing Diverse Advertisements, New Data Shows, PR Newswire (Nov. 11, 2020), https://www.prnewswire.com/news-releases/64-of-consumers-consider-making-an-immediate-purchase-after-seeing-diverse-advertisements-new-data-shows-301170981.html [https://perma.cc/5XHT-KECK]; Victoria Petrock, Consumers Expect Brands to Be Inclusive, Insider Intel. (Nov. 25, 2020),

diversity disclosures. The literature has yet to explore the importance of corporate diversity disclosures to these other stakeholders. The third is that legislative reform is needed for disclosures to be used as an instrument to increase corporate diversity.

The Article makes theoretical, empirical, and policy contributions in relation to these claims. Theoretically, it brings the ESG and corporate diversity literatures together for the first time. ESG is about the role of business in society, particularly whether and how companies consider the public interest in their practices and policies.[4]

Scholars have long written about Corporate Social Responsibility ("CSR") and ESG, and corporate diversity as two separate subjects.[5] CSR and ESG scholarship can be traced to the 1930s debate between Columbia Law School's Adolph Berle and Harvard Law School's Merrick Dodd.[6] Berle described the protection of shareholders as the critical challenge facing corporate law.[7] Dodd focused on the power dynamics between corporations and society and argued that corporate managers should be attentive not just to shareholders, but to other stakeholders.[8] This debate crystallized in the 1970s—at a similar moment as the environmental movement sought to mitigate ecological harm caused by certain corporate practices—with Milton Friedman's proclamation that managers should act primarily in the interest of shareholders rather than other

https://www.emarketer.com/content/consumers-expect-brands-inclusive [https://perma.cc/DM29-8H9G]; Juliana Menasce Horowitz, Americans See Advantages and Challenges in Country's Growing Racial and Ethnic Diversity, Pew Rsch. Ctr. (May 8, 2019), https://www.pewresearch.org/social-trends/2019/05/08/americans-see-advantages-and-challenges-in-countrys-growing-racial-and-ethnic-diversity/ [https://perma.cc/X568-XDGJ] (reporting that 75% of Americans say it is very or somewhat important for companies to promote racial and ethnic diversity in their workplace).

4 Sean O'Neill, What is the Difference Between CSR and ESG?, Corp. Governance Inst. (July 6, 2022), https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-is-the-difference-between-csr-and-esg [https://perma.cc/R7QY-D8VL].

5 See infra notes 31–36 and accompanying text.

6 Ronald Chen & Jon Hanson, The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law, 103 Mich. L. Rev. 1, 35 (2004).

7 A.A. Berle, Jr., Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049, 1049 (1931).

8 E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145, 1158–61 (1932).

stakeholders.[9] This academic debate is still very much alive today.[10] The Business Roundtable's declaration in 2019 that companies have a "fundamental commitment to all . . . stakeholders"[11] further complicated the debate since some scholars have argued that the declaration does not drastically shift companies' purpose beyond shareholder wealth maximization.[12]

The corporate diversity literature has its roots in the passage of Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972, which, among other things, address the role of corporations in gender and racial discrimination in the workplace and the economy.[13] The U.S. Supreme Court's diversity discourse has been integrated into corporate policies since the 1990s, which accelerated in 2020.[14]

Traditionally, CSR and ESG disclosures—which are typically not covered by financial metrics—were internal and external facing documents companies used to communicate their philanthropic efforts and their impact on the environment and the communities in which they

[9] Milton Friedman, A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits, N.Y. Times (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html/ [https://perma.cc/6VKK-MWZV].

[10] See Jill E. Fisch & Steven Davidoff Solomon, Should Corporations Have a Purpose?, 99 Tex. L. Rev. 1309, 1309 (2021); Mark J. Roe, Corporate Purpose and Corporate Competition, 99 Wash. U. L. Rev. 223, 223–25 (2021); Tom C.W. Lin, Incorporating Social Activism, 98 B.U. L. Rev. 1535, 1537–38 (2018); Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247, 249–51 (1999); David Millon, Essay, New Game Plan or Business As Usual? A Critique of the Team Production Model of Corporate Law, 86 Va. L. Rev. 1001, 1001–03 (2000); Ronald M. Green, Shareholders as Stakeholders: Changing Metaphors of Corporate Governance, 50 Wash. & Lee L. Rev. 1409, 1409–14 (1993); Oliver Williamson, Corporate Governance, 93 Yale L.J. 1197, 1197–1200 (1984).

[11] Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans', Bus. Roundtable (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/4UTS-ABFF].

[12] See, e.g., Dorothy S. Lund, Corporate Finance for Social Good, 121 Colum. L. Rev. 1617, 1619–20 (2021). CEOs from 181 companies representing some of America's largest companies signed the declaration. Bus. Roundtable, supra note 11.

[13] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 703–704, 78 Stat. 241, 253–59; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[14] See, e.g., Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (concluding that universities might use race as one factor among others to promote the "robust exchange of ideas" that might flow from a racially diverse academic community); see also Ellen Berrey, The Enigma of Diversity: The Language of Race and the Limits of Racial Justice 27, 196–97 (2015) (discussing the development of diversity management in the late twentieth century).

operate.[15] The CSR and ESG disclosure literature mirrored this traditional form of disclosures by mostly focusing on climate, environmental, and sustainability matters, and to some extent philanthropy, with little to no engagement with diversity.[16] Corporate diversity scholarship, on the other hand, has mostly focused on the business case for diversity, largely omitting the CSR and ESG disclosure framework.[17] In fact, expanding the ESG literature to include corporate diversity is important for developing new theories of ESG and informing diversity policy as the field changes.

Empirically, this Article shows that, at least in the last five years, public companies have firmly integrated diversity disclosures in their ESG reports. This Article uses machine-learning techniques to analyze 3,461 ESG reports for 1,288 Russell 3000 index companies listed on the Nasdaq Stock Market LLC ("Nasdaq") and the New York Stock Exchange ("NYSE") for the five-year period from 2017 to 2021. For example, 95% of corporations mentioned racial or gender diversity in their 2021 ESG disclosures.

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[15] Catherine Cote, What is a CSR Report and Why is it Important?, Harv. Bus. Sch. Online (Apr. 20, 2021), https://online.hbs.edu/blog/post/what-is-a-csr-report [https://perma.cc/6XK9-SL6M].

[16] See, e.g., Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 Harv. L. Rev. 1197, 1199–1201 (1999); Russell B. Stevenson, Jr., The SEC and the New Disclosure, 62 Cornell L. Rev. 50, 50–59 (1976); Douglas M. Branson, Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility, 29 Vand. L. Rev. 539, 575–76, 581 (1976); Theodore Sonde & Harvey L. Pitt, Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!", 16 How. L.J. 831, 834–35 (1971); David Hess, Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness, 25 J. Corp. L. 41, 42–46 (1999); Janet E. Kerr, The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens, 81 Temp. L. Rev. 831, 846 (2008); Thomas Lee Hazen, Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures, 23 U. Pa. J. Bus. L. 740, 741–47 (2021); Daniel C. Esty & Quentin Karpilow, Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation, 36 Yale J. on Regul. 625, 625–28 (2019).

[17] See, e.g., Jeffrey Meli & James C. Spindler, The Promise of Diversity, Inclusion, and Punishment in Corporate Governance, 99 Tex. L. Rev. 1387, 1387–93 (2021); Lisa M. Fairfax, Board Diversity Revisited: New Rationale, Same Old Story?, 89 N.C. L. Rev. 855, 855–59 (2011) [hereinafter Fairfax, Revisited] (criticizing the overreliance on business justifications for diversifying corporate boards); Lisa M. Fairfax, The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards, 2005 Wis. L. Rev. 795, 796–99 [hereinafter Fairfax, Bottom Line]. The exception is Veronica Martinez & Gina-Gail S. Fletcher, Equality Metrics, 130 Yale L.J.F. 869, 869, 875 (2021), which addresses the role of diversity disclosures but in the context of shareholder transparency and decision making.

In terms of policy, this Article makes the case for using disclosures instrumentally to bring about change that would benefit all stakeholders through new legislation. This Article addresses the limitations of emerging attempts to mandate diversity disclosures, particularly by the Securities and Exchange Commission ("SEC"). Since the 1960s and 1970s, companies have grappled with whether and how to disclose their CSR and ESG policies and practices that impact shareholders, other stakeholders, and society.[18] Scholars and other commentators have since debated whether the SEC has the authority to require the disclosure of ESG practices.[19] Even as academic debates have continued, however, corporations began to voluntarily disclose their CSR and ESG reports as early as the 1990s, largely because of shareholder pressure for transparency and information.[20]

In August 2021, the SEC approved Nasdaq's rule requiring companies listed on its exchange to disclose the diversity of their boards pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 , and Rule 19b-4,[21] making it the first-ever ESG disclosure mandate. While the rule is an important start to mandating diversity disclosures, the SEC is limited in its authority to use disclosures for social change. This limitation is evidenced by three features of the Nasdaq/SEC rule. First, the rule requires Nasdaq-listed companies to have two diverse board members—at least one director who self-identifies as female and at least one director

[18] See infra Section I.C and accompanying text.

[19] See generally Williams, supra note 16, at 1205–07 (arguing that the SEC has the authority to require expanded disclosure and should use this authority to ensure "corporate social transparency"); Stevenson, supra note 16, at 58–62 (explaining and rebutting the SEC's reluctancy to use its authority to require the disclosure of policies related to social goods); Branson, supra note 16, at 631–34 (discussing Judge Charles Richey's perspective on the SEC's authority to require social responsibility disclosure); Sonde & Pitt, supra note 16, at 835–36 (discussing the SEC's opportunity to "help promote the nation's environmental policy" through disclosure requirements related to the National Environmental Policy Act); Paul G. Mahoney & Julia D. Mahoney, The New Separation of Ownership and Control: Institutional Investors and ESG, 2021 Colum. Bus. L. Rev. 839, 843–45 (cautioning the SEC against adopting ESG disclosure mandates).

[20] See Cathy Hwang & Yaron Nili, Shareholder-Driven Stakeholderism, U. Chi. L. Rev. Online (Apr. 15, 2020), https://lawreviewblog.uchicago.edu/2020/04/15/shareholder-driven-stakeholderism-hwang-nili/ [https://perma.cc/7FTT-RYGP]; Andrew J. Hoffman, A Strategic Response to Investor Activism, 37 Sloan Mgmt. Rev. 51, 51 (1996); Michal Barzuza, Quinn Curtis & David H. Webber, Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance, 93 S. Cal. L. Rev. 1243, 1265 (2020); Stavros Gadinis & Amelia Miazad, Corporate Law and Social Risk, 73 Vand. L. Rev. 1401, 1464 (2020).

[21] 15 U.S.C. § 78s(b)(1); 17 C.F.R. § 240.19b-4 (2006).

who self-identifies as an underrepresented minority or as LGBTQ+—or explain why they lack diversity on their boards.[22] The "explain" portion of this "disclose or explain" approach means that companies do not have to disclose two diverse board members if they can explain why they lack board diversity. The SEC states that, "[w]hile the proposal may have the effect of encouraging some Nasdaq-listed companies to increase diversity on their boards, the proposed rules do not mandate any particular board composition."[23] Therefore, the rule advances shareholder transparency but stops short of using disclosures to increase board diversity. Second, the rule applies only to boards and would not require the disclosure of employee or executive diversity, which significantly limits its reach. Third, it only applies to public companies listed on the Nasdaq stock exchange; it does not apply to companies listed on other exchanges or private companies with large valuations that are like public companies, thereby omitting a large subset of the economy.

This Article argues that Congress should step in to establish a diversity disclosure obligation that can increase diversity in both public and private companies. The United States House of Representatives recently passed the ESG Disclosure Simplification Act of 2021 ("ESG Disclosure Act"),[24] which would require companies to disclose their ESG matters, including employee and board diversity.[25] While the proposed ESG Disclosure Act is a significant step toward mandating diversity disclosures for

[22] Underrepresented minority is defined as identifying as Black (or African American), Latinx, Asian, Native American, Alaska Native, Native Hawaiian, Pacific Islander, or a combination of multiple of these ethnicities; LGBTQ+ is defined as an individual who "self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community." Order Approving Changes to Listing Rules Related to Board Diversity, 86 Fed. Reg. 44424, 44424–25, 44425 n.18 (Aug. 6, 2021). The SEC itself is looking to propose its own board diversity disclosure regulations for companies and may include disability status in its rules. See Lydia Beyoud & Andrew Ramonas, Disability Advocates Seek Inclusion in SEC Board Diversity Rules, Bloomberg L. (Sept. 30, 2021), https://news.bloomberglaw.com/esg/disability-advocates-seek-inclusion-in-sec-board-diversity-rules [https://perma.cc/3Z7W-H2KD].

[23] Order Approving Changes to Listing Rules Related to Board Diversity, 86 Fed. Reg. at 44428.

[24] The ESG Disclosure Simplification Act was passed as part of the Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. (as passed by House, June 16, 2021). The Bill was originally introduced in the House as the ESG Disclosure Simplification Act ("EDSA") on February 18, 2021. 167 Cong. Rec. H535 (daily ed. Feb. 18, 2021).

[25] H.R. 1187 § 603. The Act would also require companies to disclose their environmental and climate risk mitigation measures. Id. § 403.

transparency, it lacks a forward-looking component to increase diversity over time.[26] This Article proposes a comprehensive disclosure regime with statistical and forward-looking components and explains how shareholder and employee activists can use disclosures to push companies to actually increase diversity incrementally over time.

This Article proceeds in four parts. Part I discusses the scholarship on CSR and ESG, the history of movements to make CSR and ESG disclosures mandatory, and the history of voluntary ESG disclosures. Part II discusses contemporary law, policy, and private ordering around diversity disclosures, including the recent Nasdaq/SEC rule mandating diversity disclosures and Congress's attempt to mandate diversity disclosures in the ESG Disclosure Act. Part III describes the data and methods used for analysis and empirically shows that diversity disclosures are already firmly included in ESG reports. Part IV analyzes the shortcomings of the Nasdaq/SEC and legislative approaches, arguing that because the purpose of securities laws is limited to ensuring transparency for shareholders to make investment decisions, it is imperative to have a comprehensive disclosure regime that can be used to improve board and workplace diversity rather than to merely provide transparency or serve other shareholder interests. Part IV then proposes a comprehensive disclosure legislation that includes statistical information and forward-looking provisions that aim to gradually increase corporate diversity to benefit a broader range of stakeholders. It also discusses the role of shareholder and employee activists as mechanisms to pressure companies to improve diversity under both the proposed regime and the current Nasdaq/SEC "disclose or explain" rule.

I. ENVIRONMENTAL, SOCIAL, AND GOVERNANCE DISCLOSURES

Environmental, Social, and Governance activities and Corporate Social Responsibility are about the role of business in society, which has long been debated in academic writing.[27] The premise is that corporations have obligations to various stakeholders, including shareholders, employees, suppliers, customers, community members, advocacy groups of various types, and the public.[28] These stakeholders often base their investment

[26] See Atinuke O. Adediran, Disclosures for Equity, 122 Colum. L. Rev. 865, 873–74 (2022) (explaining how to use disclosures to reach racial equity ends).
[27] See generally supra notes 6–9 and accompanying text.
[28] See Hwang & Nili, supra note 20.

decisions, careers, and customer and community engagement decisions on their perception of a company's performance on ESG matters.[29] Ninety percent of S&P 500 companies and many small- and medium-sized companies currently disclose ESG reports.[30] The voluntary disclosure of ESG reports has a long history from movements that pushed for mandatory CSR disclosures.

A. Scholarship on ESG

Until recently, scholarship on ESG was largely devoid of discussions about corporate diversity, and scholarship on corporate diversity also mostly lacked the ESG framework, which tends to emphasize disclosures. There are generally two areas of traditional CSR and ESG scholarship. The first area is more limited, treating CSR as mainly synonymous with corporate philanthropy.[31] The second strand of scholarship focuses on ESG and related disclosures as mostly about environmental and sustainability concerns.[32] In both strands, diversity was often

[29] See Lucian A. Bebchuk & Roberto Tallarita, The Illusory Promise of Stakeholder Governance, 106 Cornell L. Rev. 91, 108–09 (2020); Philipp Schreck, Disclosure (CSR Reporting), *in* Encyclopedia of Corporate Social Responsibility 801, 802 (Samuel O. Idowu, Nicholas Capaldi, Liangrong Zu & Ananda Das Gupta eds., 2013).

[30] See 90% of S&P 500 Index Companies Publish Sustainability Reports in 2019, G&A Announces in its Latest Annual 2020 Flash Report, Governance & Accountability Inst. (July 16, 2020), https://www.ga-institute.com/storage/press-releases/article/90-of-sp-500-index-companies-publish-sustainability-reports-in-2019-ga-announces-in-its-latest-a.html [https://perma.cc/7DMD-VUKP].

[31] See, e.g., M. Todd Henderson & Anup Malani, Essay, Corporate Philanthropy and the Market for Altruism, 109 Colum. L. Rev. 571, 581 (2009); Henry N. Butler & Fred S. McChesney, Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation, 84 Cornell L. Rev. 1195, 1202 (1999); Faith Stevelman Kahn, Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy, 44 UCLA L. Rev. 579, 613 (1997). Outside of scholarship, the media also tends to equate ESG with corporate philanthropy. See, e.g., Alison Smith, Fortune 500 Companies Spend More Than $15bn on Corporate Responsibility, Fin. Times (Oct. 12, 2014), https://www.ft.com/content/95239a6e-4fe0-11e4-a0a4-00144feab7de [https://perma.cc/H97U-863X].

[32] See, e.g., Ofer Eldar, Designing Business Forms to Pursue Social Goals, 106 Va. L. Rev. 937, 940 (2020) ("Without a mechanism for ensuring that CSR actually benefits the stakeholders, companies can easily use it as a means of 'greenwashing.' "); Kerr, supra note 16, at 846 (focusing exclusively on sustainability and the environment); Hazen, supra note 16, at 742 (briefly citing law firm memo that states that social responsibilities and good corporate governance include elimination of toxic corporate culture and enhancement of diversity, inclusion, and equity); Esty & Karpilow, supra note 16, at 630 (advocating for a shift from purely environmental information regulation to a broader form of information regulation to include workplace diversity); Virginia Harper Ho, Disclosure Overload? Lessons for Risk

acknowledged in cursory fashion. John Coffee has argued that while climate change is clearly an ESG issue, skeptics may doubt that diversity disclosures relate to systematic risk disclosure.[33] Paul Brest and Colleen Honigsberg are notable recent exceptions of taking a broader approach to include diversity in discussions about ESG. They have noted that "there is considerable convergence . . . around social standards involving . . . forced labor, workplace safety, discrimination, and diversity."[34] Remarkably, they explore the effects of ESG matters, including diversity, as applicable to a larger group of stakeholders rather than "just investors."[35] However, like other scholars, they too place most of their emphasis on environmental and sustainability matters, and their goal in advancing disclosures is for transparency rather than for a social

Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release, 65 Vill. L. Rev. 67, 71–72 (2020) (addressing ESG disclosure reforms focused only on environmental and climate risk disclosures); Edwin M. Epstein, The Corporate Social Policy Process and the Process of Corporate Governance, 25 Am. Bus. L.J. 361, 374 (1987) (noting that CSR broadly encompasses affirmative action policies for women and minorities, but not addressing diversity as CSR); Gadinis & Miazad, supra note 20, at 1414–15 (acknowledging that CSR is broad and includes diversity among a range of other issues, such as privacy and climate change, but focusing on climate disclosures); John C. Coffee, Jr., The Future of Disclosure: ESG, Common Ownership, and Systematic Risk, 2021 Colum. Bus. L. Rev. 602, 620 (noting that skeptics may doubt that racial diversity and inclusion relate to ESG); Hess, supra note 16, at 53 (noting that in the 1970s, the CSR debate shifted to include affirmative action policies).

Outside of academic writing, nonprofit organizations and the media also often equate ESG with climate risk. See Inv. Resp. Rsch. Ctr. Inst., State of Integrated and Sustainability Reporting 2018, at 9 (2018) (discussing the wide variation of disclosure compliance in reporting a company's stance on climate change mitigation); Alice Uribe & Leslie Scism, ESG Gains Could Buy Better Terms in Insurance Program, Wall St. J. (Oct. 24, 2021), https://www.wsj.com/articles/esg-gains-could-buy-better-terms-in-insurance-program-11635073200 [https://perma.cc/NF2Y-KL78]. Management scholars have acknowledged that CSR and ESG can be broadly defined, but they have also similarly treated them as synonymous with sustainability and disaggregated ESG from diversity. See, e.g., Güler Aras & David Crowther, Governance and Sustainability: An Investigation into the Relationship Between Corporate Governance and Corporate Sustainability, 46 Mgmt. Decision 433, 436 (2008); Hans B. Christensen, Luzi Hail & Christian Leuz, Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review, 26 Rev. Acct. Stud. 1176, 1185–86 (2021). But see Giacomo Boesso, Francesco Favotto & Giovanna Michelon, Stakeholder Prioritization, Strategic Corporate Social Responsibility and Company Performance: Further Evidence, 22 Corp. Soc. Resp. & Env't Mgmt. 424, 427 (2015) (treating diversity as an undisputed form of CSR along with environmental and employee relations in testing companies' financial performance).

[33] Coffee, supra note 32, at 620.

[34] Paul Brest & Colleen Honigsberg, Measuring Corporate Virtue and Vice: Making ESG Metrics Trustworthy, *in* Frontiers in Social Innovation 79, 84 (Neil Malhotra ed., 2022).

[35] Id.

or racial justice end, such as to increase corporate diversity or confront systemic racism.[36]

Like the ESG literature, until recently, scholars of corporate diversity did not tend to use the ESG framework with its focus on disclosures in their analysis. Diversity scholarship tends to fall into two categories. The first is scholarship that addresses the rationales for—and benefits and drawbacks of—diversifying corporations.[37] The second is the more recent scholarship that uses the ESG framework and addresses disclosures in the context of corporate diversity.[38] This Article joins this rapidly growing literature that discusses diversity disclosures in the context of ESG. The Article then pushes the literature further with an original empirical analysis that shows how corporations have shifted ESG disclosures to include diversity disclosures in the last five years. It also takes the view that concerns about the lack of diversity in corporations are not only about corporate performance for shareholders' interests, but should also include

[36] See id. at 86–94.

[37] Fairfax, Revisited, supra note 17, at 856–57, 860; Fairfax, Bottom Line, supra note 17, at 795, 799; Meli & Spindler, supra note 17, at 1387; Aaron A. Dhir, Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity 175, 180, 296–97 (2015); Yaron Nili, Beyond the Numbers: Substantive Gender Diversity in Boardrooms, 94 Ind. L.J. 145, 150 (2019); Deborah L. Rhode & Amanda K. Packel, Diversity on Corporate Boards: How Much Difference Does Difference Make?, 39 Del. J. Corp. L. 377, 377 (2014); Akshaya Kamalnath, Social Movements, Diversity, and Corporate Short-termism, 23 Geo. J. Gender & L. 449, 450 (2022); Akshaya Kamalnath, Strengthening Boards Through Diversity: A Two-Sided Market That Can Be Effectively Serviced by Intermediaries, 40 Law & Ineq. 155, 156–57 (2022).

[38] See Martinez & Fletcher, supra note 17, at 875, 892–93 (noting that the focus of institutional investors on ESG matters prompted corporate support for the Black Lives Movement in 2020 and that "Blackrock also has asked corporations in which it invests to publish disclosures on the racial and ethnic composition of their U.S. workforces and other information aligned with the Sustainability Accounting Standards Board ('SASB'), a nonprofit organization that has developed standardized reporting metrics for ESG data, including data related to diversity and inclusion"); Chris Brummer & Leo E. Strine, Jr., Duty and Diversity, 75 Vand. L. Rev. 1, 56 (2022) (taking a fiduciary duty approach to corporate diversity and discussing diversity-specific ESG indices); Veronica Root Martinez, The Diversity Risk Paradox, 75 Vand. L. Rev. En Banc 115, 124 (2022) (arguing that corporate diversity disclosures can be sources of litigation risk for companies). Other scholars have also written about ESG and diversity outside of the context of disclosures. See, e.g., Afra Afsharipour, ESG and Board-Shareholder Engagements in M&A, *in* Board-Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices (Luca Enriques & Giovanni Strampelli eds., forthcoming 2023).

discussions about how to make corporations more diverse and inclusive for the benefit of all stakeholders.[39]

B. History of Mandatory CSR Disclosures

When the environmental and consumer movement of the 1970s began, civil rights matters were included as part of the push for mandatory CSR disclosures. At the time, CSR disclosures focused on equal employment opportunity for racial and ethnic minorities and did not include the disclosure of gender and other identities. In the 1950s and 1960s during the civil rights movement, fair employment became part of the criteria used to evaluate CSR.[40] In 1970, the consumer movement on corporate social responsibility made several appeals for mandating the disclosure of environmental and civil rights matters.[41]

In 1971, the Natural Resources Defense Council ("NRDC"), Project on Corporate Responsibility ("the Project"), and the Center on Corporate Responsibility ("the Center") filed a rulemaking petition with the SEC requesting that it amend its reporting rules to require corporations to disclose more information about the environmental impact of their activities and their progress in achieving equity.[42] Regarding environmental disclosures, the proposal wanted the SEC to require companies "to describe with respect to each major activity or product . . . : (1) the nature and extent . . . of the resulting pollution or injury to natural areas and resources, and (2) the feasibility of, and plans for, correcting the same."[43] "The [p]etition also requested that the SEC require disclosure of whether the registered company has changed company products, projects, production methods, policies, investments or advertising to advance

[39] See Brest & Honigsberg, supra note 34, at 93; Brummer & Strine, supra note 38, at 25–26.

[40] Stacy Kinlock Sewell, "The Best Man for the Job": Corporate Responsibility and Racial Integration in the Workplace, 1945–1960, 65 Historian 1125, 1125 (2003); Archie B. Carroll, Kenneth J. Lipartito, James E. Post & Patricia H. Werhane, A Revolution of Rising Expectations (1963–1973), *in* Corporate Responsibility: The American Experience 230, 230 (Kenneth E. Goodpaster ed., 2012).

[41] That year, "a group of Washington lawyers sponsored by Ralph Nader took on General Motors and inaugurated the consumer movement for corporate social responsibility." Campaign GM, Harv. Crimson (Sept. 20, 1971), https://www.thecrimson.com/article/1971/9/20/campaign-gm-pin-1970-a-group/ [https://perma.cc/V85B-KRFL]. For additional historical background, see generally Luther J. Carter, Campaign GM: Corporation Critics Seek Support of Universities, 168 Science 452, 452 (1970).

[42] Nat. Res. Def. Council, Inc. v. SEC (*NRDC I*), 389 F. Supp. 689, 693–94 (D.D.C. 1974).

[43] Id. at 694.

environmental values."[44] With respect to equal employment opportunity, the proposal sought to require companies that "make[] public claims about [their] employment of minorities or women [to] be required to include in [their] SEC filings statistical data" so that those claims can "be tested by interested persons."[45] The petitioners' goal was to obtain the disclosure of sufficient information so as to allow investors to "make socially responsible decisions."[46]

In response, the SEC did two things. It first issued a release simply describing its limited policies on environmental and civil rights disclosures.

> [T]he Securities and Exchange Act call[s] for disclosure, if material, when compliance with statutory requirements with respect to environmental quality e.g., various air, water and other antipollution laws, may necessitate significant capital outlays, may materially affect the earning power of the business, or cause material changes in . . . business . . . .
>
> [And these requirements] call for disclosure, if material, when legal proceedings arising under statutory requirements relating to Civil Rights would for example, result in the cancellation of a Government contract or termination of further business with the Government.[47]

Next, in December 1971, the SEC issued an order stating that it "declined to take the action requested" by the petitioners.[48] Without providing much reasoning, the SEC appeared to have decided that "no reasonable investor . . . want[ed] the type of information" sought.[49]

The letter informing the petitioners of the order also stated that the SEC would "actively consider" amendments to its disclosure requirements "in the near future,"[50] but no meaningful changes came. In April 1973, the SEC passed amendment Forms S-I, S-7, and S-9 (for registration of new issues under the 1933 Act), Form 10 (for registration under the 1934 Act), Form 10-K (for annual reports under the 1934 Act), and Form 8-K (for

[44] Id.
[45] Id.
[46] Environmental Disclosure Rules: Despite Court Win, SEC Adopts Broad New Standard for Corporations, 9 Env't L. Rep. 10222, 10222 (1979).
[47] Disclosures Pertaining to Matters Involving the Environment and Civil Rights, 36 Fed. Reg. 13989, 13989 (July 29, 1971) (footnote omitted).
[48] *NRDC I*, 389 F. Supp. at 694.
[49] Id. at 699.
[50] Id. at 694 (citation omitted).

interim reports under the 1934 Act).[51] The additions required corporations to report "material effects that . . . the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of" a company.[52] But there were no amendments made relating to equal employment, and companies were "already required to disclose all material features of their business" and "all material litigation."[53] Therefore, the amendments—the diminutive environmental disclosure changes and non-existent equal employment disclosure changes—made no practical difference.[54]

Deeming this response from the SEC unsatisfactory, the NRDC, the Project, and the Center filed a lawsuit to require the Commission to modify its rules and mandate the reporting of more environmental and equal employment opportunity data.[55] In *Natural Resources Defense Council, Inc. v. SEC* ("*NRDC I*"), the district court concluded that the SEC failed to deliver "an informed and reasoned consideration of the changes . . . it should [have] effect[ed]" after the National Environmental Policy Act of 1969 ("NEPA") passed.[56] The court then remanded with instructions that fuller proceedings be conducted and issued instructions for the SEC to explore possible avenues that can "eliminate corporate practices that are inimical to the environment and equal employment opportunity."[57]

On remand, the SEC issued a release giving notice of renewed proceedings to fulfill the district court's instructions.[58] In nineteen days of public hearings, there were fifty-four oral presentations and 353 written comments.[59] Comments favoring the proposals declared that greater disclosure was essential considering what the disclosed information would show about environment and equal employment costs.[60]

[51] Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, 38 Fed. Reg. 12100, 12100 (May 9, 1973).
[52] Id.
[53] Stevenson, supra note 16, at 55.
[54] See id.
[55] *NRDC I*, 389 F. Supp at 692–93.
[56] Id. at 699.
[57] Id. at 701–02.
[58] Disclosure of Environmental and Other Socially Significant Matters: Notice of Public Proceeding, 40 Fed. Reg. 7013, 7014 (Feb. 18, 1975).
[59] Nat. Res. Def. Council, Inc. v. SEC (*NRDC II*), 432 F. Supp. 1190, 1195 (D.D.C. 1977), *rev'd*, Nat. Res. Def. Council v. SEC (*NRDC III*), 606 F.2d 1031, 1031 (D.C. Cir. 1979).
[60] *NRDC III*, 606 F.2d at 1038 n.4.

Comments opposed the disclosure proposals on the ground "that shareholders were not seriously interested in the information, and that the benefits would be small."[61] After collecting this additional public input, the SEC again decided against imposing additional disclosure requirements.[62]

The NRDC returned to court to challenge the SEC's decision and succeeded again, though only temporarily. In *Natural Resources Defense Council, Inc. v. SEC* ("*NRDC II*"), the district court held that although NEPA did not require the SEC to promulgate broad environmental disclosure regulations, the SEC was required to consider alternatives to the fullest extent possible.[63] Finding that the SEC failed to do so, the court remanded the case back to the commission once more.[64] But the U.S. Court of Appeals for the District of Columbia Circuit reversed.[65] The D.C. Circuit emphasized Congress's discretion in granting the SEC power to develop disclosure rules, acknowledging that judicial review must be deferential to the extent of relying to some degree on the agency's expertise.[66] The court of appeals held that the Commission was "wholly justified in rejecting the proposed rules and choosing" to rely on its existing disclosure standard that rests on the materiality of information to investors.[67] The materiality standard contemplates

> a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder . . . . [T]hat the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[68]

Although the court of appeals was silent on the breadth of the materiality standard, given this definition, the standard can go beyond

[61] Id. at 1038.
[62] *NRDC II*, 432 F. Supp. at 1195.
[63] Id. at 1198.
[64] Id. at 1212.
[65] *NRDC III*, 606 F.2d at 1062.
[66] Id. at 1045.
[67] Id. at 1062.
[68] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); see also 17 C.F.R. § 230.405 (2011) (defining "material" as "those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered").

financial materiality.[69] The SEC and courts have observed, for example, "that the prototypal reasonable investor or shareholder should have the right to know the type of people managing a corporation, soliciting proxies, and standing for election to the board of directors."[70]

In the end, the movement "yielded meager results" in mandating CSR disclosures.[71] Voluntary environmental disclosures have become particularly attractive for corporations whose shareholders demand climate risk information even though companies subject to SEC rules are required to disclose non-financial statements that are material, including climate risk related matters, but few SEC rules expressly require environmental disclosures. Item 101 of Regulation S-K requires companies to "disclos[e] . . . certain costs of complying with environmental laws."[72] Item 101 also requires disclosure of "any material estimated capital expenditures for environmental control facilities for the remainder of a [company]'s current fiscal year and its succeeding fiscal year and for such further periods as the [company] may deem material."[73] Item 103 of Regulation S-K also requires companies to disclose environmental penalties of $100,000 or greater.[74] The rule requires the disclosure of material pending administrative or judicial proceedings, other than "ordinary routine litigation incidental to the business."[75] In November 2020, the SEC updated the rule to increase the existing quantitative threshold from $100,000 to $300,000 but also allow companies to choose from a range of different thresholds that they determine is reasonably designed to result in disclosure of material environmental proceedings.[76]

[69] George S. Branch & James A. Rubright, Integrity of Management Disclosures Under the Federal Securities Laws, 37 Bus. Law. 1447, 1447–48 (1982).

[70] Id. at 1448.

[71] Hoffman, supra note 20, at 52.

[72] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6293 (Feb. 8, 2010); Marcy Gordon, New Corporate Climate Change Disclosures Proposed by SEC, Associated Press (Mar. 21, 2022), https://apnews.com/article/climate-business-environment-e55ae33115e6a9e1202673ab51745924 [https://perma.cc/2JR6-D7QY].

[73] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. at 6295–96.

[74] 17 C.F.R. § 229.103 ("(Item 103) Legal proceedings.").

[75] Id.

[76] Modernization of Regulation S–K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63728 (Oct. 8, 2020) (codified at 17 C.F.R. § 229.103).

C. History of Voluntary CSR and ESG Disclosures

Unlike the mandatory disclosure movement, the voluntary disclosure of equal employment opportunity and environmental disclosures were separate from the very beginning. In April 1961, the NAACP filed complaints with the President's Committee on Equal Opportunity Employment about discrimination against Black employees at Lockheed Martin Corporation's aircraft plant in Marietta, Georgia.[77] The plant in Marietta "was a segregated facility, and the small number of existing [B]lack employees were concentrated in low-level jobs."[78] After the NAACP filed its complaint, the Commission's Executive Director, John Field, "flew to Lockheed's headquarters in California to meet with [the] company['s] president Courtlandt Gross to try to persuade him to take strong steps to resolve the complaints."[79] In response, "Lockheed immediately removed 'White' and 'Colored' signs from rest rooms, drinking fountains, and cafeterias at the . . . plant."[80] Then, "[i]n a ceremony on May 25, 1961, Gross and [then] Committee Chair Lyndon Johnson formally agreed to what they called a 'Plan for Progress,' " which was conceived to enlist voluntary cooperation from large companies to fight racial discrimination, as well as create equal employment, training, and promotion for minority employees.[81]

President Kennedy "hailed it as a 'milestone' in civil rights, asserting that it was 'setting a pattern' for voluntary action in achieving equal employment opportunity."[82] By 1966, there were 328 signatories—some of the largest corporations in the country—who provided the Committee with aggregated employment statistics.[83] However, this aggregated data

[77] Judson MacLaury, President Kennedy's E.O. 10925: Seedbed of Affirmative Action, 2 J. Soc'y for Hist. Fed. Gov't 42, 48 (2010).

[78] Id.

[79] Id.

[80] Id. at 49.

[81] Id.; Hubert Humphrey, U.S. Vice President, Fifth Anniversary Ceremony, Plans for Progress 3–4 (June 6, 1966).

[82] MacLaury, supra note 77, at 49.

[83] Humphrey, supra note 81, at 4–5. The Plans for Progress program was not very successful in its racial equity goals. As Vice President Hubert Humphrey remarked during the fifth anniversary ceremony of Plans for Progress in 1966, "If you start from a small enough base, any increase will look better than it actually is." Id. at 5; see also Daniel H. Pollitt, Racial Discrimination in Employment: Proposals for Corrective Action, 13 Buff. L. Rev. 59, 69–70 (1963) (citing a survey out of North Carolina to conclude that the "program got off to a very slow start indeed").

did not disclose company-level data to the general public.[84] By the 1970s, the voluntary model of equal employment opportunity had to make way for affirmative action requirements that shifted compliance with equal employment from voluntary to mandatory with the passage of the Equal Employment Opportunity Act of 1972 and the Equal Employment Opportunity Commission ("EEOC").[85] Since then, companies (federal contractors and those with more than 100 employees) have been required to disclose their employment data by gender, race, and ethnicity to the EEOC.[86] The EEOC makes aggregated data available to the public. However, company-level data is not publicly disclosed.[87] It is only in voluntary disclosures that companies provide that information to the public.

II. CONTEMPORARY LAW AND POLICY APPROACHES

Recently, the SEC and Congress have made attempts to mandate ESG disclosures, including diversity disclosures. This Section outlines the SEC's authority to mandate ESG disclosures and its recent approval of the Nasdaq diversity disclosure rule. It also addresses the United States House of Representative's attempt to make ESG disclosures mandatory and uniform through the ESG Disclosure Simplification Act. Finally, it discusses what public companies are doing regarding diversifying their workforce.

A. The SEC's Authority and Its First ESG Disclosure Mandate

The SEC was established in 1934 upon the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934.[88] Section 14(a) of

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[84] See MacLaury, supra note 77, at 49; see also Boeing Co. & President's Comm. on Equal Emp. Opportunity, Joint Statement on "Equal Employment Opportunity Plan for Progress," John F. Kennedy Presidential Libr. & Museum, July 12, 1961, at 1, https://www.jfklibrary.org/asset-viewer/archives/JFKWHSFHW/008/JFKWHSFHW-008-004 [https://perma.cc/GRE2-5FEN] (noting that the Boeing Company submitted "statistical data on its personnel and responded to questions with regard to its employment policies and practices . . . on a completely confidential basis and . . . only for the official use of the Committee").

[85] Jennifer J. Armiger, "What Was Good Enough in the 1960s Is Not Good Enough Today": Sex, Race, and Business Opposition to Equal Opportunity Policy in 1970s America, 10 Bus. & Econ. Hist. On-Line 1, 8 (2012).

[86] U.S. Equal Emp. Opportunity Comm'n, EEO Data Collections, https://www.eeoc.gov/employers/eeo-data-collections [https://perma.cc/N228-ANR6] (last visited Jan. 25, 2023).

[87] Id.

[88] Carroll et al., supra note 40, at 167.

the Securities Exchange Act of 1934 empowers the SEC to require the disclosure of any information it deems "necessary or appropriate in the public interest or for the protection of investors."[89] The 1934 Act empowers the SEC with broad authority over all aspects of the securities industry, including the power to register, regulate, and oversee the nation's securities self-regulatory organizations ("SROs"), such as the New York Stock Exchange, the Nasdaq Stock Market, and the Financial Industry Regulatory Authority ("FINRA").[90]

The legislature's main goals in enacting these laws was to ensure more transparency in financial statements so that investors could make informed decisions about investments and to establish laws against misrepresentation and fraudulent activities in the securities markets.[91] To meet these goals, the securities laws mandated public corporations to issue annual audited statements and annual reports.[92] The laws also mandated companies to provide investors with detailed prospectuses.[93] The SEC was built on the notion that transparency is critical to investors—the idea that sunlight is the best disinfectant, as described by Louis Brandeis.[94]

Public companies must disclose information related to their financial conditions, operating results, and management compensation to the SEC.[95] Section 14(a) of the Securities Exchange Act of 1934 and Rule

[89] 15 U.S.C. § 78n(a).

[90] Elisabeth Keller & Gregory A. Gehlmann, Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934, 49 Ohio St. L.J. 329, 330, 347 (1988).

[91] James M. Landis, Legislative History of the Securities Act of 1933, 28 Geo. Wash. L. Rev. 29, 30 (1959); see also Thomas J. Schoenbaum, The Relationship Between Corporate Disclosure and Corporate Responsibility, 40 Fordham L. Rev. 565, 566 (1972) (discussing the role of disclosures in securities law); Eric D. Roiter, Illegal Corporate Practices and the Disclosure Requirements of the Federal Securities Laws, 50 Fordham L. Rev. 781, 782–83 (1982) (addressing the legal and policy issues that arise from disclosure obligations of the securities laws when corporate action is illegal or questionable).

[92] U.S. Secs. & Exch. Comm'n, Exchange Act Reporting and Registration, https://www.sec.gov/education/smallbusiness/goingpublic/exchangeactreporting [https://perma.cc/YT9N-F29Q] (last modified Apr. 28, 2022).

[93] Securities Act of 1933, Pub. L. No. 73-22, §§ 2, 6, 10, 48 Stat. 74, 75, 78, 81.

[94] Brigham Daniels, Mark Buntaine & Tanner Bangerter, Testing Transparency, 114 Nw. U. L. Rev. 1263, 1265 (2020) (citing Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1914)).

[95] Timely Disclosure of Material Corporate Developments, 35 Fed. Reg. 16733 (Oct. 29, 1970); Dale Arthur Oesterle, The Inexorable March Toward a Continuous Disclosure Requirement for Publicly Traded Corporations: Are We There Yet, 20 Cardozo L. Rev. 135, 139, 140 n.16 (1998).

14a prohibit public companies from making false or misleading statements with respect to material facts or failing to state any material fact necessary to make the statements not misleading.[96] Section 17(a) of the Securities Act of 1933 and Rule 10b-5 prohibit untrue statements of material facts or omissions of material facts necessary to make the statements made not misleading in connection with the offer, purchase, or sale of securities.[97]

A public company's disclosure obligations begin with the initial registration statement filed with the SEC, which must continue to be amended to keep shareholders informed through periodic reports and other materials.[98] The SEC makes these documents publicly available without charge.[99] The filed documents are subject to review by SEC staff for compliance with federal securities laws.[100] And noncompliance can be costly. In 2020, noncompliance with disclosure rules made up nearly half (49%) of all SEC actions filed against public companies.[101] This was the highest percentage of nondisclosure actions since 2014.[102] The average monetary settlement imposed on a public company by the SEC in 2020 was $28 million.[103] The median monetary settlement imposed was $4 million.[104]

Even if the SEC can regulate ESG disclosures for public companies, its authority to regulate private companies is limited.[105] This is partly the

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[96] 17 C.F.R. § 240.14a-9 (2001).

[97] 15 U.S.C. § 77q(a) (2006); 15 U.S.C. § 78j(b) (2006); 17 C.F.R. § 240.10b-5 (2010).

[98] Oesterle, supra note 95, at 141–42.

[99] U.S. Secs. & Exch. Comm'n, Accessing EDGAR Data, https://www.sec.gov/os/accessing-edgar-data [https://perma.cc/ZLB6-D447] (last modified Oct. 17, 2022).

[100] Zahn Bozanic, J. Richard Dietrich & Bret A. Johnson, SEC Comment Letters and Firm Disclosure, 36 J. Acct. & Pub. Pol'y 337, 338 (2017).

[101] Stephen Choi, Sara E. Gilley, Heather B. Lazur, Giovanni Patti & Lindsay V. Schick, SEC Enforcement Activity: Public Companies and Subsidiaries 5 (2020).

[102] Id.

[103] Id. at 2.

[104] Id.

[105] See William J. Carney, The Costs of Being Public After Sarbanes-Oxley: The Irony of "Going Private," 55 Emory L.J. 141, 142 (2006) (noting that some public companies go private to avoid SEC regulation). Private companies include family-owned businesses, sole proprietorships, and small and medium-sized companies. Private companies are not required to disclose their financial statements to the SEC. Michael Minnis & Nemit Shroff, Why Regulate Private Firm Disclosure and Auditing?, 47 Acct. & Bus. Rsch. 473, 473 (2017). Private companies do need to file financial documents with the secretary of state in the state in which they are incorporated, and quarterly tax estimates and yearly tax returns with the Internal Revenue Service. See Evan Tarver, Are Private Companies Required to Publish Financial Statements?, Investopedia (Oct. 30, 2022), https://www.investopedia.com/ask/ans

reason why this Article proposes the legislative approach to ESG disclosure mandates in Part IV.

1. Diversity Disclosures in Securities Laws

Similar to environmental disclosures that already have some limited disclosure mandates in securities laws, in 2009, the SEC adopted a rule—Item 407(c) of Regulation S-K—requiring companies to disclose whether and how they consider diversity in identifying director nominees.[106] But the rule does not *require* firms to adopt policy regarding the consideration of diversity in their nomination processes. The SEC only requires a company to explain how its policy is implemented and how its boards assess the policy's effectiveness.[107] Nor does the SEC provide a definition of diversity. Instead, it allows companies to define it as expansively as to include differences of viewpoint, professional experience, education, skill, and other individual qualities, or as narrowly as to focus on concepts such as race or gender.[108] Ultimately, the rule does not require firms to adopt a diversity policy at all.[109] And, until 2021, this was the only diversity disclosure rule on the books, meaning there were no mandated statistical disclosures or requirements that companies consider diverse candidates in their nomination policies.

Two other SEC disclosure rules have similar "disclose or explain" provisions, both of which require disclosures in annual reports filed pursuant to the Securities Exchange Act of 1934. Section 406 of Sarbanes-Oxley Act of 2002 ("SOX") requires a company to disclose whether it has adopted a code of ethics that applies to the company's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. A company that has not adopted such a code must disclose this fact and explain why it has not done so.[110] Similarly, Section 407 requires a

wers/062415/private-company-required-disclose-financial-information-public.asp# [https://perma.cc/FCY2-GUKV]. However, none of these documents are generally publicly available. See, e.g., Jennifer S. Fan, Regulating Unicorns: Disclosure and the New Private Economy, 57 B.C. L. Rev. 583, 641 (2016) (discussing the fact that even for large private companies incorporated in the state of Delaware with at least $1 billion in valuation, obtaining a certificate of incorporation from the Secretary of State of Delaware requires a fee).

[106] Proxy Disclosure Enhancements, 74 Fed. Reg. 68334, 68364 (Dec. 23, 2009).

[107] Id.

[108] Id. at 68344.

[109] Dhir, supra note 37, at 84.

[110] 15 U.S.C. § 7264(a).

company to disclose whether it has at least one "financial expert" serving on its audit committee, and if so, the name of the expert and whether the expert is independent of management.[111] A company that lacks an audit committee financial expert must disclose and explain that fact.[112]

However, both Sections 406 and 407 are mandatory rules—as opposed to "disclose or explain" rules—because both the NYSE's and Nasdaq's rules require a code of ethics and someone with financial knowledge on the audit committee, and, therefore, nullify the "explain" portion of the SEC's rule. Specifically, Nasdaq's rule states that each issuer "shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available."[113] The NYSE's rule similarly requires listed companies to "adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers."[114] Correspondingly, Nasdaq requires at least one audit committee member to have "financial sophistication,"[115] and the NYSE requires an "accounting or related financial management expertise"[116] on the audit committee of listed companies. While neither the NYSE nor Nasdaq require the audit committee to include a person who satisfies the SEC's definition of a financial expert, both require some financial knowledge. As such, the NYSE and Nasdaq regulations essentially make the SEC's rule mandatory making them significantly different from diversity disclosure rules in securities laws.

2. Human Capital Disclosures

In August 2020, the SEC amended Item 101(c) of Regulation S-K to require companies to make human capital disclosures in the "Business" section of their annual 10-K reports, to the extent the information is material to an understanding of their business.[117] It requires companies to

[111] Id. § 7265(a).
[112] Id.
[113] Nasdaq Stock Market LLC, Marketplace Rules 4350(n).
[114] N.Y.S.E. Corporate Governance Rules § 303A.10.
[115] Nasdaq Stock Market LLC, Marketplace Rules 4350(d)(2)(A).
[116] NYSE Regul., NYSE Listed Company Manual Section 303A Corporate Governance Standards Frequently Asked Questions 12 (rev. ed. 2010) (internal quotation marks omitted) (citation omitted).
[117] 17 C.F.R. § 229.101(b)(2)(ii). Regulation S-K is an SEC regulation "that outlines how [companies] should disclose material qualitative descriptors of their business on registration statements, periodic reports, and any other filings." Regulation S-K, Legal Info. Inst.: Wex

provide "a description of [their] human capital resources, including any human capital measures or objectives that the [company] focuses on in managing [its] business."[118] One of the goals of the amendments was to modernize and simplify how companies describe their business and improve disclosure for investors.[119] Prior to the amendments, Item 101(c)—which had not undergone significant revisions in over thirty years—merely required companies to disclose the number of people they employed.[120]

Like the lack of definition of what constitutes diversity in the 2009 rule, the new Item 101(c) does not define human capital resources, nor does it require companies to disclose any particular type of information.[121] The SEC intentionally left the meaning of human capital open on the basis that the term may evolve over time and can be subject to various interpretations in different industries.[122] The rule suggests that disclosures may include "measures and objectives that address the attraction, development, and retention of personnel," although these suggestions are "non-exclusive examples of subjects that may be material, depending on the nature of the . . . business and workforce."[123]

Despite the lack of explicit reference to the meaning of human capital, however, 2020's racial reckoning influenced how the SEC's leadership spoke about the amendment, which may have influenced how companies chose to interpret the meaning of human capital disclosures. For example, after the amendment became public, then Acting Commissioner Allison Herren Lee released a statement heralding the changes while also expressing regret that the rule is silent on "diversity in the face of profound racial injustice."[124] A June 2021 speech by the SEC Chair Gary

(Jan. 2022), https://www.law.cornell.edu/wex/regulation_s-k [https://perma.cc/2CYZ-GZLT].

[118] Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63739 (Oct. 8, 2020). This change was proposed in August 2019. Id. at 63726.

[119] The amendments also included changes to the description of legal proceedings as well as risk factors in Items 103 and 105 respectively. Id. at 63740, 63742.

[120] 17 C.F.R. § 229.101; see also George S. Georgiev, The Human Capital Management Movement in U.S. Corporate Law, 95 Tul. L. Rev. 639, 678 (2021) (discussing the modification of the rule to include human capital disclosures).

[121] See Christopher M. Bruner, Corporate Governance Reform and the Sustainability Imperative, 131 Yale L.J. 1217, 1255 (2022).

[122] Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. at 63739.

[123] Id.

[124] Press Release, Allison Herren Lee, Comm'r, U.S. Secs. & Exch. Comm'n, Regulation S-K and ESG Disclosures: An Unsustainable Silence (Aug. 26, 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26 [https://perma.cc/4FDH-8LGT].

Gensler also noted that the new disclosure rule could "include a number of metrics, such as workforce turnover, skills and development training, compensation, benefits, [and] workforce demographics including diversity."[125]

One industry analysis of 451 S&P 500 companies that filed an annual 10-K report between November 2020 and July 2021 shows that 82% of 10-K reports included general discussions about diversity, equity, and inclusion, encompassing a range of identity factors, including race, gender, and sexual orientation.[126]

3. Nasdaq/SEC's First Standalone Diversity Disclosure Rule

On December 1, 2020, Nasdaq filed a proposal with the SEC to enhance the transparency of board diversity statistics through disclosure requirements.[127] The SEC published the proposal for comment in the *Federal Register* on December 11, 2020, and received over 200 comment letters from Nasdaq-listed issuers, institutional investors, state and federal legislators, advocacy organizations, and other parties.[128] About 85% of the letters supported the proposal on the basis that it would enhance corporate governance, advance board diversity, facilitate transparency and decision making, reflect the core values of investors and others, enhance corporate performance, and promote investor confidence.[129]

On February 26, 2021, Nasdaq filed an amendment to the proposed rules and a response letter to the SEC addressing the comments it received.[130] In the amendments, Nasdaq responded to concerns raised by

[125] Press Release, Gary Gensler, Chair, U.S. Secs. & Exch. Comm'n, Prepared Remarks at London City Week (June 23, 2021), https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321 [https://perma.cc/A4W8-C5JH].

[126] Discussing Human Capital: A Survey of the S&P 500's Compliance with the New SEC Disclosure Requirement One Year After Adoption, Gibson Dunn (Nov. 10, 2021), https://www.gibsondunn.com/discussing-human-capital-survey-of-sp-500-compliance-with-new-sec-disclosure-requirement-one-year-after-adoption/ [https://perma.cc/CJF3-GAVW].

[127] Nasdaq to Advance Diversity Through New Proposed Listing Requirements, Nasdaq (Dec. 1, 2020, 7:15 AM), https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01 [https://perma.cc/VB7R-9PXN]; Nasdaq Stock Mkt. LLC, Proposed Rule Change (Form 19b-4) (Dec. 1, 2020).

[128] Letter from John A. Zecca, Exec. Vice President, Chief Legal & Regul. Officer, Nasdaq, to Vanessa A. Countryman, Sec'y, U.S. Secs. & Exch. Comm'n 1 (Feb. 26, 2021) (File No. SR-NASDAQ-2020-081).

[129] Id. at 2. Most who opposed did so on the basis that it is either a mandate or tokenism quota. Id. at 7.

[130] Id. at 1.

some commenters to provide more flexibility for boards with five or fewer directors, and adding a grace period for covered companies that fall out of compliance with applicable board diversity objectives.[131] In its response letter, Nasdaq emphasized that the rules are not intended to impose a quota because companies will have the choice to either meet the board diversity objectives or explain why it is appropriate for the company to lack diversity.[132]

The SEC approved the board diversity disclosure rule on August 6, 2021.[133] The SEC concluded that the disclosure rule will improve "the quality of information available to investors for making investment and voting decisions by providing consistent and comparable diversity metrics."[134] Chairman Gary Gensler further explained that the new rules "reflect calls from investors for greater transparency about the people who lead public companies," and will "allow investors to gain a better understanding of Nasdaq-listed companies' approach to board diversity."[135]

The board diversity disclosure rule has three components. It requires most Nasdaq-listed companies with more than five directors to: (1) annually disclose the statistics of their board directors by gender, race, ethnicity, and LGBTQ+ status; and (2) include at least one woman on their board of directors *and* one person who is an underrepresented minority—an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities, or who self-identifies as LGBTQ+,[136] *or* publicly disclose why the company's board does not include two diverse

[131] Id. at 2.

[132] Id. at 3.

[133] Order Approving Changes to Listing Rules Related to Board Diversity, 86 Fed. Reg. 44424, 44445 (Aug. 12, 2021).

[134] Press Release, Allison Herren Lee & Caroline A. Crenshaw, Comm'rs, U.S. Secs. & Exch. Comm'n, Statement on Nasdaq's Diversity Proposal—A Positive First Step for Investors (Aug. 6, 2021), https://www.sec.gov/news/public-statement/statement-nasdaq-diversity-080621?utm_medium=email&utm_source=govdelivery [https://perma.cc/2LMR-PDXP].

[135] Press Release, Gary Gensler, Chair, U.S. Secs. & Exch. Comm'n, Statement on the Commission's Approval of Nasdaq's Proposal for Disclosure about Board Diversity and Proposal for Board Recruiting Service (Aug. 6, 2021), https://www.sec.gov/news/public-statement/roisman-board-diversity [https://perma.cc/X98U-9RHQ].

[136] An individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.

directors.[137] (3) It provides an optional one-year diversity recruitment service offered to companies who have no diverse board members.[138]

a. Annual Diversity Statistical Disclosure—Rule 5606

Rule 5606 of the Nasdaq/SEC disclosure rule requires Nasdaq-listed companies to annually disclose statistical information of self-identified gender, race, and LGBTQ+ affiliation characteristics of their board of directors. Companies must disclose their board diversity data by the later of August 8, 2022, or the date the company files its proxy or information statement for its annual meeting of shareholders. If the company does not file a proxy or information statement, it must disclose on the date it files its Form 10-K or 20-F during the 2022 calendar year.[139]

If a company fails to comply with Rule 5606, it will receive a notification from Nasdaq about noncompliance, at which point it will have forty-five calendar days to submit a plan to regain compliance.[140] Upon receipt and review of the plan to comply with the rule, Nasdaq may provide the company with up to 180 days to regain compliance.[141] If the company does not submit a plan or regain compliance within the applicable time periods, it risks being delisted from the exchange.[142]

b. "Disclose or Explain" Provision—Rule 5605(f)

The language of Rule 5605(f) of the Nasdaq/SEC rule departs from other SEC disclosure mandates outside of Item 407(c) of Regulation S-K (also related to diversity), because it simply requires companies to

[137] Order Approving Changes to Listing Rules Related to Board Diversity, 86 Fed. Reg. at 44426. In the case of smaller companies with fewer than five directors, only one diverse director (woman or minority) is required. The following entities are exempt from the disclosure requirements:

> (1) Acquisition companies; (2) asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); (3) cooperatives (as set forth in Rule 5615(a)(2)); (4) limited partnerships (as set forth in Rule 5615(a)(4)); (5) management investment companies (as set forth in Rule 5615(a)(5)); (6) issuers of non-voting preferred securities, debt securities, and derivative securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on the Exchange; and (7) issuers of securities listed under the Rule 5700 series.

Id. at 44435 n.149.

[138] Id. at 44437 n.185.

[139] Id. at 44427 n.38.

[140] Id. at 44437.

[141] Id.

[142] Id.

disclose two diverse board members or explain why they do not have two such members. The rule also carries limited financial burden for companies that do not comply with the provision. The SEC calls Rule 5605(f) a "disclosure-based framework for Nasdaq-listed companies that would contribute to investors' investment and voting decisions."[143] The rule sets out a phased-in compliance based on a company's listing tier on Nasdaq. All Nasdaq-listed companies must have or explain why they do not have one diverse director by August 7, 2023.[144] Companies listed on the Nasdaq Global Select Market and the Nasdaq Global Market must have or explain why they do not have two diverse directors by August 6, 2025. Companies listed on the Nasdaq Capital Market must have or explain why they do not have two diverse directors by August 6, 2026.

The SEC states that "[w]hile the [rule] may have the effect of encouraging some Nasdaq-listed companies to increase diversity on their boards, [it] do[es] not mandate any particular board composition . . . . Rather, a Nasdaq-listed company that does not meet the board diversity objectives may comply . . . by . . . explaining why it does not meet the objectives."[145] The SEC would not assess the substance or merits of a company's explanation.[146]

If a company fails to comply with Rule 5605(f), Nasdaq will notify the company that it has until the later of its next annual shareholders meeting, or 180 days from the event that caused the deficiency to cure it.[147] A company that does not regain compliance within the applicable period risks being delisted from the exchange.[148]

c. Board Recruitment Service

The diversity disclosure rule has a third, albeit limited, component related to board recruitment services. Under the provision, Nasdaq would provide companies who currently have no diverse directors with one year of complimentary access for two users to a board recruiting service. This provision is meant to provide access to a network of board-ready diverse

[143] Id. at 44428.
[144] Id. at 44434 n.140.
[145] Id. at 44428.
[146] Id. at 44426.
[147] Id.
[148] Id.

candidates for companies to identify and evaluate and is completely optional.[149]

B. Legislative Responses to Diversity Disclosure

On February 18, 2021, the ESG Disclosure Simplification Act was introduced in the House of Representatives.[150] In a mostly party-line vote with no Republican support, the Act passed in the House on June 17, 2021.[151] The Act is a legislative attempt to establish disclosure mandates for a range of ESG matters, including sustainability, climate risk, political contributions, executive compensation, workforce management, and diversity—race, ethnicity, LGBTQ+ status, and gender for all employees.[152]

As the research in this Article reveals, many companies are already disclosing these data in their ESG reports.[153] The ESG Disclosure Act would standardize this voluntary act and make ESG disclosures uniform across the board. In this way, the ESG Disclosure Act is like the European Union's ("EU") CSR disclosure rule.[154] Recognizing the fact that CSR extends beyond environmental matters, the European Parliament has mandated businesses to discuss information on sustainability, environmental factors, and diversity policies in relation to administrative, management, and supervisory roles regarding age, gender, and educational backgrounds.[155]

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149 Id. at 44425.

150 H.R. Rep. No. 117-54, at 3 (2021).

151 Roll Call 169 | Bill Number: H.R. 1187, U.S. House of Reps.: Clerk (June 16, 2021, 5:41 PM), https://clerk.house.gov/Votes/2021169 [https://perma.cc/5TQC-3VYJ].

152 Corporate Governance Improvement and Investor Protection Act, H.R. 1187, 117th Cong. §§ 102, 603 (2021).

153 See infra Part III.

154 Directive 2014/95, 2014 O.J. (L 330) 19 (EU), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095 [https://perma.cc/35XS-HQAH].

155 Id. The rule omits race and ethnicity disclosures. While disclosure is mandatory, there is currently no required disclosure guideline in the EU. There is a guideline furnished by the European Commission in 2017 to help companies disclose ESG matters. However, since the guidelines are not mandatory, companies can choose to use international, European, or national guidelines according to their own characteristics or business environments. See Yerassyl Kalikhan et al., Incentive Mechanisms for Advancing Long-Termism and Sustainability Along the Investment Chain, Colum. Univ. Sch. Int'l & Pub. Affs. 41 (Mar. 2021), https://www.sipa.columbia.edu/sites/default/files/migrated/downloads/Final%2520Fall%2520SIPA%2520Capstone%2520UNDESA%2520Report%2520Incentive%2520Mechanisms%2520for%2520AMs%2527%2520AOs%2527%2520Bs%2527%2520Regs%2527%2520and%2520Cos%2527%2520Long-Term%2520Investments%2520Objectives%25

Section 603 of the ESG Disclosure Act would mandate disclosure relating to workforce composition, including "data on . . . racial, ethnic, self-reported sexual orientation, and gender composition . . . for senior executives and other individuals in the workforce."[156]

Section 902 of the ESG Disclosure Act would require additional demographic data based on voluntary self-identification, on the racial, ethnic, gender identity, sexual orientation, and veteran status composition of boards of directors, nominees for boards of directors, and executive officers of public companies. The provision also mirrors Item 407(c) of Regulation S-K by requiring companies to disclose "[w]hether the board of directors . . . has . . . adopted any policy, plan, or strategy to promote racial, ethnic, and gender diversity" among the "board of directors," the "nominees for the board of directors," or the "executive officers of the" company.[157]

Part IV below analyzes why neither the Nasdaq/SEC and the House of Representative's attempts can improve diversity, and why a new legislation is the right approach if the goal is to improve corporate diversity.

C. Private Ordering

Outside of regulators and legislatures, the private sector has begun to make changes towards more voluntary disclosures of diversity information and statistics, even beyond ESG reports, by including other forms of disclosure that are considered material to investors. For instance, for the first time in 2021, proxy statements for about 60% of S&P 500 companies included the disclosure of the racial and ethnic makeup of boards.[158] Also, in February 2022, Bloomberg Law found that 80%, or four out of every five S&P 500 companies, now disclose some

20Jan2021%2520.pdf [https://perma.cc/T9GY-4AWU]. However, this could change as the EU revisits its regulations on this issue. See Corporate Sustainability Reporting, Eur. Comm'n, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en#standards [https://perma.cc/66E6-TN45] (last visited Mar. 17, 2023).

[156] H.R. 1187 § 603.

[157] Id. § 902.

[158] See Conf. Bd., Corporate Board Practices in the Russell 3000, S&P 500, and S&P MidCap 400, at 5 (2021), https://www.conference-board.org/pdfdownload.cfm?masterProductID=36996 [https://perma.cc/9PPC-XDLJ]; Spencer Stuart, 2021 U.S. Spencer Stuart Board Index 6 (2021), https://www.spencerstuart.com/-/media/2021/october/ssbi2021/us-spencer-stuart-board-index-2021.pdf [https://perma.cc/2PUK-S7DZ].

information related to diversity and inclusion in their annual 10-K reports.[159] Importantly, many of these 10-K disclosures contain forward-looking provisions, aspirations, or even diversity thresholds.[160] And while it is not happening in record numbers, some companies are disclosing information about gender pay equity.[161]

Investors are also pushing companies to disclose their confidential Equal Employment Opportunity data and to perform and disclose racial equity or civil rights audits.[162] For instance, in 2021 and 2022, seventy-two racial equity audits have been completed by companies like Amazon, Chevron, Comcast, Alphabet, Bank of America, and Citigroup.[163]

These changes are a step in the right direction. The proposals in Part IV take some of these private ordering strategies into account. However, the proposals go further than what companies are already voluntarily doing for three reasons. First, while most corporations already disclose some amount of diversity information, not all public companies do, and the information disclosed is generally inconsistent across the board. Some companies provide cursory information, while others disclose details. Most companies disclose information about gender, while information about LGBTQ+ diversity is generally more limited.[164] Second, while some private companies may also choose to disclose diversity information, most are unlikely to do so. The goal of my proposals is that

[159] Andrew Ramonas, S&P 500 Opens Up on Diversity After Floyd as Investors Seek More, Bloomberg L. (Feb. 11, 2022), https://www.bloomberglaw.com [https://perma.cc/4Y5E-852C]. Some of the disclosures include general discussions about diversity. Others include statistical information.

[160] Id.

[161] In one 2022 study, only 75 out of 954 (7.8%) companies reported the pay ratios between women and men. Ella Ceron, Most U.S. Companies Aren't Disclosing Gender Pay Gap Analysis, Bloomberg (Mar. 15, 2022), https://www.bloomberg.com/news/articles/2022-03-15/equal-pay-day-most-u-s-companies-aren-t-disclosing-gender-pay-gap-data#xj4y7vzkg [https://perma.cc/K4AD-5UVG].

[162] Lydia Beyoud & Andrew Ramonas, Shareholders Up Demands for Workplace Diversity Data Seen by Few, Bloomberg L. (June 7, 2021), https://news.bloomberglaw.com/esg/shareholders-up-demands-for-workplace-diversity-data-seen-by-few [https://perma.cc/Y6CN-JFC9].

[163] Press Release, Thomas P. DiNapoli, N.Y. State Comptroller, Remarks at SEIU Capital Stewardship Program and CtW Investment Group Webinar: Racial Equity Audits: A Critical Tool for Shareholders (Apr. 13, 2021), https://nyscomptroller.medium.com/remarks-by-new-york-state-comptroller-thomas-p-397b006d1d5c [https://perma.cc/K47G-3F8F]; Racial Equity Audits: A Critical Tool for Shareholders, SOC Inv. Grp., https://www.socinvestmentgroup.com/critical-tool-for-shareholders [https://perma.cc/Q3ZE-FL7Z] (last visited Jan. 25, 2023).

[164] See infra Part III.

large companies, regardless of form, disclose diversity information. Third, diversity disclosures often stop short of doing more than providing information for the benefit of shareholders. My proposals aim to use disclosures instrumentally to increase corporate diversity.

III. DIVERSITY DISCLOSURES IN ESG REPORTS

In recent years—and particularly since 2020's racial reckoning—public companies have begun voluntarily disclosing diversity matters in their ESG reports. Scholarship has yet to grapple with this change, and what it might mean for ESG policies. This Section first discusses the scholarship on ESG and corporate diversity. It then empirically shows how public companies have incorporated diversity into their ESG disclosures in the last five years, which has increased exponentially since 2020.

In this Section, I show how companies have been voluntarily disclosing matters related to diversity in their ESG reports in a two-stage process. Diversity disclosures are disclosures about matters related to diversity, including gender, race, ethnicity, LGBTQ+ status, and disability. In the first stage of the research, I examined the frequency and percentage of mentions of diversity terms in ESG reports. In the second stage, I examined the frequency and percentage of actual statistics of diversity terms in ESG reports. Table 1 in Appendix A has a list of diversity terms used in the study.

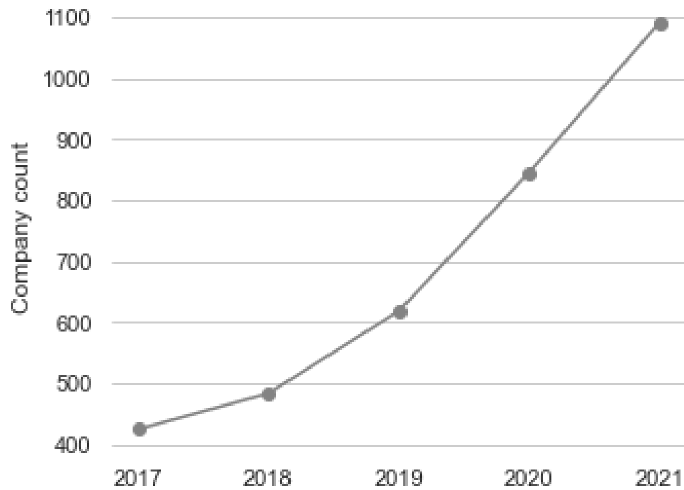
To analyze the extent to which diversity disclosures have been incorporated in ESG reports, I obtained ESG reports from the Corporate Register database, which is the most comprehensive online database of corporate non-financial reporting.[165] The data and analysis in this Article are limited to standalone ESG reports and do not include other non-financial data, such as annual reports. Together, there are 1,243 public companies and 3,461 reports across five years from 2017–2021 in the analyses. I chose the last five years to highlight the recent rapid progression in this phenomenon.

Since 2020, there has been an exponential increase in the number of companies disclosing ESG reports in general. As indicated in Figure 1

[165] Since the 1990s, Corporate Register has been collecting non-financial reports that companies publicly disclose. Corporate Register harvests the reports from company websites and in many cases, companies send their reports directly to Corporate Register for inclusion in the database. About, Corporate Register, https://www.corporateregister.com/about/ [https://perma.cc/M54H-CP47] (last visited Nov. 5, 2022).

below, the number of U.S. public companies with ESG reports in the dataset more than doubled from 424 in 2017 to 845 in 2020 and continued to increase to 1,091 in 2021. Given that this Article's focus is on diversity disclosures in ESG reports, 2020 and 2021 are significant years for analysis.

Figure 1: Overall Number of Companies with ESG Reports Per Year



ESG disclosures are different from financial disclosures in several ways, although it is probable that those differences would gradually become amorphous. First, "financial reporting is mandatory, verifiable, and enforced through methods" like "external audit[s], litigation, and regulatory oversight."[166] ESG reporting, on the other hand, is still largely voluntary,[167] besides the SEC's first approval of Nasdaq's ESG mandatory disclosure in 2021.[168] ESG disclosure is also mostly unregulated and "does not have a widely enforced reporting framework."[169] For example, only about 15% of the ESG reports in this

[166] Shuili Du & Kun Yu, Do Corporate Social Responsibility Reports Convey Value Relevant Information? Evidence from Report Readability and Tone, 172 J. Bus. Ethics 253, 253 (2020).
[167] Id. at 253–54.
[168] See supra notes 133–38 and accompanying text.
[169] Du & Yu, supra note 166, at 253 (citation omitted).

study used an external auditor. Second, financial reporting mostly targets the investor community and focuses primarily on financial data. The targeted audiences of ESG disclosures, however, consist of a wider network of stakeholders, including employees, customers, suppliers, business partners, public interest and advocacy groups, governments, nonprofit organizations, the media, and the public at large.[170] Third, unlike financial reports, ESG reports "primarily include textual, non-quantifiable information regarding firms' policies, practices, and performance in social, environmental, and governance domains."[171] Because of this variation, ESG reports differ in content, design, reporting frequency, scope, and quality.[172]

This variation in form and content creates some challenges for providing uniform analysis of ESG reporting across companies and over time.[173] A method for analyzing this varied data is to read the text for

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[170] Daniel Tschopp & Ronald J. Huefner, Comparing the Evolution of CSR Reporting to that of Financial Reporting, 127 J. Bus. Ethics 568, 570 (2015).

[171] Du & Yu, supra note 166, at 253–54.

[172] Schreck, supra note 29, at 802.

[173] In the absence of mandatory rules, not all companies have ESG reports every year, and report titles can vary from company to company or from year to year. 44.7% (n=1410) of the reports have a variation of the title "Corporate Responsibility Report." 37.9% (n=1194) of the reports have a variation of the title "Sustainability Report." 14.5% (n=457) of the reports have a variation of the title "Environmental Social and Governance Report." The remaining 3% (n=90) of the reports have a variety of titles, including "Environment, Health and Safety Report," "Community Review," or "Non-Financial Statement." The shortest report is 6 pages and the longest is 367 pages. The average report is about 51 pages long.

To illustrate this variation, Best Buy's 2021 98-page report is divided into Environmental, Social, and Governance sections. Best Buy, Environmental, Social and Governance Report (2021), https://corporate.bestbuy.com/wp-content/uploads/2021/06/ESG_Report_FY21_FINAL.pdf [https://perma.cc/VT88-E4FK]. The section on the environment addresses sustainability and renewable energy and is only 13 pages long. Id. The social section is the longest section at 55 pages and covers diversity, equity and inclusion, philanthropy, human rights, employee engagement, and customer feedback. Id. The governance section is only 10 pages long and addresses ethics and corporate governance. Id. Contrast this to Exelon Corporation's 2020 124-page report, which is organized in a more typical ESG report fashion than Best Buy's three ESG categories. It starts with a message from the CEO and then covers a range of topics, including "Building an Energy Company for the Future," "Creating Value for Customers," "Enhancing Corporate Governance," "Taking Action for Racial Equity," and "A Safe, Innovative and Rewarding Workplace." Exelon, 2020 Exelon Corporation Sustainability Report 2 (2020), https://www.exeloncorp.com/sustainability/Documents/dwnld_Exelon_CSR%20(1).pdf [https://perma.cc/P4TE-APS5]. Each of these topics then addresses several related subtopics. The topic on creating an innovative and rewarding workplace, for example, covers engaging talent, and diversity, equity, and inclusion, among other topics. Id. Similarly, Adobe Corporation's 26-page report starts with a message from the CEO and addresses a range of topics, including ethics and integrity, community engagement, relevant words and phrases and hand-code them. Corporate law scholars have typically relied on hand-coding as a method for analyzing non-financial corporate data that include large amounts of text.[174] Hand-coding is mostly reliable but has some major flaws that advances in machine learning, particularly Natural Language Processing ("NLP"), have sought to address. NLP has made the coding process less labor-intensive and more reliable, valid, and reproducible by others.[175] NLP was developed by academics in the fields of computer science, linguistics, and mathematics with the primary goal of translating human or natural language into commands that can be executed by computers.[176] Research has shown that NLP can be just as accurate as hand-coding text data, making it an increasingly popular method among management scholars, social scientists, and legal scholars.[177]

sustainability, and diversity and inclusion. Adobe, Corporate Social Responsibility Report 2020 (2020), https://www.adobe.com/content/dam/cc/en/corporate-responsibility/pdfs/Adobe-CSR-Report-2020.pdf [https://perma.cc/GJ9K-V9PG].

[174] See, e.g., Yaron Nili & Cathy Hwang, Shadow Governance, 108 Calif. L. Rev. 1097, 1121 (2020) (analyzing non-charter, non-bylaw governance texts through hand-coding); Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric Talley, Cleaning Corporate Governance, 170 U. Pa. L. Rev. 1, 25 (2021) (analyzing corporate charters through hand coding). Legal scholars in other contexts have also used hand-coding. See, e.g., Atinuke O. Adediran, Racial Allies, 90 Fordham L. Rev. 2151, 2170 (2022); Jennifer Nou & Edward H. Stiglitz, Regulatory Bundling, 128 Yale L.J. 1174, 1187 (2019); see also Dihr, supra note 37, at 175–77, 296–97 (analyzing letters submitted to the SEC and proxy statements).

[175] Laura K. Nelson, Derek Burk, Marcel Knudsen & Leslie McCall, The Future of Coding: A Comparison of Hand-Coding and Three Types of Computer-Assisted Text Analysis Methods, 50 Socio. Methods & Rsch. 202, 218 (2021); Kevin Crowston, Eileen E. Allen & Robert Heckman, Using Natural Language Processing Technology for Qualitative Data Analysis, 15 Int'l. J. Soc. Rsch. Methodology 523, 541 (2012).

[176] Yue Kang, Zhao Cai, Chee-Wee Tan, Qian Huang & Hefu Liu, Natural Language Processing (NLP) in Management Research: A Literature Review, 7 J. Mgmt. Analytics 139, 141 (2020).

[177] See, e.g., Maggie McKinley, Petitioning and the Making of the Administrative State, 127 Yale L.J. 1538, 1631 (2018) (using NLP to analyze petitions submitted to Congress); Nelson et al., supra note 175, at 203 (explaining that advances in technology have been advantageous for content analysis of text-based data in social science research); Kang et al., supra note 176, at 142 (stating that scholars in management now frequently use NLP methods); Lauren B. Edelman, Working Law: Courts, Corporations, and Symbolic Civil Rights 89–91 (2016) (using NLP to analyze human resources and compliance professional resources to understand Equal Employment Opportunity law); Matthew E.K. Hall, Gary E. Hollibaugh, Jr., Jonathan D. Klingler & Adam J. Ramey, Attributes Beyond Attitudes: Personality Traits on the U.S. Supreme Court, 9 J.L. & Cts. 345, 354–55 (2021) (analyzing Supreme Court opinions between 1946 and 2015 using NLP to measure Justices' personality traits); Nina Varsava, Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing, 93 N.Y.U. L. Rev. Online 75, 86 n.55 (2018) (analyzing Justice Gorsuch's opinions with NLP techniques).

Here, I use Python's NLP tools. The coding process was both inductive and deductive. It was inductive in that I developed categories of words and phrases through my engagement with the data; I read fifty ESG reports manually. It was deductive because part of my analysis came from generally accepted definitions of diversity as representation regarding race and ethnicity, gender, LGBTQ+ status, and disabilities in the literature. Using both methods, I arrived at a carefully constructed list that companies use to describe diversity, such as "racial diversity," and "gender diversity." The process of using a carefully constructed list of terms has been found to be as accurate as hand coding.[178] I dropped reports that did not have text files, leaving a total of 3,461 reports across all five years in the analysis: 424 in 2017, 483 in 2018, 618 in 2019, 845 in 2020, and 1,091 in 2021.

A possible limitation of NLP is that it can omit unsettled or nuanced concepts.[179] This concern is minimal here because I have defined diversity to focus on race and ethnicity, gender, LGBTQ+ status, and disabilities. My manual reading of the reports also shows consistent use of the curated diversity terms. Nevertheless, I took an extra step to address this possible concern by extending the list of terms and phrases with noun phrasing, which is an NLP technique used in information retrieval.[180] A noun phrase is a word or group of words that functions in a sentence as subject, object, or prepositional object.[181] Noun phrasing is used to capture a richer linguistic representation of document content.[182] It can improve precision over other document indexing techniques since it allows for multi-word phrases to be matched with words or phrases present in text documents to improve the quality of information retrieval.[183] The noun phrase process

[178] See Nelson et al., supra note 175, at 220.
[179] Id. at 204.
[180] I used Universal Sentence Encoder provided through Tensor Flow Hub to convert each noun phrase to a fixed length numeric vector that represents the semantic meaning of the phrase (embedding vector). Universal Sentence Encoder is a publicly available pre-trained model that allows for the representation of words, sentences, and texts as a collection of numbers (numeric vectors) that machines can analyze and mathematical models can use. See, e.g., Daniel Cer et al., Universal Sentence Encoder (2018), https://click.endnote.com/viewer?doi=10.48550%2Farxiv.1803.11175&token=WzM3OTIzNzEsIjEwLjQ4NTUwL2FyeGl2LjE4MDMuMTExNzUiXQ.WKEqcAMopiwZnpi91zriv_9CznA [https://perma.cc/3T9N-CQP3].
[181] Kristin M. Tolle & Hsinchun Chen, Comparing Noun Phrasing Techniques for Use with Medical Digital Library Tools, 51 J. Am. Soc'y. Info. Sci. 352, 357 (2000).
[182] Id.
[183] Id.; Gobinda G. Chowdhury, Natural Language Processing, 37 Ann. Rev. Info. Sci. & Tech. 51, 57 (2003).

involved capturing sentences and retrieving clusters of words and phrases that are close in meaning to the diversity terms.[184] The noun phrasing process generated 217 phrases, most of which were already captured by the well-curated list of diversity terms. From the new retrieved list, I included a few new phrases such as "LGBTQ orientation," "board gender diversity," and "directors board diversity" that may not have been originally retrieved. Finally, I categorized the original words and phrases and the new word phrases into groups as indicated in Table 1 in the Appendix.

The carefully constructed list and the noun phrases were then entered into Python to conduct a two-stage analysis. In the first stage, I analyzed ESG reports with mentions of diversity terms. In the second stage, I analyzed ESG reports with actual diversity statistics.

As indicated in Figure 2 below, the first stage of the analysis shows that in 2017, 94.6% of all reports mentioned at least one diversity term, while 97.9% of all reports in 2021 did. In terms of specific terms, as shown in Figure 3 below and further in Table 3 in the Appendix, in 2021, 94.25% of ESG reports mentioned racial diversity,[185] 95.73% of reports mentioned gender diversity,[186] 79.96% of reports mentioned diversity and inclusion,[187] and 36.90% mentioned board diversity. Notably, board diversity, which is the first ESG disclosure mandate by Nasdaq/SEC, saw a significant increase in mentions between 2017 and 2021. The data also shows an increase in mentions of minority groups and LGBTQ+ employees.

[184] I used "spaCy," the noun phrasing program in Python. Afham Fardeen, Tutorial on Spacy Part of Speech (POS) Tagging, Mach. Learning Language (Aug. 31, 2021), https://machinelearningknowledge.ai/tutorial-on-spacy-part-of-speech-pos-tagging/ [https://perma.cc/CTN7-A7LQ].

[185] Racial diversity includes race, ethnicity, racial diversity, and ethnic diversity.

[186] Gender diversity includes discussions about mitigating inequality that impacts "women" in the workplace.

[187] Diversity and inclusion includes mentions of diversity, equity, and inclusion.

Figure 2: Percent ESG Reports with at Least One Diversity Term

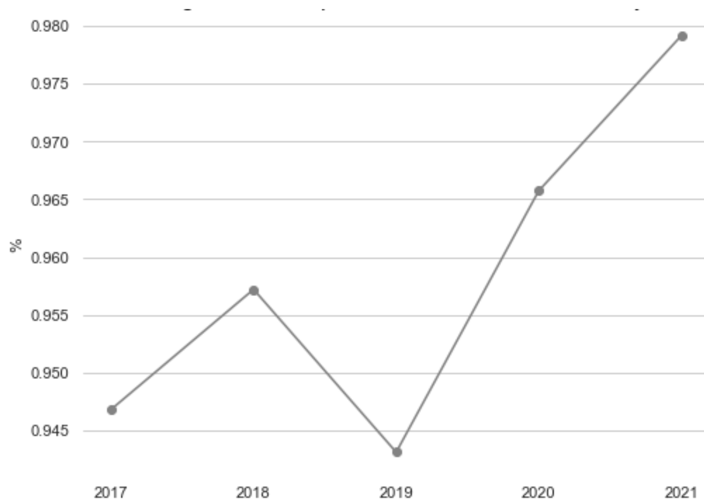


Figure 3: Percent ESG Reports with Mentions of Diversity Terms

In the second stage of the analysis, I examined the percentage of ESG reports that provide diversity statistics. Diversity statistics means that a company uses numerical data to measure the diversity of employee and board members. This differs from mere mentions of terms without numerical data. To conduct this analysis, I conducted a keyword search to find sentences with diversity terms or phrases *and* the words "percent," "percentage," or the "%" symbol. The search generated 11,786 sentences that provide diversity statistics related to any of the diversity words or phrases.[188]

As indicated in Figure 4 below, the analysis shows that while 71.81% of reports in 2017 included statistics of one of more diversity terms, 90.77% of 2021 reports included statistics with at least one diversity term. In terms of specific terms, as shown in Figure 5 below and further in Table 4 in the Appendix, in 2021, 46.92% (n=473) of companies provided statistics on Asian employees, 53.37% (n=538) disclosed statistics on Black employees, 49.01% (n=494) disclosed statistics on Latinx employees and 16.57% (n=167) disclosed board diversity statistics. Notably, board diversity, which is the first ESG disclosure mandate by Nasdaq/SEC, saw significant growth in statistical disclosures between 2017 and 2021.[189]

[188] The data is both over- and underinclusive. It is overinclusive because there is some possible noise due to the algorithm capturing some sentences that include percentages but not statistics. It is underinclusive because the algorithm is unable to read pictures and many companies place statistics in picture format in their ESG reports. To check for the accuracy of the generated list of statistical information, I randomly selected 16% (n=1,900) of the 11,786 sentences representing 548 companies. A human coder then manually read each sentence to determine any variability in the statistical information as shown in Table 2 in the Appendix.

[189] Board diversity is an outlier because of the significant jump between its 2017 starting point and the 2021 disclosures. On the other hand, gender diversity saw only a 31% increase, partly because its starting point was 67.0% in 2017.

Figure 4: Percent ESG Reports with at Least One Diversity Term with Statistics

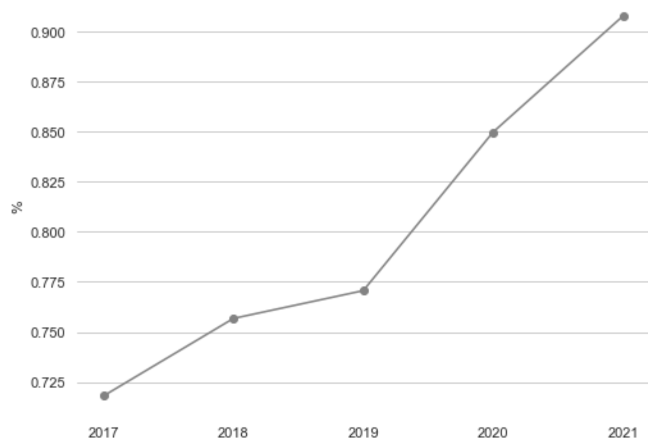
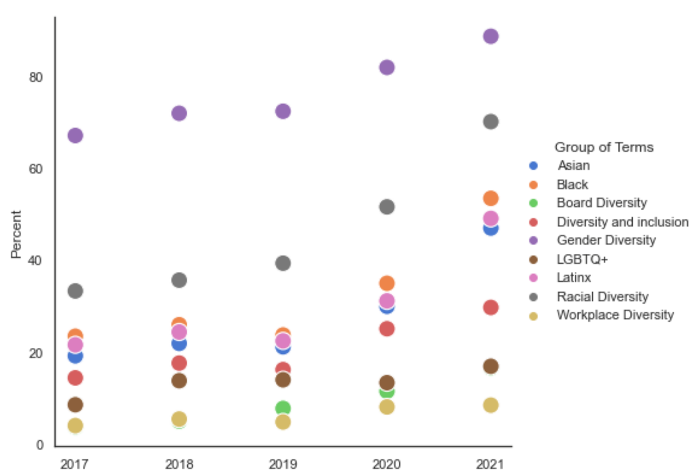


Figure 5: Percent ESG Reports with Diversity Statistics



Overall, in both the analysis of mentions of diversity terms and diversity statistics, the analysis shows that diversity disclosures are firmly embedded into ESG disclosures and will likely continue an upward trajectory. The results clearly show an increase in both diversity terms and statistics over time.

Finally, I conducted an analysis to determine whether the increase in diversity statistics over time comes mostly from an overall increase in ESG disclosures in general, or a significant increase in diversity disclosures. I focused on 2017 companies since they have been disclosing diversity terms and statistics prior to 2020. Tables 5 and 6 in the Appendix show that the number of ESG reports among the 2017 companies dropped from 376 in 2017 to 283 in 2021.[190] Yet, diversity disclosures continued to increase. For example, the mention of "Black" increased from 53.46% in 2017 to 84.81% in 2021 for those companies. The mention of "racial diversity" increased from 82.18% to 95.05%. In terms of statistical disclosures, gender diversity statistics among those companies increased from 67.02% in 2017 to 91.52% in 2021. Racial diversity statistical disclosures increased from 33.24% in 2017 to 74.20% in 2021. Board diversity statistical disclosures increased from 3.72% to 17.67%.

In sum, there is overwhelming evidence that diversity disclosures in ESG reports have increased significantly and are on an upward trajectory.[191] Mandating these disclosures would likely not be costly to most companies and will have significant advantages, as discussed below.

IV. A BETTER PATH FORWARD

This Part analyzes both the Nasdaq/SEC's mandate of the first diversity disclosure rule and the U.S. House of Representative's attempt to mandate

[190] This reduction is probably because ESG reporting is currently not mandatory so companies can choose not to disclose in any given year.

[191] This raises the question of whether the increased disclosure of diversity in ESG reports translates to actual diversity policies in public companies. This question is ultimately an empirical one. However, there are indications that some of the disclosures are about actual policy changes and efforts either in the present or future that companies have put in place or intend to put in place to improve diversity, equity, and inclusion. Particularly, companies oftentimes disclose their current board diversity statistics and make projections for how they intend to improve racial or gender diversity in the future based on specific programs and policies they have or intend to initiate. These disclosures therefore seem to be part of a broader set of goals to improve diversity. However, recent industry research suggests that investors may not trust company ESG disclosures. In a survey of 700 chief investment officers, portfolio managers, and buy-side analysts of which 100 are in the United States, 62% reported that they do not trust companies to achieve their stated ESG diversity commitments. Edelman, Edelman Trust Barometer Special Report: Institutional Investors 9 (2021), https://www.edelman.com/sites/g/files/aatuss191/files/2021-03/2021%20Edelman%20Trust%20Barometer.pdf [https://perma.cc/6AEU-JFKG]. Ninety-one percent of those surveyed are actively on the lookout for companies that do not deliver on their ESG promises and disclosures. Id. at 11.

ESG disclosures, which includes diversity disclosures. It explains that because of the limits of securities laws, Congress is better equipped to establish a comprehensive diversity disclosure rule that can improve corporate diversity for all stakeholders—shareholders, employees, customers, governments, and the public.

A. Limitations of the Nasdaq/SEC's Rule

Rule 5606, which requires Nasdaq-listed companies to annually disclose statistical information of self-identified gender, race, and LGBTQ+ affiliation characteristics of their board of directors, is a classic disclosure provision. This portion of the rule is mandatory and will provide national data on the board composition of public companies.[192] This is a required first step toward increasing diversity. The rule's language seems to capture what Nasdaq seeks to obtain, which is to provide general statistics for investors.

However, beyond that provision, the Nasdaq/SEC disclosure mandate is limited in three important ways. First, it merely requires companies to explain why they lack diversity and would not actually increase board diversity per Rule 5605(f)'s "disclose or explain" provision. Second, it applies only to board diversity and would not require the disclosure of the diversity of employees, executives, or managers, which is equally important. Third, it applies to only public companies listed on Nasdaq's stock exchange; it does not apply to NYSE companies or private companies with large valuations much like public companies.

The "disclose or explain" provision in Rule 5605(f) means that companies need only explain why they do not have diversity on their boards, and there are no other regulatory bodies mandating the rules. The rule also expressly eschews any enforcement by the SEC because the SEC would not assess the substance or merits of a company's explanation. This means that the rule is unlikely to yield much increase in diverse board members, although it can be a form of shaming. This language sends a powerful signal about the importance (or lack thereof) of board diversity.[193] The rule also lacks any forward-looking provision by which to measure change in diversity over time.

[192] See supra Subsection II.A.3.a.

[193] In fact, there is a strong possibility that the SEC may use a similar "disclose or explain" language for climate risk and other environmental disclosures. See Andrew Ramonas, SEC 'Mission Creep' on Climate Ups Republican Lawsuit Threats, Bloomberg L. (June 29, 2021),

The "disclose or explain" rule also shows that disclosure is an end in and of itself rather than a means to a separate social or racial justice end.[194] In other words, the goal of the Nasdaq/SEC rule is mainly for companies to disclose some information to investors and not to increase diversity. The goal of disclosures in the securities context is generally for transparency to help investors have all available information to determine investment decisions.[195] Indeed, this is reflected in the language of the Nasdaq/SEC rule where the SEC declares that the goal of the diversity disclosure mandate is to improve "the quality of information available to investors who rely on this information to make informed investment and voting decisions" and to allow investors to gain a better understanding of Nasdaq-listed companies' approach to board diversity.[196] The goal of disclosure is about transparency for investors and not to advance social justice. To be sure, Section 77s of the Securities Act gives the SEC authority to make "rules and regulations as may be necessary to carry out the provisions" of the Securities Act.[197] Despite the seeming breadth of this language, the SEC's role is still largely about ensuring that investors are fully informed to make investment decisions. Expanding the role of disclosures would be beneficial to stakeholders.

Second, the Nasdaq/SEC disclosure rule is limited to the disclosure of board diversity. It does not extend to executives, managers, or employees. Indeed, it would be challenging for the SEC to use its powers to require companies to disclose their diversity statistics across the board, particularly extending disclosure to all employees since it would need to justify the materiality of such information to investors. While some companies already include data on employees in their voluntary

https://news.bloomberglaw.com/esg/sec-mission-creep-on-climate-ups-republican-lawsuit-threats [https://perma.cc/F8TF-4ZXN].

194 See Adediran, supra note 26, at 885. Disclosures and metrics tracking have extended to other private sector industries where tracking is also becoming synonymous with addressing diversity and inclusion. See, e.g., Molly Huie, Analysis: Yes, Some Firms Are Actually Measuring DEI Well, Bloomberg L. (Oct. 26, 2021), https://www.bloomberglaw.com/bloomberglawnews/ [https://perma.cc/PL58-79LD].

195 See, e.g., Paul G. Mahoney, Mandatory Disclosure as a Solution to Agency Problems, 62 U. Chi. L. Rev. 1047, 1047–48 (1995) (explaining the goal of mandatory disclosures in the securities law context); Frank H. Easterbrook & Daniel R. Fischel, Mandatory Disclosure and the Protection of Investors, 70 Va. L. Rev. 669, 681–85 (1984) (same).

196 Order Approving Changes to Listing Rules Related to Board Diversity, 86 Fed. Reg. 44424, 44429 (Aug. 12, 2021).

197 15 U.S.C. § 77s(a).

disclosures, that information is currently inconsistent because disclosure is not mandatory across the board.

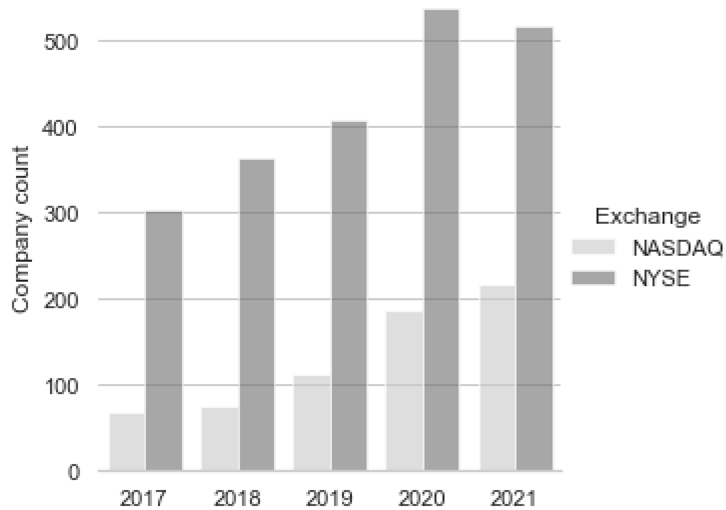
Third, the rule applies only to Nasdaq-listed companies. Nasdaq and NYSE are the largest exchanges in the United States and there are more companies listed on Nasdaq than on NYSE.[198] However, as shown in Figure 6, significantly more NYSE-listed companies disclose their ESG reports in comparison to Nasdaq-listed companies. Overall, 71.7% (n=815) of the companies that disclosed ESG reports are listed on the NYSE, while 28.8% (n=330) are listed on Nasdaq.[199] For 2021, 510 NYSE-listed companies disclosed in comparison to 212 Nasdaq-listed companies. This means that a supermajority of the companies that are disclosing diversity statistics in ESG reports are not currently included in the Nasdaq/SEC mandate. While this might seem like a positive—that the mandate would reach companies that are currently choosing not to voluntarily disclose—without a mandate, companies can choose not to disclose at any given time. This is a crucial limitation of the Nasdaq/SEC rule that Congress can address to create a national and uniform rule that would apply to all public and even some private companies whose revenues rival those of public companies.[200]

[198] Jeff Desjardins, Here's the Difference Between the Nasdaq and NYSE, Insider (July 11, 2017), https://www.businessinsider.com/heres-the-difference-between-the-nasdaq-and-nyse-2017-7 [https://perma.cc/7YPN-Q44S].

[199] None of the companies in the study are dual listed.

[200] There are currently 959 private companies valued at more than $1 billion. Paul Kiernan, SEC Pushes for More Transparency from Private Companies, Wall St. J. (Jan. 10, 2022), https://www.wsj.com/ [https://perma.cc/4Q5L-FP9X]. The SEC is currently working on a plan to require private companies with large valuations to routinely disclose information related to their finances and operations. Id. Requiring private companies to disclose their ESG activities—including diversity matters—is consistent with this new plan. Id. Even outside of financial and operational disclosures, diversity disclosures for large private companies is an important public policy. Id.

Figure 6: ESG Reports by Stock Exchange



Even though the Nasdaq/SEC rule is limited and will likely have only a small, if any, impact on increasing board diversity, conservative groups have already begun challenging it in court. In a pending case, *Alliance for Fair Board Recruitment v. SEC*, the Alliance for Fair Board Recruitment, which has taken legal action against California over its requirement for corporate board diversity, filed a petition for a review of the Nasdaq/SEC rule in the U.S. Court of Appeals for the Fifth Circuit.[201] Oral arguments seem to suggest that the court of appeals will side with Nasdaq and the SEC.[202] However, there is serious cause for concern because of the current composition of the Roberts Court.

[201] Petition for Review, All. for Fair Bd. Recruitment v. SEC, No. 21-60626 (5th Cir. Aug. 9, 2022); Bre Bradham & Patricia Hurtado, Nasdaq Board-Diversity Plan Challenged in Court as 'Unfair' (1), Bloomberg L. (Aug. 18, 2021), https://news.bloomberglaw.com/esg/nasdaqs-board-diversity-plan-challenged-in-court-as-unfair [https://perma.cc/M3CW-N45A]; Andrew Ramonas, SEC's Board Diversity Drive Runs Risk of More Legal Challenges, Bloomberg L. (Oct. 22, 2021), https://news.bloomberglaw.com/securities-law/secs-board-diversity-drive-runs-risk-of-more-legal-challenges [https://perma.cc/AYD6-A9EL].

[202] Andrew Ramonas, Nasdaq Diversity Rule Challenge Puts Conservatives on Defense (1), Bloomberg L. (Aug. 29, 2022), https://news.bloomberglaw.com/securities-law/nasdaq-diversity-rules-challenge-puts-conservatives-on-defense [https://perma.cc/D8QN-M6ET].

B. Limitations of Legislative Attempt

The House of Representative's bill is the first time we see Congress attempt to create a broad ESG disclosure law that includes a range of ESG issues, including diversity, in the 2021 ESG Disclosure Act. However, the Act treats diversity and climate disclosures differently.[203] This distinction is not necessary for the goal of addressing both diversity and environmental justice and can easily be cured if Congress adopts the language of the proposed disclosure rule in the next Section.

Section 403(2)(A) of the ESG Disclosure Act deals with climate change disclosures. It would require companies to disclose inter alia, "short-, medium-, and long-term financial and economic risks and opportunities relating to climate change, and the national and global reduction of greenhouse gas emissions."[204] The provision also has a forward-looking provision that requires companies to "allow for tracking of performance over time with respect to mitigating climate risk exposure."[205] Section 403(3)(B) would require a description of "any established corporate governance processes and structures to identify, assess, and manage climate-related risks."[206] Section 403(3)(C) would require "a description of specific actions that [a company] is taking to mitigate identified risks."[207] All three provisions are forward-looking in that they would require companies to show how they are mitigating climate risk over time and track their performance. While the provision does not provide specific timeframes, it nevertheless expects companies to continually show improvement.

Contrast these provisions to the diversity disclosure provisions in the ESG Disclosure Act that lack a forward-looking provision and do not require companies to disclose specific actions they have taken to diversify their boards or workforce. Instead, companies need only disclose whether they have adopted any policy, plan, or strategy to promote racial, ethnic, and gender diversity among board members and executive officers. As such, the ESG Disclosure Act is like the Nasdaq/SEC rule that merely

[203] Another advantage of consolidation is that it allows for a side-by-side comparison of ESG disclosure mandates.

[204] H.R. 1187, 117th Cong. § 403(2)(A) (2021).

[205] Id. § 403(2)(B)(v). The term "forward-looking provision" is used throughout this Article to mean language that seeks to improve diversity or other ESG issues over time, usually on a year-by-year basis.

[206] Id. § 403(3)(B).

[207] Id. § 403(3)(C).

requires companies to explain why they do not have two diverse board members and does not require companies to improve board and employee diversity over time.

Congress can amend the ESG Disclosure Act to include a forward-looking provision and require companies to disclose specific action taken towards improving diversity. While not fully forward-looking, legislatures in California have established board diversity rules with provisions that look into the future for a particular level of diversity. These rules are beginning to have an impact on increasing diversity on corporate boards.[208] California requires companies to include women and minorities on their boards of directors. California SB 826, which was enacted in 2018, requires public companies with principal executive offices in the state to have at least one female board member by the end of 2019 and *increase that number to a specified number* by the end of 2021.[209] Section 301.3 (a) and (b) state:

> (a) No later than the close of the 2019 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall have a minimum of one female director on its board. A corporation may increase the number of directors on its board to comply with this section.
>
> (b) No later than the close of the 2021 calendar year, a [covered corporation] shall comply with the following: (1) [i]f its number of directors is six or more, the corporation shall have a minimum of three female directors[;] (2) [i]f its number of directors is five, the corporation shall have a minimum of two female directors[;] (3) [i]f its number of directors is four or fewer, the corporation shall have a minimum of one female director.[210]

The law authorizes the Secretary of State to impose fines for violations of the rule. [211]

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[208] Off. of the Cal. Sec'y of State, Women on Boards: March 2021 Report (2021), https://bpd.cdn.sos.ca.gov/women-on-boards/wob-report-2021-02.pdf [https://perma.cc/P8UJ-AFLX]; Daniela Pardo & Hannah Poukish, 3 Years Later, California Law Has Increased Diversity in the Boardroom, Spectrum News (Mar. 29, 2021), https://spectrumnews1.com/ca/la-west/inside-the-issues/2021/03/26/3-years-later--ca-law-has-created-better-diversity-in-the-boardroom [https://perma.cc/3334-L9LV].

[209] Cal. Corp. Code § 301.3(a)–(b) (West 2021).

[210] Id.

[211] Id. § 301.3(e)(1).

California AB 979, which was passed in 2020, requires corporations to have a minimum of one director from an underrepresented community or of LGBTQ+ status by the end of 2021.[212] The law also requires corporations with more than four but fewer than nine directors to have a minimum of two directors from underrepresented communities or with LGBTQ+ status, and corporations with nine or more directors to have a minimum of three such diverse directors by the end of 2022.[213]

California's law clearly targets increasing diversity and can be successful towards that end. The law is an exemplar in requiring companies to improve diversity and including a forward-looking approach, albeit in the short term. The rule's reach is 2021 in the case of gender diversity, and 2022 in the case of racial, ethnic, and LGBTQ+ status diversity. The rule would be even more effective towards long term diversity increases if the forward-looking language goes beyond a set time.

However, a California Superior Court judge has struck down the gender, race, and LGBTQ+ status requirements by ruling in favor of Judicial Watch, a conservative foundation claiming that the laws violated equal protection.[214]

C. Proposed Comprehensive Disclosure Regime

To address the shortcomings of both the SEC's and Congress's attempts at establishing diversity disclosure mandates, this Section proposes comprehensive disclosure legislation that Congress can adopt. It also addresses how to use diversity disclosures to push companies

[212] Cal. Corp. Code § 301.4(a) (West 2021). "Director from an underrepresented community means an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender." Id. § 301.4(e)(1) (internal quotation marks omitted).

[213] Id. § 301.4(b).

[214] See Lauren Weber, Judge Tosses California Law Mandating Diversity on Boards, Wall St. J. (Apr. 4, 2022), https://www.wsj.com/articles/judge-tosses-california-law-mandating-diversity-on-boards-11649078797 [https://perma.cc/YR26-GBZJ]; Crest v. Padilla, No. 19STCV27561 (Cal. Super. Ct. May 13, 2022); Patrick Temple-West, California's Gender Diversity Board Mandate Struck Down in Court, Fin. Times (May 16, 2022), https://www.ft.com/content/d89c0adc-52f5-4151-a344-fa25ab4b4178 [https://perma.cc/JF37-2LQ7]. Despite these decisions, institutional investors maintain that they will keep pressure on companies to diversify their boards by race and gender. See, e.g., Ellen Meyers, Investors Keep Up Diversity Pressure After California Law Tossed, Roll Call (Apr. 7, 2022), https://rollcall.com/2022/04/07/investors-keep-up-diversity-pressure-after-california-law-tossed/ [https://perma.cc/G9SE-JPZN].

towards increasing diversity in companies through two mechanisms: shareholder activism through proxy proposals, and employee activism.

The proposed legislation takes elements from the Nasdaq/SEC rule, the California Board Diversity Rule, and the ESG Disclosure Act and extends them to include a long-range, forward-looking provision and sanctions for noncompliance. The disclosure mandate would extend to public companies and private companies with valuations of a billion dollars or more.[215] These proposals are a thought experiment indicating where legislation might be the best avenue to increase corporate diversity. However, in an increasingly polarized society and Congress, legislation will be challenging. Still, in an ideal world, the following proposals will be helpful towards the goal of increasing racial, gender, LGBTQ+, and disability diversity in companies.

1. Statistical Disclosures

The proposed rule will keep Rule 5606 of the Nasdaq/SEC rule intact to require companies to annually disclose statistical information of self-identified gender, race, and LGBTQ+ affiliation characteristics of their board of directors. Unlike the Nasdaq/SEC rule, the provision will include disability status.

In addition to board disclosures, the proposed provision goes beyond the Nasdaq/SEC rule to require companies to disclose the gender, racial, ethnic, LGBTQ+, and disability status of the C-suite and other top executives and employees. This is much like Sections 603 and 902 of the ESG Disclosure Act. Companies are already voluntarily disclosing employee data, so this disclosure requirement would establish a rule that would make it consistent across sectors.

Companies would be required to disclose their first diversity statistics a year from the passage of the proposed rule. Companies that fail to adhere to this provision will be subject to monetary settlements. Monetary impositions should mirror fines imposed for noncompliance with other SEC rules. Fines as high as $500,000 would be imposed on companies that fail to comply with these disclosures within a calendar year. Fines would double if noncompliance extended beyond a year.

[215] Jennifer S. Fan, Regulating Unicorns: Disclosure and the New Private Economy, 57 B.C. L. Rev. 583, 584–85 (2016) (arguing that unicorns should be subject to disclosure mandates like public companies). For a list of examples of unicorn companies, see Andrea Murphy, America's Largest Private Companies, Forbes (Dec. 1, 2022, 10:00 AM), https://www.forbes.com/largest-private-companies/list/#tab:rank [https://perma.cc/H3MM-LPPJ].

2. Forward-Looking Provision

The forward-looking provision of the proposed legislation takes elements from the California Diversity Rule and the climate provision of the ESG Disclosure Act and extends them. The law would require companies to (1) disclose processes and structures to identify, assess, and manage diversity; (2) provide a description of specific action taken to address employee diversity, equity, and inclusion on an annual basis until reaching a goal set by the company; and (3) disclose steps taken to increase board diversity in an incremental fashion until reaching a goal set by the company.[216]

The first provision would require companies to disclose activities such as internal diversity assessments, hiring of diversity managers, and specific roles of diversity managers.

The second provision would require companies to disclose programs and policies to increase diversity among their employees, such as recruitment and retention programs, changes in hiring procedures, etc. It would require disclosure of what companies are doing to ensure that diverse employees are included in advancement programs and are rising to the top of employee ranks. Diversity among top executives—CEOs and other C-Suite members—and other employees should gradually increase annually. The provision will encourage but not require companies to increase diversity among their employees until they reach a diversity goal the company has set.

The third provision would require companies to disclose actual steps taken to increase diversity on their boards. Companies would disclose the composition of their nominating committees and the steps the committee is taking to make incremental changes every year until reaching a goal or aspiration set by the company.

Many companies have already begun to set their own diversity goals.[217] Many shareholders and stakeholders have become vocal participants of

[216] The UN Guiding Principles on Business and Human Rights also provides a forward-looking approach to addressing human rights violations in what it calls stages of "due diligence." U.N. Hum. Rts., Off. of the High Comm'r, Guiding Principles on Business and Human Rights, 17–21 (2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/G84Z-EDGQ].

[217] See, e.g., Ellyn Shook, How to Set—and Meet—Your Company's Diversity Goals, Harv. Bus. Rev. (June 25, 2021), https://hbr.org/2021/06/how-to-set-and-meet-your-companys-diversity-goals [https://perma.cc/VN7R-LBC9] (noting that many companies have internal diversity goals and detailing Accenture's diversity goals). Companies like Hilton, Mozilla, Facebook, Wells Fargo, and others have set diversity goals of 30%, 40%, and up to 50%,

ESG and welcome changes in that direction.[218] This forward-looking provision is therefore responsive to changes in corporations towards this end.

While the statistical disclosure portion of the rule is unlikely to experience much pushback because it would merely standardize diversity disclosures nationally and many public companies are already disclosing these data, there will likely be significant push back against the forward-looking provision. Similar arguments have been made against the Nasdaq/SEC rule and the California diversity rule.[219] However, as Elizabeth Pollman has noted, internal activities in corporations today are much more progressive than the courts.[220]

Even so, it is important to note that these proposals are politically challenging. Without a major shift in politics, it is unlikely that Congress would mandate diversity disclosures. Still, these proposals provide the ideal solution to increasing corporate diversity.

3. Enforcement

Ordinarily, in the context of securities law, Congress would authorize the SEC to implement and enforce the proposed rules. In fact, the ESG Disclosure Act would amend the Securities Exchange Act of 1934 and direct the SEC to engage in rulemaking to set out the requirements for standardized ESG disclosures.[221]

The rulemaking provision of the ESG Disclosure Act allows the SEC to enforce the Act as it already does for public companies who are required to disclose a range of financial and non-financial information to

sometimes specifying when those thresholds would be met. See 25+ Examples of Awesome Diversity Goals, Ongig, https://blog.ongig.com/diversity-and-inclusion/diversity-goals/ [https://perma.cc/N7F2-2Y9L] (last visited Feb. 11, 2023).

[218] 25+ Examples of Awesome Diversity Goals, supra note 217.

[219] See Ellen Meyers, Judge Allows Legal Challenge To Go To Trial, Roll Call (Oct. 14, 2021), https://rollcall.com/2021/10/14/california-board-diversity-requirements-face-legal-challenge/ [https://perma.cc/45VF-3WJS]; Zecca, supra note 128, at 7–8.

[220] Elizabeth Pollman, The Supreme Court and the Pro-Business Paradox, 135 Harv. L. Rev. 220, 247 (2021). This is also true historically as government actors have had more conservative ideals, particularly regarding diversity, than corporate actors. See Nancy MacLean, Freedom is Not Enough: The Opening of the American Workplace 310 (2006) (discussing corporate pushback against the Reagan administration's opposition to Executive Order 11246, which established requirements for non-discriminatory practices in employment).

[221] H.R. 1187, 117th Cong. § 103(a) (2021).

the SEC regularly.[222] However, I argue that the ESG Disclosure Act gives the SEC too much power to set requirements if the goal is to increase diversity for the benefit of all stakeholders. Congress—and not the SEC—should set all standards and authorize the SEC to enforce the rules at the same or similar rate as other securities laws.

Still, since the proposed rules go beyond traditional securities laws, other agencies may be better at enforcing the rules.[223] One agency that could potentially implement the rule is the Equal Employment Opportunity Commission. The EEOC enforces federal laws that make it illegal to discriminate against employees on the basis of their race, color, religion, sex, national origin, age, or disability.[224] Employers who have at least 100 employees, and federal contractors who have at least 50 employees that meet certain criteria, are required to complete and submit an annual Employer Information Report EEO-1 to the EEOC and the U.S. Department of Labor.[225] The EEO-1 Component 1 report mandates disclosure of information about employees' job categories, ethnicity, race, and gender.[226] The EEOC receives these diversity data from public and private companies. The data is, however, currently kept confidential. With the proposed legislation, the confidentiality requirement of the EEO-1 Report would become moot as companies would be required to disclose statistical and forward-looking internal processes to the EEOC and the public.

There are currently no fines associated with the failure to file an EEO-1 report other than the fact that the Office of Federal Contract Compliance Programs may terminate or suspend all or a portion of any federal contract held by a noncompliant employer.[227] While termination or suspension of a federal contract can be significant, it may not go far enough to incentivize compliance. This is particularly true for large public

[222] Id. pmbl. ("To provide for disclosure of additional material information about public companies.").

[223] See Emily N. Strauss, Is Everything Securities Fraud?, 12 U.C. Irvine L. Rev. 1331, 1331, 1335 (2022) (showing that non-SEC investigations brought against companies for harm caused to stakeholders other than shareholders and brought by regulators like the EPA and FDA are more likely to be successful and are more lucrative than traditional securities litigation for harm caused to shareholders).

[224] Overview, EEOC, https://www.eeoc.gov/overview [https://perma.cc/YUK8-KASN] (last visited Oct. 16, 2022).

[225] EEO-1 Data Collection, EEOC, https://www.eeoc.gov/employers/eeo-1-data-collection [https://perma.cc/8AHH-4CLH] (last visited Oct. 16, 2022).

[226] Id.

[227] 41 C.F.R. § 60-1.7(a)(4) (2020).

companies and some private companies with large valuations. Like the SEC, Congress should authorize the EEOC to enforce the proposed rules with actual fines.

To be sure, neither the SEC nor the EEOC are perfect sources of enforcement for the proposed disclosure legislation. Both agencies have limited resources. The SEC is limited by securities laws in its focus on investors,[228] and the EEOC's enforcement power has been weak from the agency's inception because its role was originally confined to investigation and reconciliation.[229] The EEOC has been criticized as "demonstrating limited ambition to change employer practices or remedy past discrimination."[230] Congress can empower whichever agency it chooses—both in terms of allocation of funds and rulemaking—to apply the proposed disclosure rules broadly to public and private companies and include a forward-looking provision.

D. Mechanisms for Forward-Looking Provision

Scholars have written about the limits of disclosures on corporate behavior in a range of contexts, including in securities laws[231] and human rights.[232] The overall posture of the literature is that merely disclosing statistical data is unlikely to change corporate behavior. This Article

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[228] U.S. Sec. & Exch. Comm'n, The Role of the SEC: Mission, Investor, https://www.investor.gov/introduction-investing/investing-basics/role-sec#:~:text=The%20U.%20S.%20Securities%20and%20Exchange,Facilitate%20capital%20formation [https://perma.cc/GP77-3KVQ] (last visited Mar. 17, 2023).

[229] Edelman, supra note 177, at 49.

[230] See Margo Schlanger & Pauline Kim, The Equal Opportunity Commission and Structural Reform of the American Workplace, 91 Wash. U. L. Rev. 1519, 1582 (2014).

[231] See, e.g., Steven M. Davidoff & Claire A. Hill, Limits of Disclosure, 36 Seattle U. L. Rev. 599, 602–03 (2013) (arguing that the impact of disclosures on investment decisions is far more limited than typically assumed); Easterbrook & Fischel, supra note 195, at 680–82 (arguing that mandatory disclosures may not bar securities fraud).

[232] See, e.g., Adam S. Chilton & Galit A. Sarfaty, The Limitations of Supply Chain Disclosure Regimes, 53 Stan. J. Int'l L. 1, 23–24 (2017) (showing that supply chain disclosures are less likely than disclosure regimes in other contexts to reduce human rights abuses because they do not provide information on actual products and are weak proxies for human rights outcomes); Marcia Narine, Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts, 47 Colum. Hum. Rts. L. Rev. 84, 130 (2015) (arguing that mere disclosures do not change corporate behavior because not enough consumers or investors penalize companies). Despite these seemingly disparate arguments, human rights is likely different from corporate diversity because investors, employees, customers, and corporate executives all want companies to be more diverse. See supra note 3 and accompanying text.

therefore proposes not just the disclosure of statistical data, but also the promulgation of forward-looking provisions. It further recognizes the need for other mechanisms that can enhance the effectiveness of disclosures and to push companies toward gradual change. While there may be a number of such mechanisms,[233] this Section discusses two: shareholder activists and employee activists.

1. Shareholder Activists

There are different forms of shareholder activism, including direct communication with management, indirect communication through the press or social media, and writing a letter to the board. This Article focuses on shareholder proposals through proxies, because it involves activist shareholders "put[ting] forth proposals focused on incremental value creation through constructive interaction with company management," which is the focus of the forward-looking approach.[234]

Under SEC Rule 14a-8,[235] shareholders of public companies are permitted to present proposals on a wide range of social issues to raise awareness and pressure corporate management to act.[236] Shareholder proposals are published in proxy statements and typically receive substantial publicity in newspapers. Shareholders then vote on proposals at annual meetings or, more commonly, in proxy statements.

In 2020, shareholders submitted 720 proposals for votes, 37% of which related to social and environmental concerns.[237] Shareholder proposals

[233] See Anat Alon-Beck, Michal Agmon-Gonnen & Darren Rosenblum, No More Old Boys' Club: Institutional Investors' Fiduciary Duty to Advance Board Gender Diversity, 55 U.C. Davis L. Rev. 445, 492 (2021) (discussing other ways in which shareholder activists can improve gender diversity in companies). Customers can also serve as agents. See Shannon Cook, How Millennials & Gen Z Are Pushing Brands On Diversity And Inclusion, BusinessBecause (Mar. 3, 2021), https://www.businessbecause.com/news/insights/7504/millennial-gen-z-diversity-and-inclusion [https://perma.cc/JM5R-6N65].

[234] See Chris Ruggeri, Activist Shareholders: How Will You Respond?, Deloitte, https://www2.deloitte.com/us/en/pages/finance/articles/cfo-insights-shareholder-investor-activism.html [https://perma.cc/BP8F-EQPL] (last visited Jan. 25, 2023).

[235] 17 C.F.R. § 240.14a-8(a) (2012).

[236] Myron P. Curzan & Mark L. Pelesh, Revitalizing Corporate Democracy: Control of Investment Managers' Voting on Social Responsibility Proxy Issues, 93 Harv. L. Rev. 670, 671 (1980).

[237] Gibson Dunn, Shareholder Proposal Developments During the 2020 Proxy Season 3–4 (2020), https://www.gibsondunn.com/wp-content/uploads/2020/08/shareholder-proposal-developments-during-the-2020-proxy-season.pdf [https://perma.cc/MN8U-TJ2X]. Social proposals cover a wide range of issues: inclusion- and diversity-related issues; gender/racial pay gap; disclosure of board statistics; and reporting on human rights, workplace policies, and

submitted to public companies during the 2022 proxy season saw an increase in matters related to ESG.[238] Proposals in the social category have increased by 20% since 2021 and constitute the largest category of submitted proposals in 2022.[239] There are now fewer grounds for companies to exclude a shareholder proposal from a proxy since the SEC rescinded a Trump-era policy that helped company executives to exclude shareholder proposals on environmental and social issues from their annual proxy statements.[240] Usually, a company seeking to exclude proposals "must file a request for a no-action letter with the SEC, presenting its reasons for excluding the proposals."[241] "The proponent may then respond to the no-action request, and the SEC's staff subsequently decides whether it agrees with the company."[242] The SEC ultimately grants a no-action letter in almost half of all cases.[243]

Shareholder proxy proposals can be an effective tool for organizational change. There are examples of cases where corporate executives have changed company policies either in response to a threatened proxy proposal or because of the number of votes obtained by the shareholder proposal.[244]

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the opioid crisis. Environmental proposals include addressing climate change, recycling, and sustainability disclosures.

[238] Gibson Dunn, Shareholder Proposal Developments During the 2022 Proxy Season 2 (2022), https://www.gibsondunn.com/wp-content/uploads/2022/07/shareholder-proposal-developments-during-the-2022-proxy-season.pdf [https://perma.cc/D7HE-7JX5].

[239] Id.

[240] Paul Kiernan, SEC Rescinds Trump-era Policy, Eases Path for Shareholder Proposals on Environmental, Social Issues, Wall St. J. (Nov. 3, 2021), https://www.wsj.com/articles/sec-eases-path-for-shareholder-proposals-on-environmental-social-issues-11635979349 [https://perma.cc/4G4C-QS69]; Lydia Beyoud, ESG Proxy Proposals Land on Easier Path for Vote After SEC Change, Bloomberg L. (Nov. 9, 2021), https://news.bloomberglaw.com/esg/esg-proxy-proposals-land-on-easier-path-for-vote-after-sec-change [https://perma.cc/R9T9-QF58].

[241] Roberto Tallarita, Stockholder Politics, 73 Hastings L.J. 1697, 1719 (2022); see also Letter from William H. Carter, Special Couns., U.S. Secs. & Exch. Comm'n, to J. Scott Melton, Corp. Couns., Wal-Mart Stores, Inc. (Apr. 10, 1991) (on file in Westlaw) (requesting, and receiving, an SEC no-action letter for excluding from proxy materials a proposal that recommends providing shareholders with information on Wal-Mart's equal employment opportunity and affirmative action).

[242] Tallarita, supra note 241, at 1719.

[243] Id. (showing that the SEC granted 49.5% of no-action requests in a study).

[244] Curzan & Pelesh, supra note 236, at 671; see also Aaron Tilley, Microsoft Shareholders Force Company to Disclose Sexual Harassment Data, Wall St. J. (Nov. 30, 2021), https://www.wsj.com/articles/microsoft-shareholders-force-company-to-disclose-sexual-harassment-data-11638309907?mod=djemSustainableBusinessPro [https://perma.cc/CK52-6D

However, shareholder proposals have some limitations that can significantly restrict their utility in this context. First, there are large variations on the success of shareholder proposals. The average support on shareholder proposals voted on during the 2020 proxy season was 31.3% of shareholder votes cast.[245] The highest support was for governance proposals.[246] Proposals for social and environmental matters received support in only 23.5% of cases.[247] Specifically, support for environmental proposals increased from 23.9% in 2019 to 30.2% in 2020.[248] By contrast, support for social proposals—most of which are related to diversity issues—decreased from 23.6% in 2019 to 21.5% in 2020.[249]

Second, shareholder proposals are usually not specific enough to require significant corporate action.[250] This is because shareholders are limited by the regulatory constraint on "micro-manage[ment]," which prevents them from "probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment . . . or seek[] to impose specific time-frames or methods for implementing complex policies."[251] In almost all cases, shareholders present their proposals in the form of recommendations to management rather than binding resolutions.[252] Examples of proposals include requests for disclosure of some information, or a report describing

UT] (discussing how Microsoft shareholder proposals forced the company to disclose how it handles sexual harassment claims).

[245] Gibson Dunn, supra note 237, at 6.

[246] Id. Governance proposals include written consent and independent chair proposals. Id. at 4; see also James J. Brudney, Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus, 33 Comp. Lab. L. & Pol'y J. 555, 592–93 (2012) (noting that proposals involving corporate governance are more common and often garner significant shareholder votes).

[247] Gibson Dunn, supra note 237, at 6.

[248] Id.

[249] Id. at 6–7. Support for board diversity specifically was 20.7%. Id.

[250] Tallarita, supra note 241, at 1716. This 21.5% figure is corroborated by the 2021 shareholder survey. See Edelman, supra note 191, at 25.

[251] Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 (May 28, 1998). The SEC's new policy however is not to accept company arguments that shareholder proposals constitute impermissible micromanagement. See Richard Vanderford, Shareholder Voices Poised to Grow Louder With SEC's Help, Wall St. J. (Feb. 11, 2022), https://www.wsj.com/articles/shareholder-voices-poised-to-grow-louder-with-secs-help-11644575402?mod=djemSustainableBusinessPro [https://perma.cc/R928-4YGE].

[252] Tallarita, supra note 241, at 1716. These recommendations are known as precatory proposals. Id.

the company's plans regarding a certain issue.[253] For example, in November 2021, Microsoft shareholders approved a proposal requesting an annual report on the number of sexual harassment cases investigated and resolved and results of independent investigations into its executives, including Bill Gates.[254] While these disclosures are helpful, they would not necessarily put an end to sexual harassment at Microsoft.

Despite their limitations, scholars like James Brudney have argued that shareholder proposals can exert some pressure on a board of directors to address shareholder concerns.[255] Media coverage of a board's refusal can also have negative reputational consequences for a business.[256] In addition, industry data suggests that investors are engaging in more shareholder activism related to diversity and inclusion.[257] In the context of the current SEC "disclose or explain" rule, shareholder proposals may be useful despite some caveats. Specifically, shareholders can use proposals to pressure companies who merely "explain" why they lack diversity to disclose diverse board members. Of course, disclosure alone would not bring about actual change, but a proposal from shareholders asking companies to disclose rather than explain their lack of diversity can exert pressure on companies to meet the SEC's tokenism rule, which is a good start for companies that completely lack diversity.

However, shareholder proposals will likely be more effective under the forward-looking legislative provisions proposed in this Article, where a company would be expected to increase its employee and board diversity annually. Shareholder proposals can be particularly effective in pressuring companies to describe their plans towards meeting a diversity threshold, and perhaps disclosing year-over-year increases. Specifically, the proposal would require companies to disclose internal diversity assessments, programs and policies put in place to increase diversity

[253] Id.
[254] Tilley, supra note 244.
[255] Brudney, supra note 246, at 597.
[256] Id.
[257] Seventy-one percent of the 100 U.S. investors surveyed in 2021 said that their shareholders are likely to engage in diversity and inclusion activism. Edelman, supra note 191, at 25. Shareholders are now routinely requesting that companies produce racial equity audits or civil rights audits. Among other things, racial equity audits are conducted by third parties to determine whether a company's policies, practices, and products are equitable and nondiscriminatory for employees, customers, and the communities in which they operate, and whether a company has sufficient mechanisms in place to monitor effectiveness. Blackrock, Morgan Stanley, Facebook, Starbucks, and Citi are some of the companies that now do racial audits. DiNapoli, supra note 163; SOC Inv. Grp., supra note 163.

among employees, and changes in hiring procedures. This level of specificity would allow shareholder activists to pressure companies to do more every year towards meeting their goal. For example, if a company set a 40% diverse employee goal for 2025 and discloses that it changed its hiring process in 2022 to improve employee diversity, shareholder activists can use proxies to ask companies for specific steps taken and whether and how it was yielding results towards its 2025 diversity goal.

Another limitation of shareholder proposals is that they apply only to public companies.[258] Since the proposed forward-looking rule would apply to both public and private companies, other mechanisms, such as employee activities, would have an important role to play in implementation.

2. Employee Activists

Employee activism—employees pressuring companies to act in some specified way—is on the rise.[259] One study "finds a 50 percent increase in employee activism events between 2018 and 2020, and a near tripling

[258] Public companies receive proposals from shareholders. See Shareholder Proposals Toolkit, Prac. L. Corp. & Sec., https://content.next.westlaw.com/practical-law/document/I9f3314c53f2311e89bf099c0ee06c731/Shareholder-Proposals-Toolkit?viewType=FullText&transitionType=Default&contextData=(sc.Default)&firstPage=true [https://perma.cc/53V9-NQCN] (last visited Jan. 25, 2023).

[259] Megan Reitz, John Higgins & Emma Day-Duro, The Wrong Way to Respond to Employee Activism, Harv. Bus. Rev. (Feb. 26, 2021), https://hbr.org/2021/02/the-wrong-way-to-respond-to-employee-activism [https://perma.cc/R9XG-LMJG]; see also Barbara Ortutay, With Rare Candor, Employees Protest Facebook's Trump Policy, Associated Press News (June 1, 2020), https://apnews.com/article/donald-trump-us-news-ap-top-news-facebook-inc-mark-zuckerberg-081d1e91b1b75e7924db74e151c05dde [https://perma.cc/BZ6W-VVUR] (describing Facebook (now Meta) employees' protest against Chairman and CEO Mark Zuckerberg's decision to retain posts by President Donald Trump on its platform); Jackie Davalos, Uber, Lyft Drivers Nationwide Stage Strike for Right to Unionize, Bloomberg L. (July 21, 2021), https://news.bloomberglaw.com/daily-labor-report/uber-lyft-drivers-nationwide-stage-strike-for-right-to-unionize [https://perma.cc/G76Z-JBKL] (reporting that Uber and Lyft drivers "staged a strike . . . demanding better pay and the right to unionize"). Employee activism is not limited to public companies; it is also occurring in nonprofit organizations. See Meg Schiffres, Diversity Richmond Employees Continue Protesting and Striking Over Working Conditions, NPR News (Nov. 10, 2021), https://vpm.org/news/articles/26994/diversity-richmond-employees-continue-protesting-and-striking-over-working [https://perma.cc/4YLF-B8RB] (protesting unsafe working conditions at historic LGBTQ+ community center); see also Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 Stan. L. Rev. 821, 847 (2021) (maintaining that "organizing and social movements [are] sources of learning, inspiration, and ideation").

of events from 2019 to 2020."[260] The issues that employees protest have become quite extensive too. Just a few years ago, "in 2018, employee activism focused more exclusively on the treatment of women in the workplace"; it now includes social, environmental, and even political issues.[261] Climate change has become a particularly salient issue for corporate employees. For example, in 2019, more than 4,000 Amazon employees signed a letter calling on the company to take an aggressive stance to address climate change.[262] In 2020, thousands of Minneapolis cleaning workers—who clean corporate buildings like Ecolab, U.S. Bank, Wells Fargo, and United Health Group—walked off their jobs demanding that their employers act on climate change.[263]

Employee activists have been successful in mobilizing large numbers of employees, generating significant media attention, and forcing employers to engage in some types of substantive organizational change.[264] Indeed, many investors support employee activism as a sign of a healthy workplace culture.[265]

Despite the rise and seeming success of employee activism, however, diversity—outside of gender—has yet to become a strong catalyst for activism. This is a potential limitation of employee activism, particularly if diversity is separated from other ESG issues. Yet, there is evidence that employee activism may extend more to workplace diversity in the near future. A 2019 survey of 375 corporate executives and board members found that 81% of companies expect an unprecedented rise in workplace

[260] David F. Larcker, Brian Tayan & Stephen A. Miles, Protests from Within: Engaging with Employee Activists, Harv. L. Sch. F. on Corp. Governance (Mar. 24, 2021), https://corpgov.law.harvard.edu/2021/03/24/protests-from-within-engaging-with-employee-activists/ [https://perma.cc/W9XQ-2DBZ] (reporting data from Marketing Scenario Analytica).

[261] Id.

[262] Karen Weise, Over 4,200 Amazon Workers Push for Climate Change Action, Including Cutting Some Ties to Big Oil, N.Y. Times (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/technology/amazon-climate-change-letter.html [https://perma.cc/ZF7L-NTWH].

[263] Jeremy Brecher, Did We Just Witness the First Union-Authorized Climate Strike in the United States?, Common Dreams (Mar. 1, 2020), https://www.commondreams.org/views/2020/03/01/did-we-just-witness-first-union-authorized-climate-strike-united-states [https://perma.cc/G9BL-V5MB].

[264] Nishi Gautam & Edward J. Carberry, Understanding Employee Activism in the High-Tech Sector: A Comparative Case Analysis (unpublished manuscript) (on file with author).

[265] Seventy-two percent of the 100 U.S. investors involved in a study consider companies with strong employee activism attractive for investment. Edelman, supra note 191, at 19.

activism over the next three to five years.[266] Forty-six percent of companies believe that activism would focus on sustainability and climate change, and 45% believe it would focus on the lack of diversity in the workplace.[267] If this survey is prescient, then employee activism may have a role in increasing overall workplace diversity that extends beyond gender.

Even if the proposed disclosure regime is not adopted and we remain in a "disclose or explain" regime, employee activists can pressure companies to disclose rather than explain their lack of diversity. When speaking with a collective voice, workers can have a powerful influence on company executives because activism can impact a company's reputation.

If Congress adopts the proposed diversity disclosure legislation, companies that do not presently disclose diversity in management and the workplace would be required to do so and show specific year-by-year improvements and changes towards improvement. This would give employees a rare insight into the companies in which they work and allow them to push for incremental change towards their companies' goals. Without any knowledge of what companies have done each year, it would be challenging for employees to know what to pressure companies to do in subsequent years. The proposed disclosure regime would also provide employees with a clear picture of what other companies are doing to improve diversity annually. Of course, companies who do not want to increase diversity might use data from similar companies to argue that they are perhaps not worse off than their peers who are also lagging in a particular aspect of diversity. While this is a potential risk of comparative information, it can also help employee activists argue that they prefer to work in companies that are leading in diversity rather than lagging.

Beyond shareholder and employee activists, both the "disclose or explain" and the forward-looking provisions can make it easier for other activists, think-tanks, and reformers to use disclosed diversity data to publicly call out companies that are lagging and push them to increase diversity, particularly under the forward-looking provisions.[268]

[266] Herbert Smith Freehills, Future of Work: Adapting to the Democratized Workplace 4 (2019), https://www.herbertsmithfreehills.com/latest-thinking/the-new-world-of-work-report-warns-of-an-unprecedented-rise-in-workplace-activism-v2 [https://perma.cc/QYL8-3SA9].

[267] Id.

[268] See Adediran, supra note 26, at 917–20.

Legislatures and other policy makers can also use the forward-looking provisions to engage in legal reform over time. It is a lot easier to know what other legal changes are needed if policy-makers know what progress has been made in previous years and decades.

CONCLUSION

Diversity—race and ethnicity, gender, LGBTQ+ status, and disability—has become a central concern in corporations since the 2020 racial reckoning and the COVID-19 pandemic. This Article argues that disclosures can be used instrumentally to increase corporate diversity for the benefit of a range of corporate stakeholders, including employees, customers, and the communities in which companies operate. To achieve this goal, legal reform through Congress is necessary to establish both statistical and forward-looking disclosure requirements that require companies to make improvements towards increasing diversity on an annual basis. With diversity data on not just statistics, but also internal policies and programs, actors such as shareholder activists, employee activists, and policy-makers can use the information to push companies towards increasing diversity. Without a robust set of data, these actors are unlikely to be able to pressure companies to increase diversity at all levels of a company.

Scholars and policy-makers have underappreciated this possibility because the disclosures literature in Corporate Social Responsibility ("CSR") and Environmental, Social, and Governance ("ESG") have largely omitted diversity disclosures. Similarly, scholarship on diversity disclosures is still developing and has yet to incorporate the ESG disclosures framework. This Article brings those literatures together for the first time. The marrying of the literatures in these areas is important so that scholars can influence policy changes in ESG. This Article provides original empirical data to show that public companies have been disclosing diversity information as part of their ESG reporting for at least the last five years, which means that companies firmly consider diversity to be part of their ESG disclosures and activities.

Scholarship and policy have also been limited by securities laws, which require SEC regulations to rest on the materiality of information to investors. The materiality standard would make it challenging for the SEC to mandate rules to improve diversity for all stakeholders. This Article discusses these challenges in the 2021 Nasdaq diversity disclosure rule approved by the SEC. The rule requires Nasdaq-listed companies to disclose diverse board members or explain why they lack diverse board members. The rule is unlikely to lead to increased corporate diversity because it merely requires disclosures for investor transparency and decision-making, applies only to Nasdaq-listed companies, and only to board diversity—not executives or other employees. Similarly, the United States House of Representatives recently passed a bill to mandate diversity disclosures as part of a larger ESG disclosures law. However, the bill is flawed because it lacks a forward-looking provision by which improvements can be measured.

This Article argues that unlike the SEC, which is limited by securities laws, Congress can adopt the proposed legislation with statistical and forward-looking provisions that can gradually increase corporate diversity among executives, board members and other employees in both public and private companies.

APPENDIX

Table 1: Dictionary of Diversity Terms

Group	Term
Asian	Asian
	Pacific Islander
Black	Black
	African American
Latinx	Latinx
	Latino
	Hispanic
LGBTQ+	LGBTQ+
	Lesbian
	Gay
	Bisexual
	Transgender
	Queer
	LGBTQ Orientation
Board Diversity	Board Diversity
	Board Gender Diversity
	Board Racial Diversity
	Directors Board Diversity
Diversity and inclusion	Diversity and inclusion
	Diversity, Equity, and Inclusion
Gender Diversity	Gender Diversity
	Women
	Female
Racial Diversity	Race
	Ethnic
	Racial diversity
	Ethnic diversity

Workforce Diversity	Diverse Workplace
	Employee Diversity

Table 2: Link Between Python and Human Coder

Group	*Precision*
Asian	67.41%
Black	74.28%
Board Diversity	76.06%
Gender Diversity	75.98%
LGBTQ+	6.98%
Latinx	78.87%
Racial Diversity	67.21%
Workplace Diversity	32.00%
Total	**64.51%**

* The difference between the computer and human coder was significantly different for LGBTQ+ disclosures, which skewed the overall percentage difference. Without LGBTQ+ disclosures, the link between the human and computer coder was 73.7%.

Table 3: Percent ESG Reports with Mentions of Diversity Terms

	2017	*2018*	*2019*	*2020*	*2021*
Asian	39.10	37.39	36.70	43.35	58.73
Black	53.46	55.41	51.56	63.90	77.68
Board Diversity	10.11	14.86	19.63	26.75	36.90
Diversity and inclusion	54.52	62.61	63.30	72.07	79.96
Gender Diversity	86.17	88.74	88.44	92.36	95.73
LGBTQ+	37.50	36.04	35.60	38.60	47.72
Latinx	46.28	42.57	42.75	49.80	63.59
Racial Diversity	82.18	84.01	82.57	90.65	94.25
Workplace Diversity	18.09	17.12	17.80	20.03	24.70

Table 4: Percent ESG Reports with Diversity Statistics

	2017	*2018*	*2019*	*2020*	*2021*
Asian	19.15	21.85	21.10	29.91	46.92
Black	23.40	25.90	23.67	34.91	53.37
Board Diversity	3.72	4.95	7.71	11.46	16.57
Diversity and inclusion	14.36	17.57	16.15	25.03	29.66
Gender Diversity	67.02	71.85	72.29	81.82	88.59
LGBTQ+	8.51	13.74	13.94	13.31	16.87
Latinx	21.54	24.32	22.39	31.09	49.01
Racial Diversity	33.24	35.59	39.27	51.52	70.04
Workplace Diversity	3.99	5.41	4.77	8.04	8.43

Table 5: Year over Year Diversity Mentions for 2017 Companies

	2017	*2018*	*2019*	*2020*	*2021*
Asian	39.10	43.12	45.39	55.64	68.90
Black	53.46	62.68	63.48	76.69	84.81
Board Diversity	10.11	15.94	20.92	27.82	38.87
Diversity and inclusion	54.52	67.39	68.44	77.44	85.51
Gender Diversity	86.17	89.49	91.49	94.74	96.11
LGBTQ+	37.50	42.39	47.52	54.14	66.43
Latinx	46.28	49.28	51.77	63.53	70.67
Racial Diversity	82.18	86.23	89.72	91.73	95.05
Workplace Diversity	18.09	19.57	23.40	27.07	30.39
Number of Companies	**376**	**276**	**282**	**266**	**283**

* The number of companies decreased from 376 in 2017 to 282 in 2019 while diversity disclosures increased over time.

Table 6: Year over Year Disclosure Statistics for 2017 Companies

	2017	*2018*	*2019*	*2020*	*2021*
Asian	19.15	25.00	29.08	37.59	54.06
Black	23.40	29.71	32.98	44.74	63.96
Board Diversity	3.72	5.80	8.87	13.16	17.67
Diversity and inclusion	14.36	19.93	21.63	31.58	37.81
Gender Diversity	67.02	76.45	78.72	87.97	91.52
LGBTQ+	8.51	18.48	21.99	24.06	27.92
Latinx	21.54	28.62	29.08	39.47	56.54
Racial Diversity	33.24	38.41	48.94	58.65	74.20
Workplace Diversity	3.99	5.80	6.38	9.02	9.54
Number of Companies	**376**	**276**	**282**	**266**	**283**

* The number of companies dropped from 376 in 2017 to 282 in 2019 while diversity disclosures increased over time.