Making Money Green: A Proposal for a Sustainable Stock Exchange

Mary Grace Thurman
MAKING MONEY GREEN: A PROPOSAL FOR A SUSTAINABLE STOCK EXCHANGE

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ABSTRACT

Investors crave sustainable business data as a lucrative indicator of long-term business success, yet this demand is not being met by current environmental, social, and corporate governance (“ESG”) investment portfolios, voluntary business disclosure reports, or the Securities and Exchange Commission’s (“SEC”) climate-related rule proposal. Instead, an alternative, voluntary stock exchange premising entry upon satisfaction of industry-specific ESG prerequisites, would directly connect investors with the sustainable investments they desire without requiring them to interpret dense scientific data and decipher which companies exercise positive business practices.

This Article demonstrates that creating an alternative stock exchange for trading solely sustainable businesses would provide a mechanism to allow investors to back companies that align with their values and enforce compliance with preset sustainable business standards, going beyond mere disclosure requirements while avoiding the political influence and mandated capital compliance costs associated with rules implemented by the SEC.

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INTRODUCTION

The SEC requires a plethora of disclosures for publicly traded companies, yet there are currently no required disclosures for many pertinent sustainable business practices.1 Sustainability issues are highly relevant to investments in public companies.2 This information caters to the ethical interests of many investors by providing them the information necessary to invest in companies whose practices they support,3 and even

3 Roberto Silvestri, Ethics and Sustainability in Finance: Two Crucial Aspects to Fight Climate Change, CFA INST. (Jan. 13, 2022), https://blogs.cfainstitute.org/marketintegrity
for those investors less driven by their ethical prerogatives, sustainable business practices have consistently been shown to influence the long-term financial success of companies.\footnote{See, e.g., \textit{The Importance of Environmental Awareness When Running a Business}, MARYVILLE UNIV. (July 18, 2019), https://online.maryville.edu/blog/importance-of-environmental-awareness-when-running-a-business [https://perma.cc/SE7K-6BQ3].} Despite these compelling reasons to disclose sustainability data, there is currently no uniform disclosure requirement in place.\footnote{See \textit{Peirce, supra note 1.}}

In the absence of mandated disclosures, various companies have begun voluntarily disclosing this information to promote investments in their companies.\footnote{See generally \textit{Jill E. Fisch, Making Sustainability Disclosure Sustainable}, 107 GEO. L.J. 923 (2019).} However, even though many publicly traded companies have been forthright with this information, evidence indicates that even these companies do not disclose all matters of relevance.\footnote{\textit{Id.} at 947.} Instead, data is being selectively disclosed in a manner that highlights positive sustainability efforts, while leaving out data that does not.\footnote{\textit{Id.} at 948.} This selective disclosure “greenwashes” companies for investors, shielding them from much of the desired and necessary information.\footnote{The SEC Revisits Sustainability: Will Sustainability Reporting Become Mandatory for Publicly-Traded U.S. Corporations?, HUSCH BLACKWELL (Oct. 7, 2016), https://www.productlawperspective.com/2016/10/the-sec-revisits-sustainability-will-sustainability-reporting-become-mandatory-for-publicly-traded-u-s-corporations [https://perma.cc/UNS2-J5KD]; see also Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 [https://perma.cc/RX4N-LBM9].}

The SEC has been mulling over requiring sustainability disclosures for years and is currently poised to mandate strict climate-related disclosures in 2024.\footnote{SEC Disclosure Laws and Regulations, INC. (Jan. 5, 2021), https://www.inc.com/encyclopedia/sec-disclosure-laws-and-regulations.html [https://perma.cc/G6PE-GDBV].} Mandated disclosures are the SEC’s primary regulatory response,\footnote{Peirce, \textit{supra} note 1.} but increasing data suggests this may not be the most helpful method for protecting investors and promoting market efficiency.\footnote{Peirce, \textit{supra} note 1.} Evidence suggests that requiring frequent disclosures contributes to
short-termism in business decisions.\textsuperscript{13} And specifically, data relating to sustainable business practices involve dense, scientific data that poses unique practicability problems to investor interpretation,\textsuperscript{14} and there does not appear to be a workable method for structuring such disclosures in a manner that would facilitate the comparability and standardization necessary for useful disclosure requirements.\textsuperscript{15}

Furthermore, a disclosure requirement of this nature would be prone to political influence and would risk being struck down by the Supreme Court.\textsuperscript{16} Sustainability and environmental regulations are among the most politically controversial.\textsuperscript{17} Because the SEC is a federal administrative agency, it is subject to the influence of politics and changing administrations, putting controversial initiatives at significant risk of being undercut by future presidencies.\textsuperscript{18} Additionally, the Supreme Court in \textit{West Virginia v. EPA}\textsuperscript{19} recently limited administrative agency authority to address major questions with economic or political significance when the subject matter is atypical and where the agency does not have express congressional authorization.\textsuperscript{20} As a result, the SEC’s proposed climate-related rule risks being overturned because it is economically significant and concerns a subject matter not ordinarily within the SEC’s wheelhouse.\textsuperscript{21}

While neither mandated nor voluntary disclosures appear to offer an ideal solution for supplying investors with the sustainability data they desire, the creation of an alternative publicly traded stock market that predicates admission on meeting select sustainability requirements


\textsuperscript{14} Fisch, \textit{supra} note 7.


\textsuperscript{17} Id.


\textsuperscript{19} West Virginia v. Env’t Prot. Agency, 142 S. Ct. 2587 (2022) (commonly referred to as “West Virginia v. EPA”) [hereinafter West Virginia v. EPA].

\textsuperscript{20} See generally Zucker et al., \textit{supra} note 16.

\textsuperscript{21} Id.
would provide investors with this information in a workable manner while preventing “greenwashing” and being shielded from the government’s political influence over the SEC. The entry requirements would be industry-specific, with the standards for entry publicly disclosed. The publication of the uniform baseline requirements for entry would offer investors peace of mind as to the companies available to invest in, while also preventing the impracticability of sifting through dense scientific data to draw these conclusions individually for each public company. Furthermore, it would hold those companies boasting sustainable achievements accountable by requiring all requested information be reported to the market at the risk of removal.

A sustainable stock exchange would cater to the promotion of sustainable business practices and the correlating reward of long-term business success for investors while avoiding the SEC’s regulatory uncertainty. Publicly traded companies currently listed on other exchanges could switch to this new exchange, and private companies could choose to list here. Existing exchanges, like the New York Stock Exchange (“NYSE”), could launch such a venture, with support from the SEC and the Financial Industry Regulatory Authority. A new startup exchange could also challenge the incumbents.

In evidencing the need for a sustainable stock exchange, this Article will first discuss the economy’s push toward ESG investing (Part I), followed by the resulting rise of inadequate voluntary disclosures (Part II), mandatory disclosures as the standard solution and the issues associated with them (Part III), the SEC’s current climate-related rule proposal and the problems associated with it (Part IV), and will finish with the proposed solution for best connecting investors with ESG regulated investments free from the issues associated with voluntary and mandatory disclosures: a sustainable stock exchange (Part V).

I. THE RISE OF ESG INVESTING & SUSTAINABILITY IN INVESTMENTS

The central concern behind sustainability is promoting intergenerational equity by meeting the needs of the present without compromising those of the future. It encompasses the broad categories of ESG...
issues and has been of growing importance for decades. Gender, racial, and sexual diversity matters in the workplace have become key social concerns for businesses, while climate change has taken over as the primary environmental focus across nearly all industries. Even the politically conservative finance industry is categorizing climate change as an “emerging investment theme” and a “key risk factor” that “can impact the long-term success of [companies] and the economy.”

In response to the growing desire for data evidencing sustainable business practices, many investment portfolios now engage in and heavily promote what has come to be known as ESG investing. The United Nations ("U.N.") is largely credited with popularizing the abbreviation “ESG” in its 2004 report, *Who Cares Wins: Connecting Financial Markets to a Changing World*, which was a companion to *The Materiality of Social, Environmental and Corporate Governance Issues to Equity Pricing*, a


report resulting from the 2004 U.N. Global Compact Leaders Summit.\textsuperscript{32} Who Cares Wins expressed the views and recommendations of eighteen financial institutions and other stakeholders:

[T]he way that environmental, social and corporate governance issues are managed is part of companies’ overall management quality needed to compete successfully. Companies that perform better with regard to these issues can increase shareholder value by, for example, properly managing risks, anticipating regulatory action or accessing new markets, while at the same time contributing to the sustainable development of the societies in which they operate. Moreover, these issues can have a strong impact on reputation and brands, an increasingly important part of company value.\textsuperscript{33}

Then-U.N. Secretary-General Kofi Annan petitioned over fifty financial institution CEOs to participate in promoting the concept within their investment portfolios,\textsuperscript{34} the idea being that a business’s “ability to manage environmental, social, and governance” concerns in a socially conscious way demonstrates the quality of leadership necessary to a lucrative long-term investment able to maintain sustainable growth.\textsuperscript{35} A company that focuses on sustainable growth will generate greater capital, subsequently resulting in greater profits to its investors.\textsuperscript{36} Thus, a score indicative of these efforts is thought to accurately report the investment quality of companies to their investors.\textsuperscript{37}

ESG investing uses a framework that focuses on a company’s positive societal contributions to forecast its future financial success and business growth.\textsuperscript{38} Since the introduction of ESG investing in 2004, assets

\begin{footnotes}
\footnote{33} U.N. GLOB. COMPACT, supra note 31, at i.
\footnote{36} Id. at 924–25.
\footnote{37} Id.
with positive ESG scores have come to be seen as “a mark of operational
and management quality” that represents “responsiveness to evolving
market trends, resilience to regulatory risk, and more engaged and pro-
ductive employees.” These qualities have been shown to lead to higher
earning quality and lower risk of bankruptcy time and time again. In
fact, the vast majority of empirical studies have found a significant corre-
lation between sustainable practices and economic performance, indicat-
ing that ESG attributes are the best known signal of earnings volatility.
Empirical evidence, however, is not necessarily accurate or representa-
tive, nor does it consistently reflect the difference between causation and
correlation. Regardless, today ESG-labeled investment products are
worth $41 trillion, which is “almost one-third of global managed funds.”
The substantial prioritization and focus given to the ESG framework
demonstrate the increasing importance of sustainability in the invest-
ment industry.

Despite the popularity of ESG investments, however, the ESG sys-
tem has been subject to numerous criticisms for years. Most recently

deliver financial performance, but also show how it makes a positive contribution to
society.”).

39 The Price of Climate Change, BLACKROCK (Nov. 18, 2015), https://www.blackrock.com
-change [https://perma.cc/TV7G-XLZ9]. However, consider this alongside the discrepancies
in ESG investing today where scores are being subjectively determined, and thus often
difficult to interpret and not necessarily an accurate indicator of business success. Jennifer
Howard-Grenville, ESG Impact Is Hard to Measure—But It’s Not Impossible, HARV. BUS.
-impossible [https://perma.cc/G7CE-2638].
40 Fisch, supra note 7, at 933.
41 Id.; Why ESG Is Here to Stay, MCKINSEY (May 26, 2020), https://www.mckinsey.com
.com/2008/08/why-empirical-research-isnt-scientific [https://perma.cc/8N8N-ZKJB].
43 Sanda Ojiambo, The Inventors of ESG: ‘Critics Have a Point—Here’s the New Global
2022/10/18/inventors-esg-critics-new-global-reporting-system-ungc [https://perma.cc
/4QM4-9NVQ].
44 See id. (“Lenders reason that companies with healthy ESG scores have better gover-
nance and risk management processes, and therefore represent lower lending risk.”); Why
ESG Is Here to Stay, supra note 41 (“An increasing body of research shows a positive
link between ESG performance and financial performance or value creation.”).
45 Jacob H. Hupart, Public Criticism of Ratings Used for ESG Investing, NAT’L L. REV.
-investing [https://perma.cc/89HJ-GPWR].
the system has been criticized for focusing on evaluating the risk of harm on the company’s financial performance and not harm caused to humanity. The various ESG score systems are accused of “greenwashing” businesses and highlighting their sustainable efforts with positive ESG scores while the scores actually only reflect the potential for harm to the companies’ finances and not to the purported object of the efforts: increasing positive environmental, social, and governance contributions for society.

In the absence of standardization and regulation of ESG scores, there are great inconsistencies in calculation methodology, as well as investor ignorance as to what these scores actually represent and how they are calculated. However, even with the knowledge of the numerous issues surrounding ESG investing, investors continue to be interested in companies claiming to prioritize environmental, social, and governance societal contributions over merely financial ones.

Regardless of the associated inconsistencies with the structure of the current ESG system, the strong interest in ESG has changed modern capitalism. Today, the economy prioritizes sustainable efforts over the traditional profit maximization paradigm. While corporate governance has historically been considered the primary factor for indicating future investment success, environmental and social concerns are being given

48 Taparia, supra note 46.
49 Emily Platt, Inconsistencies in ESG Metrics, WEALTHSPIRE ADVISORS (June 1, 2021), https://www.wealthspire.com/blog/inconsistencies-esg-metrics [https://perma.cc/5G7L-7YAG].
50 See generally Taparia, supra note 46 (stating investment managers use rating agencies that create and subsequently sell indexes and ratings based on ESG criteria to businesses. These scores are not based on companies’ environmental or social responsibility. Agencies “measur[e] how much potential harm ESG factors like carbon emissions have on companies’ financial performance.”).
51 Id.
53 Id.
greater importance. Companies with positive ESG scores have come to be seen as reliable investments, incentivizing investors to prioritize those companies when building their portfolios. This shift toward promoting environmental and social concerns is best demonstrated by looking at recent actions related to diversity.

Over the last five years, the finance industry has begun focusing on diversity in portfolio building and investment decisions, with large companies taking high profile actions to promote diversity in hiring and leadership. The investment management company State Street placed a statue of a young, fearless girl with her hands on her hips in front of Wall Street’s Charging Bull statue on the Bowling Green in Manhattan to promote its “SHE fund,” which selectively invested only in companies with gender-diverse boards. The creation of this “fearless girl” statue shone a light on the importance of gender diversity, as the young girl defiantly stared down the raging bull, complete with a plaque that read, “Know the power of women in leadership. SHE makes a difference.” State Street used the statue to advertise its “demand [for] accountability from companies that lacked gender diversity on their boards.”

Diversity as an investment theme was given even greater weight a few years ago by Nasdaq. In September 2021, Nasdaq approved new board diversity standards that were subsequently approved by the SEC to “encourage greater board diversity” and “require board diversity disclosures for Nasdaq-listed companies.” Under the new rule, Nasdaq-listed companies are required to publicly disclose board-level diversity...
statistics annually. Each company is required to have a minimum of two diverse board members (companies have until 2025–2026 to hire the second diverse board member), and for U.S. companies, one must identify as female and the other must be a racial or ethnic minority or identify as LGBTQ+. Companies are required to publish their board’s diversity in their annual proxy statement, or, if the company has not met the diversity requirements, they must publicly disclose the reason(s) they did not satisfy the objective, as a means for motivating compliance. The Nasdaq diversity disclosure requirement demonstrates the newfound importance of prioritizing board and company diversity, along with the larger push for sustainable business practices in the finance industry more generally. It also shows how exchanges can play a role in furthering diversity efforts.

The increase in participation in the market by millennials is another massive force behind the importance of corporate sustainability and the increased promotion of sustainable investments. The “millennial effect” refers to the largest generational shift since the Baby Boomers, to a generation focused on diversity and change. Various surveys have shown that over seventy-five percent of wealthy millennials “consider the social and environmental impact of the companies they invest in to be an important part of investment decision-making” and they are more than twice as likely to invest in a company that prioritizes social issues over monetary ones. The millennial effect has the potential to provide an even greater counterweight to the traditional focus on the wealth-maximization paradigm of corporate governance than that already being seen. Actions encouraging diversity, like those taken by Nasdaq and State Street, are likely only the beginning of what will be demanded by the value-oriented millennial generation.

63 Id.
64 Id.
65 Id.
66 See Barzuza et al., supra note 58, at 1291–92.
68 Barzuza et al., supra note 58, at 1291 (citing Gillian Tett, Millennial Heirs to Change Investment Landscape, FIN. TIMES (Sept. 20, 2018), https://www.ft.com/content/59f6562a-786d-11e8-af48-190d103e32a4 [https://perma.cc/L7GM-W7NB]).
69 Id.
70 See id. at 1320–21.
71 See Breheny et al., supra note 62; Barzuza et al., supra note 58, at 1250–51; Beupre, supra note 67.
With this generational shift comes the greatest wealth shift in U.S. history. In the next thirty years, the millennial generation will inherit between $12 and $30 trillion, a value comparable to the GDP of the United States.72 This massive impending transition has not gone unnoticed by investment management companies. BlackRock has already begun writing about “understanding Millennial investors”73 in their annual reports, specifically highlighting the necessity for winning millennial loyalty as early as possible in the wealth transfer process.74 This generation demands to see companies doing the “right” thing, making the race to win millennial loyalty one that must be socially focused and oriented.75

The race to manage millennial wealth will demand an even further revamp of the financial system than what is already being seen today, with more of a focus on diverse boards and ESG investing. This generation is rising to the age of fiscal maturity and has consistently had a “novel preference for social responsibility in corporate governance.”76 Indicating that this generational wealth shift will require that companies be “values-driven, not value-driven.”77 This has already begun to incentivize investment companies to offer products with high social value.78 This socially conscious attitude toward investing is creating “bottom-up pressure” for investment funds to publicly prioritize socially cognizant goals as opposed to merely monetary ones.79

The importance of sustainability has substantially permeated the finance industry, where investment companies are now building portfolios based upon not only the traditional economic practices of companies, but also the social, environmental, and ethically focused practices of those companies.80 Investors are demanding information on the sustainable values of the companies they invest in,81 specifically information pertaining to how companies address the risks of climate change, diversity in hiring and leadership, and the fair treatment of employees.82
These sustainable considerations have proven to have positive effects on the long-term success of companies, contribute to the successful evaluation of business risk, as well as show insights into a board’s level of engagement, demonstrating which boards are “aware of and managing factors that affect the viability of the company’s strategy over the intermediate and long term.” The positively attributed consequences of sustainable business practices have led to the shift in prioritizing the importance of sustainable decision making as an investment theme today.

II. The Incomparable, “Greenwashing” Effect of Voluntary Disclosures

In the absence of mandated disclosures, many companies have taken it upon themselves to voluntarily disclose information relating to the environmental effects of their business practices. This response to investor demand for such information, however, is problematic. Voluntary disclosures allow companies to selectively choose what, if any, information to share, instead of requiring disclosure of all pertinent information. This has led to a broad range of disclosure approaches that create and allow for this sort of selective disclosure, resulting in large amounts of unreliable information being disclosed. The voluntary selection of data to be shared often leads to incomparable, inaccurate, and inconsistent data.

Voluntary disclosures lack substantive and procedural requirements, creating substantial variety in the data disclosed. This procedural and substantive variety produces incomparable data that makes it difficult to accurately assess the effect of the information shared on

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Write Its Own Environmental, Social, and Governance Rules, CTR. FOR AM. PROGRESS (Dec. 13, 2021), https://www.americanprogress.org/article/the-sec-should-write-its-own-environmental-social-and-governance-rules [https://perma.cc/4J8H-6ZEK] (“Investors, other market participants, and the public are increasingly pressing companies for information on a broad range of [ESG] issues. . . . [I]nvestors in the United States and abroad were pushing companies to disclose how they handle climate change risks, whether they treat their workers fairly, how they promote diversity in hiring and leadership, and much more.”).

83 Fisch, supra note 7, at 932–33.
84 Id. at 931–33.
85 See id. at 925–26.
86 See id. at 925–27.
87 Id. at 926–27.
88 Id.
89 Fisch, supra note 7, at 926–27.
90 Id. at 925–27.
economic performance.91 Because there are many pertinent factors relevant to sustainability,92 voluntary disclosures generate an influx of ad hoc data amongst companies and particularly across industries.93 Selective data disclosure by one company often does not align with information voluntarily disclosed by another company.94 Business practices each carry different environmental risks and concerns, particularly when considered amongst all of the unique practices employed by a single company.95 For comparison to be possible in the presence of this substantial variety in reported data, regulation of the content shared is necessary. The variety in data being voluntarily disclosed and lack of standardization prevents investors from utilizing these disclosures to assess a company’s long-term growth and success, diminishing the practical purpose of disclosing this information.96

In the absence of any regulation over the information being disclosed, not only is the data inconsistent and incomparable, but the issuers may be incentivized to “greenwash” their disclosures by sharing positive data and excluding unfavorable information.97 The lack of oversight and regulation surrounding voluntary disclosures affords companies the freedom to portray themselves as sustainable while omitting adverse information that would otherwise taint this image.98 Because of this, companies are able to selectively disclose information that highlights their business practices as being sustainable.99

A great example of this occurred with a sustainability report released by Volkswagen in 2016.100 Volkswagen heavily focused the report on the company’s efforts to reduce carbon dioxide (“CO2”) emissions, designed

91 Id.
93 Fisch, supra note 7, at 926.
94 Id. at 947.
96 Fisch, supra note 7, at 927.
97 Id. at 947.
98 Id.
to catch investors’ attention. However, in the same series of reports, Volkswagen drastically reduced discussion of nitrogen oxide (“NO\textsubscript{X}”) emissions, the main pollutant released by Volkswagen that year. This caused investors to deduce that the company was being an environmental activist with its low-carbon emissions, without the knowledge that this reduction was accompanied by large emissions of a different dangerous and largely undisclosed pollutant. Voluntary disclosures provide companies like Volkswagen the opportunity to misrepresent information pertaining to their business practices and social efforts by selectively omitting crucial information and depriving investors of the full picture of the companies in which they invest.

In addition to the issues presented by companies “greenwashing” themselves and the impracticability of comparing unstandardized data, the voluntary nature of these disclosures permits the data to go unchecked, leading to the potential for inaccuracies. Mandated disclosures are strictly regulated by the SEC, where the information is checked for honesty and compliance. However, voluntary disclosures operate less like an SEC disclosure and more like promotional materials in which companies can discuss whatever they wish. These voluntary disclosures are rarely, if ever, audited or monitored for accuracy or quality control. The lack of accountability arising out of this unregulated system permits companies to continue “greenwashing” and inhibits investors’ ability to accurately determine which companies are exercising sustainable business practices.

III. THE CONSEQUENCES OF QUARTERLY MANDATED SEC DISCLOSURES: POLITICAL INSTABILITY & SHORT-TERMISM

The SEC’s primary method of promoting transparency among publicly traded companies is creating rules that mandate disclosures of particular information to investors on a regular basis; however, required
disclosures encourage short-termism, lack standardization, and are subject to political influence. While these mandated disclosures are frequently intended to allow for better investments, they often end up promoting measurable short-term success over immeasurable long-term benefits. Numerous studies have shown that requiring frequent disclosures of financial information leads businesses to make decisions that improve their profits in the short term, because the businesses want to impress investors in each disclosure, regardless of the long-term consequences of those decisions. Furthermore, actions that may be better for businesses in the long run often do not yield measurable data, particularly in the short amount of time between required quarterly disclosures, causing these longer-term actions to be ranked low on a business’s list of priorities.

Data relating to sustainable business decisions is often immeasurable, with only indirect immediate effects on the financial success of companies, making this data particularly susceptible to being less prioritized by businesses in their short-term business decisions. Business decisions that primarily impact the workplace, contributing to better employee mental health, greater employee retention, and less rapid employee turnover, are often not reflected in standard financial disclosures. Furthermore, frequently mandated disclosures and a desire to regularly report environmentally friendly progress may incentivize businesses to make decisions that are ultimately less beneficial than alternative decisions that are more sustainable but largely immeasurable. Even ESG investments, which are intended to address engagement in sustainable, long-term business decisions, do not address “short-termism” effectively due

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110 Id. at 928–29.
111 Park, supra note 13.
112 Id.; see also David M. Primo, Against Disclosure, N.Y. TIMES (Nov. 8, 2013), https://www.nytimes.com/2013/11/10/opinion/sunday/against-disclosure.html [https://perma.cc/6MMT-VHRG]; see also Fisch, supra note 7, at 940 n.106.
113 Fisch, supra note 7, at 947.
115 See Park, supra note 13.
116 Böhringer & Jochem, supra note 114.
118 See generally id.
to their inconsistent metrics and lack of auditing.\footnote{120}{Matt Orsagh, Jim Allen & Kurt Schacht, CFA Inst., \textit{Short-Termism Revisited}, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 11, 2020), https://corpgov.law.harvard.edu/2020/10/11/short-termism-revisited [https://perma.cc/4949-6EAK].} Even worse are poor ESG actors who are forecast to cost $8 trillion in global climate change by 2050.\footnote{121}{Id.} The gaps seen in promoting long-term sustainable financial growth in ESG investments and the often largely immeasurable nature of sustainable goals, combined with the frequency with which companies are required to submit disclosures, will only further contribute to the problematic short-termism that currently besets SEC disclosures.\footnote{122}{See generally id.}

In addition to the risk of encouraging short-termism, mandating disclosure of the sustainable values and business practices of all publicly traded companies presents unique practicability issues. Many sustainability matters, particularly those involving environmental data, involve complex scientific data that is uninterpretable to the typical investor.\footnote{123}{Ariel Pinchot & Giulia Christianson, \textit{What Investors Want from Sustainability Data}, WORLD RES. INST. (Feb. 12, 2019), https://www.wri.org/insights/what-investors-want-sustainability-data [https://perma.cc/ZM3S-NZTW].} While much of the financial information disclosed is also uninterpretable to the ordinary person, investors rely upon their financial analysts and investment companies to interpret this information.\footnote{124}{Chron Contributor, \textit{Required Proficiencies to Work as a Financial Analyst}, CHRON.COM (May 13, 2021), https://work.chron.com/required-proficiencies-work-financial-analyst-16022.html [https://perma.cc/2KFC-45AN].} With the introduction of scientific data, however, further experts would be needed to properly interpret the disclosed information, much of which has proven to be unreliable in the first place due to the subjectivity of the criteria.\footnote{125}{See NAT’L ACADS. OF SCI., ENG’G & MED., \textit{COMMUNICATING SCIENCE EFFECTIVELY: A RESEARCH AGENDA} ch. 4 (2017); Bruce I. Jacobs & Kenneth N. Levy, \textit{The Challenge of Disparities in ESG Ratings}, 2 J. IMPACT & ESG INV. 107, 107 (2022).}

Even upon successful interpretation, this data would suffer from standardization and comparability issues.\footnote{126}{Fisch, \textit{supra} note 7, at 949, n.171 (citing Letter from Amy C. McGarrity, Chief Inv. Off., Colo. PERA to Jay Clayton, Chairman, SEC & Russell G. Golden, Chairman, Fin. Acc. Standards Bd. (Mar. 16, 2018)). Fisch noted Officer McGarrity was “expressing concern over lack of comparability among non-GAAP measures of financial performance and calling for the SEC to undertake a standardization project.” \textit{Id.}} For disclosures to serve their intended purpose, they must enable investors to draw comparisons amongst companies.\footnote{127}{Fisch, \textit{supra} note 7, at 928.} Thus, disclosure requirements must be “specific enough to provide investors and capital markets with meaningful and
readily comparable information,” a standard that would be unattainable if all publicly traded companies were required to output massive amounts of information pertaining to their sustainable business practices. Each industry has varying relevant data related to its social and environmental risks, making it unclear how regulation of this data could ever be standardized with a uniform disclosure requirement for all industries. Just as the environmental risks created by an agricultural firm would be incomparable to those posed by a technology firm like Google, the range of environmental and social issues cannot be captured by one set of disclosures. The inability to standardize the disclosure of the various risk factors across all industries of publicly traded companies would likely inhibit any reasonable comparative use of the data, and therefore defeat the purpose of the disclosure requirement.

In addition to the issues arising from utilizing mandatory disclosures as they pertain to ESG data, the SEC is a federal agency whose Commissioners are presidential appointees, and is thus not immune to political influence and changing presidencies. With this structure comes political influence over both the members of the SEC and the actions the agency takes. Each Commissioner’s term runs for five years, with terms staggered to allow for one to conclude each year. With the potential for each president to elect one Commissioner every year of their presidency, comes substantial flux in the political agenda of the SEC, and the risk that any success seen during one presidency may be undercut by the next. The inconsistency in political parties in the White House, therefore, limits the long-term viability of various disclosure requirements at a federal level.

This can be demonstrated by looking at the contrast between President Trump’s and President Biden’s stance on sustainability regulations. President Trump made it apparent that he would not support

128 Id. at 928–29.
130 Id.
131 See generally Fisch, supra note 7, at 923.
132 Id.
133 See generally id. at 928.
135 Id.
136 Fisch, supra note 7, at 923.
137 Compare Philip A. Wallach & Kelly Kennedy, Examining Some of Trump’s Deregulation
the SEC’s proposed rule requiring sustainability disclosures, and that he would work in opposition to any such rule.\textsuperscript{138} His presidency supported a deregulatory approach to the stock market, and he took steps to effectuate that goal,\textsuperscript{139} such as expressing his intent to eliminate the conflict mineral and resource extraction disclosure requirements (which the SEC has since implied that it no longer enforces).\textsuperscript{140} Conversely, however, under the Biden administration, the SEC has taken a proactive approach on matters of sustainability, proposing, for the first time ever, very progressive disclosure requirements for environmental risks and concerns.\textsuperscript{141}

President Biden has introduced and promoted the current SEC proposal requiring sustainability disclosures related to climate change.\textsuperscript{142} The introduction of a requirement for sustainability disclosures would be a huge and costly undertaking for companies.\textsuperscript{143} To implement expensive disclosure requirements for a topic as politically turbulent as sustainability creates a heightened risk that the policies may be reversed in years to come and, thus, threatens company capital spent trying to comply with these protocols, and by proxy, threatens the economic success of company investors.\textsuperscript{144} This fluctuating political influence over federal administrative


\textsuperscript{139} Wallach & Kennedy, supra note 137.


\textsuperscript{142} Crowley et al., supra note 137.


\textsuperscript{144} This occurred with the Conflict Minerals Rules, which was implemented by the Obama administration and then went unenforced years later during the Trump administration. The rule required that companies determine whether their products use so-called “conflict minerals,” and if so, where they originate. Mike Scott, \textit{Conflict Minerals Rules Show the
agencies like the SEC threatens whether controversial regulations will survive the changes in administrations, and consequently, threatens company capital spent in compliance with these fluid requirements.\(^{145}\)

Investors need data pertaining to the sustainable values and business practices of the companies in which they invest, but requiring further disclosure may not be the best way to provide them with this information.\(^{146}\) ESG values and reporting metrics have proven incredibly inconsistent, varying dramatically across indexes and depriving investors of accurate, comparable information.\(^{147}\) Between the popularity of ESG investing and the demands for disclosure requirements in this area, the importance and relevance of this information can no longer be contested.\(^{148}\) Requiring disclosure of this data would be a substantial undertaking for all public companies, the data provided would be uninterpretable, and the politically fluctuating allegiance of the SEC risks substantial monetary loss to companies and their investors.

### IV. The SEC’s Climate-Related Disclosure Rule

In response to the increasing demand for sustainable values and business practices in publicly traded companies, investors and investment companies have been asking the SEC to mandate sustainability disclosures for years.\(^{149}\) The SEC previously refused to mandate these disclosures, stating that disclosures should be limited to “financial reporting” on matters “material to investors.”\(^{150}\) However, the SEC now recognizes...
sustainability as a facet of financial reporting that is economically material, and has begun taking steps toward its regulation.151

The SEC currently requires various disclosures related to diversity in hiring and leadership,152 and in 2016 they released a Disclosure Effectiveness Initiative, requesting public comment on the extent to which the SEC should further mandate sustainability disclosures.153 The SEC was specifically curious about the extent to which investors value the importance of sustainability disclosures for shareholder investments and voting decisions.154 In response to their request, the SEC received tens of thousands of comments and various letters requesting that the SEC “require annual, uniform sustainability reporting from public companies as part of the overhaul of the agency’s disclosure regime”155 and “develop a comprehensive framework requiring issuers to disclose identified [ESG] aspects of each public-reporting company’s operations.”156 To address these requests, the SEC issued a proposed rule requiring select environmental disclosures relating to climate risks.157

The SEC’s proposal introduces stringent requirements for environmental disclosures that would be costly for businesses to comply with and that are likely to be struck down by the Supreme Court. The SEC climate-related disclosure proposal will require companies to disclose their climate goals, plans to achieve these goals, and report on the effect of these transition activities on the company’s finances on their Form 10-K.158 It will also require that companies disclose how climate-related risks, both known and those reasonably likely to materially impact the business, might affect the business in the short, medium, and long term,159 and

151 Fisch, supra note 7, at 934.
153 Fisch, supra note 7, at 939 n.97.
154 Id. at 940.
155 Id. (quoting Che Odom, Investors Want Sustainability Disclosures in SEC Overhaul, BLOOMBERG (July 21, 2016), https://www.bna.com/investors-sustainability-disclosures-n73014445099 [https://perma.cc/8AB2-LTH7]).
157 See Press Release, SEC, supra note 10 (explaining the SEC’s proposal for sustainability disclosures).
158 Gensler, supra note 141.
159 Sara Dewey, What to Know About the SEC’s Proposed Climate Risk Disclosure Rule,
their methodology for identifying, assessing, and managing these climate risks. Companies will also be required to share how different climate-related events to which their business is subjected will impact specific line items on the company’s financial statements.

In addition to those broader and more subjective climate-related disclosure requirements, the most controversial and contested part of the proposal requires that businesses disclose three scopes of greenhouse gas emissions. Most contested are the requirements for Scope 3 emission reporting. Scopes 1 and 2 require disclosure of direct and indirect greenhouse emissions from either purchased electricity or other forms of energy. Scope 3 emissions, however, are those indirect emissions from upstream and downstream business activities that are required to be disclosed if material, or if the business has a set greenhouse emission target or goal that includes these Scope 3 emissions. The public comments recommended removing Scope 3 reporting requirements from the rule entirely and complained about the high cost of compliance that would result from obtaining the required data.

The public comment period closed on June 17, 2022, with the rule currently pending action by the SEC and rollout intended for some time in 2024. The rule received almost 15,000 public comments, most of


Dewey, supra note 159.

After evaluating the public comments submitted to the SEC providing feedback on the proposed rule, the most frequent change suggested by opponents of the rule was to remove the Scope 3 greenhouse emissions disclosure requirements. Jacob H. Hupart, Megan N. Gates, William F. Weld, Douglas P. Baumstein, Jennifer B. Rubin, Courtney O. Taylor & Luke Haubenstock, What Public Comments on the SEC’s Proposed Climate-Related Rules Reveal—and the Impact They May Have on the Proposed Rules, MINTZ (July 20, 2022), https://www.mintz.com/insights-center/viewpoints/2301/2022-07-20-what-public-comments-secs-proposed-climate-related-rules [https://perma.cc/B73H-PLPM]. This change was recommended in sixty-nine comments, with the second most frequently recommended change only appearing in thirty-five comments. Id.

Id.


SEC, supra note 160.

Hupart et al., supra note 162 (reporting 21% of comment submissions argued “compliance with the proposed rule will impose unreasonable and extensive costs on businesses”).

This is the status as of the time this Article was written. David Cifrino & Jacob Hollinger, McDermott Will & Emery LLP, SEC Proposes Landmark Standardized
which were form letters submitted by climate action organizations in support of the rule.\textsuperscript{168} Though this proposal received substantial support, its majority was provided by nonprofit organizations who will not be directly affected by the rule.\textsuperscript{169} Of the criticisms submitted in response to the proposed rule, the prevailing critiques were concerned with the cost of compliance affiliated with its provisions and the burden that would arise from the Scope 3 reporting requirement.\textsuperscript{170}

Even if the SEC responds to the critiques and criticisms of the public, the rule is likely to remain incredibly costly to businesses due to its subjectivity and breadth.\textsuperscript{171} Furthermore, the required quarterly reporting requirements and disclosure of the effect of each climate risk on every financial line item may encourage short-termism, while the subjective nature of many of the disclosure requirements will lack standardization, and the entire proposal will suffer from volatility due to routinely shifting political influence.\textsuperscript{172} And, even if the proposed rule is implemented and survives political input and the cost-based attacks being brought by opponents, it is likely to be struck down as an invalid exercise of administrative agency authority regarding a “major question” by the Supreme Court under \textit{West Virginia v. EPA}.\textsuperscript{173}

A. \textit{Risks Associated with the SEC’s Proposal}

The SEC’s proposed rule will likely encourage short-termism and suffer from political influence, while inflicting huge costs upon publicly traded companies, harming companies’ capital, and potentially incentivizing privatization. The SEC’s current climate-related rule proposal would require publicly traded companies to make substantial disclosures in both their registration statements, as well as periodic reports.\textsuperscript{174} These reports

\begin{itemize}
  \item Of the comments, 12,304, or 84\%, were form letters, 10,861 of which were expressing support for the rule, with only 1443 in opposition. Those supporting the rule included the Union of Concerned Scientists, the Climate Action Campaign, and the National Wildlife Federation. Hupart et al., \textit{supra} note 162.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item Park, \textit{supra} note 13.
  \item Zucker et al., \textit{supra} note 16.
  \item \textit{Id.}
\end{itemize}
would require companies to disclose all “climate-related risks and their actual or likely material impacts on the issuer’s business, strategy, and outlook; governance of climate-related risks and relevant risk management processes; greenhouse emissions; climate-related financial statement metrics and related disclosures; and climate-related targets and goals.”\(^{175}\)

These requirements are likely to be a massive undertaking for businesses.\(^{176}\) Much of the information required, such as the “likely material impacts on the issuer’s business, strategy, and outlook” and how the identified climate risks may manifest in the short, medium and long term, is left to be subjectively determined with ambiguous parameters for showing how to identify when to disclose various information.\(^{177}\) The current proposed structure does not offer clarity to businesses as to what information specifically is being required and instead asks for vague categories of content without defining what is considered to be “material” or even what the consideration must be material \(^{178}\).

The frequency with which this data will be required on periodic reports will be incredibly costly and may encourage business practices that will generate desirable environmental data in the short term that may lead to adverse long-term effects or inaccurately represent the business’ viability as a long-term investment.\(^{179}\) In addition to cost being one of the most commonly critiqued facets of the rule, experts are speculating that compliance with these disclosures will require substantial investment by public companies to compile the data required to be disclosed.\(^{180}\) And, if the SEC successfully enacts the rule, all publicly traded companies will be required to collect this data regardless of the imposed cost at the risk of SEC investigation and enforcement for noncompliance.\(^{181}\)

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\(^{175}\) Id.

\(^{176}\) Id.

\(^{177}\) Id.; see also Press Release, SEC, supra note 10.


\(^{181}\) Hodge et al., supra note 178.
Mandating these costly disclosures creates a risk that large companies with enough capital to go private may choose to do so to avoid the massive spending required to report on their sustainable business practices. Specifically, large, wealthy companies with unfavorable environmental practices will be faced with the choice not to pay substantial sums to supply this information to their investors when the alternative of privatization would allow this information to remain out of the public eye and would avoid the substantial amount of work that would be involved in complying with these massive disclosure requirements. The potential for privatization associated with this proposed, expensive disclosure risks pulling substantial funding out of the stock market and harming investors. Even companies who do not privatize will be forced to incur massive spending to comply with the requirements, potentially harming investors by diminishing the value of the business.

Because the proposed rule is broad, subjective, and ambiguous, it’s poised to be a serious challenge to public companies both in monetary compliance cost and the diversion of business efforts spent adhering to the mandated frequency of the required periodic reports. It also risks harming investors with the possibility for diminished wealth in markets from privatization and decreased company capital resulting from the high compliance cost, particularly in providing the “Scope 3” downstream emissions. Ultimately, while a well-intentioned and even well-liked rule, as it is in its current state, it poses substantial monetary risks to companies, their investors, and stock markets more generally.

B. The Proposal’s Judicial Vulnerability

Recent Supreme Court precedent indicates the SEC’s climate-related rule likely exceeds its statutory authority due to its vast economic

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184 See Survey Reveals Costs and Benefits of Climate-Related Disclosure for Companies and Investors, supra note 180.
185 Id.
186 Zucker et al., supra note 16.
187 See generally Hupart et al., supra note 162.
significance and the “extraordinary circumstances” present.\textsuperscript{188} This past term, the Supreme Court limited the authority of administrative agencies under the major questions doctrine in \textit{West Virginia v. EPA}.\textsuperscript{189} The Environmental Protection Agency (“EPA”) is tasked with many climate-related and environmental regulatory capabilities, and instated emission caps regulating greenhouse emissions from power plants to cleaner sources.\textsuperscript{190} They claimed to instate the regulation pursuant to their authority under § 111(d) of the Clean Air Act.\textsuperscript{191} West Virginia challenged these requirements asserting that regulations imposing emission caps went beyond the administrative agency’s congressionally granted authority under the Clean Air Act.\textsuperscript{192} Upon review, the Supreme Court engaged in a broad interpretation of legal standing allowing West Virginia to challenge the rule despite EPA’s intention not to enforce the rule and held that implementation of this rule surpassed their congressionally granted authority.\textsuperscript{193}

The Court relied upon the “major questions doctrine,” explaining that in “extraordinary cases,” administrative agencies must have “clear congressional authorization” to exercise authority of large “economic and political significance.”\textsuperscript{194} To determine whether it was an “extraordinary case,” the Court looked to whether EPA’s conferred authority to make the decision at issue was rooted in ambiguous statutory text and whether they lacked expertise in the subject matter.\textsuperscript{195} The Court found Congress did not clearly vest EPA with the authority to completely control the internal methods utilized by power plants, and as such, their generation shifting rule exceeded EPA’s statutory authority.\textsuperscript{196} The Court explained that this substantial control over power companies was a major question that Congress would not grant an administrative agency authority to regulate without “clear expression in the statute,”\textsuperscript{197} and thus, EPA’s rule was impermissible.\textsuperscript{198}

\begin{thebibliography}{99}
\bibitem{188} Id.
\bibitem{189} Id.
\bibitem{190} Id.
\bibitem{191} Id. For a discussion of the Clean Air Act, see also \textit{The Clean Air Act and the Economy}, EPA (Jan. 20, 2023), https://www.epa.gov/clean-air-act-overview/clean-air-act-and-economy [https://perma.cc/H2LS-TGAB].
\bibitem{192} West Virginia v. EPA, 142 S. Ct. 2587, 2599 (2022).
\bibitem{193} Id. at 2594.
\bibitem{194} Id. at 2608; Zucker et al., \textit{supra} note 16.
\bibitem{195} West Virginia v. EPA, 142 S. Ct. at 2609; Zucker et al., \textit{supra} note 16.
\bibitem{196} 142 S. Ct. at 2595; Zucker et al., \textit{supra} note 16.
\bibitem{198} It is worth noting the Court did not consider the rule under the “Chevron doctrine,”
\end{thebibliography}
The SEC claims statutory authority to pass its climate-related disclosure requirement pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934, which collectively allow the SEC to require disclosures that are “necessary or appropriate in the public interest or for the protection of investors.” The SEC argues climate disclosures are necessary in the public interest because “climate-related risks have present financial consequences that investors in public companies consider in making investment and voting decisions.” This interpretation of their statutory authority appears to be ambiguous, particularly when their past authority has been limited to financial disclosures directly related to investor protection and public interest.

Because the SEC is attempting to pass a rule with large economic significance and subject matter in which they lack expertise pursuant to ambiguous statutory authority, the Supreme Court will likely strike this rule down as an impermissible exercise of administrative authority without clear congressional authorization under West Virginia v. EPA. Application of the major questions doctrine to the SEC’s proposed rule would likely render the same outcome as it did when applied to EPA’s attempted expansion of control into the makeup and controls of power plants. Due to the heavy financial burden the SEC rule would impose and its “extraordinary circumstances,” it appears highly unlikely that a rule of this nature will survive judicial review under this recent, binding precedent. If this rule is tried in front of the same court in such close succession, there do not appear to be any distinguishing elements indicating that the outcome would be different. As such, this proposal is increasingly which requires the court to accept an administrative agency’s interpretation of ambiguous law where the interpretation is both “rational” and “reasonable.” Zucker et al., supra note 16. The dissent argues the decision enables courts to circumvent Chevron and interpret ambiguous statutes instead as negating agency power. Olson, supra note 197.


Zucker et al., supra note 16.

Id.

See generally id.

West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

In the alternative, if the court applies the Chevron doctrine, a different outcome is possible. However, there is no basis for assuming this in the absence of any discussion of this analysis in the majority decision in West Virginia v. EPA. See generally Zucker et al., supra note 16.
problematic to both investors and companies at the risk of substantial capital being spent in preparation for and in compliance with a judicially vulnerable proposal.

In addition to the judicial vulnerability of the SEC’s climate rule proposal, the more general issues that beset mandatory disclosures will also affect this proposal. As the proposal currently stands, it will not generate consistent, comparable data. Its current structure calls for subjective categories of information that will vary dramatically across businesses and industries. This variety will not lend itself to market comparability or efficiency. Additionally, compliance with the rule will be costly, both as an initial investment and as a continuous quarterly and annual one. The high costs associated with compliance will diminish market value and will do so at the risk that the rule is substantially changed or revoked as a result of politics or judicial review. For these reasons, this rule proposal is likely to be costly, and, ultimately, ineffective.

V. THE SOLUTION: A VOLUNTARY, SUSTAINABLE STOCK EXCHANGE

A sustainable stock exchange would remedy issues associated with voluntary disclosures, force compliance beyond mandatory disclosures, provide investors with more reliable environmental, social, and governance information than the current ESG investing structure, and would not be undercut by politics or the impending SEC climate-related disclosures. Investor interest in the sustainable business practices of companies is not being met by the current lack of standardized disclosure requirements or the voluntary undertaking of selective disclosure, nor would introduction of mandatory disclosures provide investors with the outcome they desire. ESG investments provide inconsistent indexes, leaving investors to decipher which seems most accurate and reliable. Mandatory disclosure requirements risk being altered, unenforced, or repealed, and ultimately do not mandate sustainable practices. To

206 See generally id. (explaining how new SEC regulations are vague and creates an excessive burden on companies).
207 See generally id. (explaining the inconsistencies in the new SEC regulations).
208 Id.
209 Id.
210 See generally Fisch, supra note 7 (explaining the lack of disclosures to investors).
211 Taparia, supra note 46.
212 See Fisch, supra note 7, at 928.
213 See generally Adam Hayes, SEC Filings: Forms You Need to Know, INVESTOPEDIA,
satisfy this unmet demand, the creation of an optional, sustainable stock exchange that requires participating businesses to comply with a certain degree of care for environmental, social, and governance issues as a prerequisite for listing would provide investors with the peace of mind that they are investing in companies engaged in sustainable practices, while also rewarding the listed businesses by highlighting their long-term investment potential.

To evidence the need for a sustainable stock exchange, (A) the reasons for the exchange will be introduced, followed by (B) a discussion of the methods for exchange implementation, broken down by (i) structure and qualifications and (ii) platforms for implementation, and concluding with (C) a discussion of counterarguments.

A. Reasons for Introducing a Voluntary, Sustainable Exchange Platform

A sustainable stock exchange would address the absence of comparable sustainability data, while promoting investor protection and long-term business growth in an effective, efficient, and timely manner. The sustainable business practices of companies are becoming increasingly crucial to the long-term success of investments, yet there is currently no structure in place for enforcing sustainable practices, nor does the SEC’s climate-related rule proposal supply a workable strategy for addressing this absence. The SEC is responsible for protecting investors, and their chief mechanism for doing so is requiring that publicly traded companies disclose information. However, requirements for disclosure are not rules for compliance, and increasing required disclosures to encompass dense environmental data would provide investors with unworkable, incomprehensible data.

SEC-mandated disclosures do not require businesses to adopt sustainable practices, nor would introducing sustainability requirements on the current stock exchanges be a feasible undertaking. The companies listed on the current exchanges with the greatest capital and the largest pools of investors would have the potential to privatize their business if

https://www.investopedia.com/articles/fundamental-analysis/08/sec-forms.asp

214 Fisch, supra note 7, at 928.
216 Id.
faced with the expensive \(^{217}\) mandated requirement to convert their ongoing practices into more sustainable ones. This would withdraw funding and decrease index value from public exchanges, \(^{218}\) harming the overall success of the markets and their investors. For these reasons, an additional exchange based entirely upon voluntary entry and compliance with mandatory sustainable practices would be best fit to serve the interests of investors while protecting capital within established markets.

A sustainable stock exchange would provide many benefits for investors and the companies they invest in. It would ensure compliance with the sustainable requirements for listing. It would allow for standardization and comparability of data in a format that would not require expert analysis. It would remain necessary and relevant in the rollout of the SEC’s climate-related rule, while also remaining free from the judicial and political influence over the SEC. \(^{219}\) And, lastly, it would highlight the sustainable business practices of the companies listing on the exchange, promoting their viability as sound long-term investments, and consequently, providing a timely address to the impending millennial effect. \(^{220}\)

1. Listing Requirements as a Means for Ensuring Compliance

Publicly traded companies are required to disclose all requested information to the SEC, \(^{221}\) but the requirements end there. Companies are not obligated to maintain any degree of caution or care regarding the business practices associated with the information requested, nor are they required to meet specific standards with respect to this information. \(^{222}\) Disclosure requirements demand nothing from a business other than compliance with the requirement to disclose honest information. \(^{223}\) While


\(^{218}\) MEGGINSON & BUTCHKOVA, supra note 183.


\(^{222}\) See generally id. (explaining the SEC reporting requirements).

\(^{223}\) Id.
auditors currently verify this financial information, this verification does nothing more than ensure the disclosure of accurate information, nor is there indication that the current financial auditors will be situated to validate climate information.224

An exchange platform allows for regulation of listed businesses beyond the baseline SEC requirements of all publicly traded companies.225 This permits exchanges to set entry parameters, such that listing can be premised upon satisfaction of established environmental, social, and governance requirements. Utilizing a listing structure with prerequisites for entry ensures compliance with the predetermined ESG standards by enabling the exchange to guarantee that listed companies are meeting the mandatory prerequisites. It would enforce the designated entry requirements in a manner that cannot be met by the checks provided by SEC disclosures.226 Thus, an exchange with entry premised on satisfaction of preset standards would enable mandated compliance with sustainable business standards in a manner that SEC disclosures are incapable of providing.

2. Publicized Prerequisites for Entry Provide Standardized, Comparable Data

Requiring compliance with preset, industry-specific environmental, social, and governance standards will provide investors with standardized, comparable data without the need for interpreting dense scientific data. A sustainable stock exchange would require participating businesses to maintain a certain degree of care for environmental, social, and governance issues in their business practices to qualify for entry onto the exchange. That way, investors would be able to invest in any listed company with the knowledge that each is at least meeting the minimum requirements for entry. This prerequisite structure would eliminate the need for investors or their financial analysts to interpret complex environmental, social, and governance data, while still allowing them to rest assured that the companies they are investing in are maintaining adequate care for the designated ESG concerns. Rather than leaving it to investors, the exchange would do the work of ensuring companies are sustainable.

226 Id.
SEC disclosures require investors and investment companies to assess the data submitted in company disclosures in making investment decisions.\textsuperscript{227} However, by establishing prerequisite standards for entry, investors would not need to interpret data specific to each individual company listing on the exchange. Investors typically rely upon their financial analysts to understand the content disclosed in financial disclosures.\textsuperscript{228} Sustainability disclosures pose an even greater barrier by requiring yet another expert for interpretation.\textsuperscript{229} However, by viewing the publicized standards required for entry, investors would necessarily know that all qualifying companies satisfy the ESG entry requirements without the need for additional expert interpretation. Additionally, for companies to demonstrate compliance, relevant data would be submitted to the exchange itself, allowing it to act as a data bank for parties interested in viewing the qualifying information, but without requiring that parties do so. This structure enables business transparency without requiring that investors or their analysts be the party to interpret and analyze ESG data in drawing conclusions.

In addition to offering standardized data, utilizing preset requirements pertaining to various ESG concerns will also facilitate the comparability of this data. The lack of disclosure requirements pertaining to various environmental and social issues has contributed to the inability to compare sustainable business practices across companies.\textsuperscript{230} A sustainable stock exchange would address this absence by setting and publicizing specific standards that must be satisfied for entry, thus allowing investors to directly draw comparisons amongst companies meeting the designated standards. Degree of satisfaction as well as data evidencing compliance offered in a standardized format and organized by requirement would facilitate cross-company data comparability. This structure would create a platform that both ensures and proves that standards are being met, while aiding investors in comparing the listed companies.

\textsuperscript{227} See Hayes, supra note 213.
3. Increasing Sustainable Initiatives Indicative of Relevance

Sustainable initiatives worldwide demonstrate the relevance and potential success of a sustainable trading platform. The demand for distinguishing sustainable actors is not a new concept in stock markets. Since 2004, ESG investing has become a prominent factor for determining which companies belong in various investment portfolios. More recently stock exchanges have begun to use “green marks” on stocks that meet certain environmentally friendly goals. Specifically, the London Stock Exchange began labeling companies that provide green products and services and achieve various environmental objectives with a Green Economy Mark. The Exchange uses FTSE Russell’s Green Revenues Data Model to identify companies that are deserving of the Green Economy Mark by assessing what percentage of the company revenues are green revenues and evaluating them against six environmental objectives.

Once these considerations are made, the overall strength of “greenness” is evaluated and companies are placed into one of three tiers.

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234 “The Green Economy Mark is provided by the London Stock Exchange and draws upon FTSE Russell’s Green Revenues Data Model, which identifies companies providing green products and services which achieve environmental objectives. Revenues are classified based on the Green Revenues Classification System.” Green Economy Mark Report 2022, LONDON STOCK EXCH., https://www.londonstockexchange.com/raise-finance/equity/green-economy-mark/green-economy-mark-report-2022 [https://perma.cc/VNN6-WBRJ] (last visited Feb. 8, 2024). This sustainable initiative, however, must be qualified by its requirement that recipient companies derive more than 50% of their revenues from initiatives that directly contribute to environmental initiatives like combatting climate change, thus, limiting its breadth of inclusivity across the marketplace to companies directly engaged in environmental efforts. See, e.g., Brad Isaac, Qualifying for the LSE’s Green Economy Mark, FIELDFISHER (July 29, 2021), https://www.fieldfisher.com/en/insights/qualifying-for-the-lse-s-green-economy-mark [https://perma.cc/6KCM-X8DY].

235 The six objectives are: “(1) climate change mitigation, (2) climate change adaptation, (3) the sustainable use and protection of water and marine resources, (4) the transition to a circular economy, (5) pollution prevention and control, and (6) the protection and restoration of biodiversity and ecosystems.” EU Taxonomy for Sustainable Activities, EUR. COMM’N, https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en [https://perma.cc/VG2Q-B8BP] (last visited Feb. 8, 2024).
representative of their efforts.236 The Market’s Sustainable Finance Team makes the calculation of each company’s “greenness” from detailed company disclosures, allowing no company to list with a Green Economy Mark unless they produce net-positive environmental benefits.237 In the two years the London Stock Exchange has been utilizing the Green Economy Mark, 101 companies have been issued a Green Mark, contributing £149 billion in combined market capitalization.238 The extreme success, growth, and capital seen in only two years on this exchange demonstrates the potential for sustainable investments on capital markets everywhere.

In addition to the sustainable efforts being made by stock exchange platforms, many corporations both public and private are taking steps to promote and prioritize sustainability by registering as benefit corporations.239 Benefit corporations are for-profit entities designed to offset profits with actions taken in consideration for society and the environment.240 When a company registers as a corporation, corporate law requires officers and directors to maximize long-term business value, creating great pressure to earn larger profits, often resulting in compromised social value.241 Benefit corporations arose as a mitigating solution for this and to encourage a heightened degree of purpose for corporations beyond maximizing profits.242 As part of being registered as a benefit corporation, these companies are required to submit a public report disclosing their overall social and environmental performance.243 Today over

237 Id. (“Green Revenues percentage is calculated from detailed company disclosure. Sufficient revenues data is provided.”).
240 Id.
242 Benefit Corporations, supra note 239.
243 Id.
6000 public and private companies²⁴⁴ are registered as benefit corporations and are altering their framework to encourage shifting focus from profits to sustainable social and environmental business practices.²⁴⁵

The NYSE has also recently spearheaded several sustainable endeavors. It recently joined as a member of the U.N.’s Sustainable Stock Exchange Initiative and partnered with the Intrinsic Exchange Group to create a platform for investing in a new form of corporation called a “natural asset company” (“NAC”).²⁴⁶ NACs monetize natural assets to raise capital to fund their growth and support conservation and restoration efforts.²⁴⁷ These companies can represent a wide variety of natural assets, from creating companies tied to the value of various natural landscapes, such as forests and coral reefs, to working lands like farms.²⁴⁸ The public share price for these companies indicates the value of the natural asset it represents.²⁴⁹ The goal behind these companies is to capitalize the intrinsic value of nature as a method of fundraising for conservation efforts with a market that generates trillions of dollars annually in ecosystem services.²⁵⁰ The platform estimates that the natural asset economy has $125 trillion in the value of its goods and services, surpassing the traditional economy value of $9096.5 trillion.²⁵¹

The continuous creation of sustainable investment opportunities within the finance industry is being prioritized more than ever.²⁵² World

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²⁴⁵ Id.; see B Lab, B Corp Movement, VIMEO (Nov. 29, 2021), https://vimeo.com/651234509 [https://perma.cc/BJ5C-VQD6].
²⁴⁷ Introducing Natural Asset Companies, supra note 246.
²⁴⁸ Id.
²⁵¹ Id.
²⁵² Sara Bernow, Bryce Klempner & Clarisse Magnin, From ‘Why’ to ‘Why Not’: Sustainable
wide capital markets are creatively encouraging platforms to take initiatives to monetize sustainable efforts and incentivize businesses to participate by consistently demonstrating the massive potential for capital of these endeavors.\textsuperscript{253} ESG investing may have been the beginning, but green markets and their investment potential appear to be the future. As climate change continues being an exponentially greater risk with each passing year, the incentive to encourage sustainable business ventures will increase along with it.\textsuperscript{254} The successful efforts being taken by the London Stock Exchange and the NYSE are indicative of the potential for popularity and capital in a platform dedicated solely to investing in sustainable business.\textsuperscript{255}

4. Coexistence with the SEC’s Climate-Related Rule

A separate, sustainable exchange would still be necessary even if the SEC mandates disclosure requirements. The SEC’s proposed climate-related rule would supply investors with climate-related information through mandated periodic reports; however, it would not obligate companies to comply with positive ESG standards.\textsuperscript{256} The rule proposal is both at risk of being struck down by the Supreme Court and of being eliminated or reworked with changes in politics.\textsuperscript{257} Additionally, in the rollout of this rule, companies would be required to spend large amounts of capital investing in complying with the rule’s parameters for no reason other than to satisfy their obligations to the SEC as a publicly traded company.\textsuperscript{258} Supplying this information risks negative publicity for


\textsuperscript{253} See \textit{The Solution}, supra note 250.

\textsuperscript{254} See Fink, supra note 26.

\textsuperscript{255} These efforts, however, are not generally inclusive of traditional public companies. The London Green Mark is only applicable to companies that are involved in “green” businesses such as recycling and solar panels, and NYSE NACs do not encompass businesses in the traditional sense, instead creating companies out of nature to monetize its potential. See \textit{Introducing Natural Asset Companies}, supra note 246; see also \textit{Green Economy Mark}, supra note 233. This gap in public trading platforms for more traditional public companies demonstrates the applicability and demand for an exchange platform of this nature.


\textsuperscript{257} See Zucker et al., supra note 16.

\textsuperscript{258} \textit{Survey Reveals Costs and Benefits of Climate-Related Disclosure for Companies and Investors}, supra note 180.
companies with poor environmental data and threatens market capital. The high cost associated with providing these disclosures threatens privatization by companies with the most capital, as well as pulling capital from environmentally conscious companies without surplus.

For these reasons, even if the SEC’s rule is implemented as planned in 2024, an optional exchange dedicated to promoting sustainable investments would remain necessary and relevant. It offers a method for mandating compliance with sustainable business practices free from the political influences whipsawing the SEC. And, if the disclosure rule is in place, all public companies would be required to comply with its parameters. This exchange would offer an additional use for this mandated information by providing companies with a method for benefitting from capital invested in compliance with the rule, in the event it is revoked or overturned, by providing an additional use for the information compiled, as well as offering an additional benefit to the required spending for compliant companies. The disclosures would also provide a check on how well the experts are doing when deciding who to admit to the exchange, while companies admitted to the exchange would also provide a check on the disclosures. The SEC rule and the sustainable exchange would therefore be mutually reinforceable. Lastly, offering an exchange of this nature may diminish the risk of privatization by providing companies with positive ESG practices with a monetary incentive for spending the capital required to comply with the public requirements instead of going private.

Environmental and social issues are some of the most controversial and politically polarized issues in our society today, putting any disclosure requirements centered around these topics at an increased risk of being reduced or repealed with changing presidencies.

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258 See id.
259 See generally id.
261 See Schoeff, supra note 259.
262 See Mark Schoeff, Jr., How Partisan Politics Have Poisoned the SEC, INV. NEWS (Sept. 8, 2015), https://www.investmentnews.com/how-partisan-politics-have-poisoned-the-sec-62327 [https://perma.cc/TP2W-4A5P].
264 See CARY FUNK & BRIAN KENNEDY, P EW RSCH. CTR, THE POLITICS OF CLIMATE (2016),
market that requires certain standards relating to these issues, however, would be subject to SEC regulations but would be free to implement its own additional, required policies without the political risks that face SEC disclosures. While changing presidencies influence the SEC and its regulations, this power has no effect over the substantive parameters implemented by privately owned stock markets, leaving them to enforce compliance and dictate what is required of listing companies.

Not only do the political threats to the SEC’s climate-related proposal demonstrate the reason for implementation of controversial environmental and social rule frameworks by private markets, but the rule’s political instability also amplifies the risk affiliated with cost of compliance. The requirements associated with the SEC proposal are likely to be a massive undertaking for businesses to comply with. Experts are speculating that compliance with these disclosures will require substantial investment annually by public companies to compile the data required to be disclosed. All publicly traded companies would be required to collect this data at the risk of SEC investigation and enforcement for noncompliance. A rule as instable and costly as this one puts businesses at risk of wasted capital in conforming with requirements that are capable of being ultimately withdrawn.

A sustainable exchange with entry premised upon satisfaction of ESG standards would enable public companies to utilize the data compiled in compliance with the SEC’s rule to solicit investments and highlight their positive business practices, while also providing a use for the data and capital spent in the event the SEC rule is later revoked or found to be impermissible by the Supreme Court. Companies whose data demonstrate compliance with the standards for entry would be rewarded for their beneficial ESG practices by being given access to a large investor pool without having to modify any business practices. Furthermore, companies that do not meet the requirements would have a similar incentive to update their business practices to meet the required standards of the


265 Hayes, supra note 213.
267 Hayes, supra note 213.
268 Id.
269 Mission, supra note 215.
sustainability exchange at the risk of disclosing unfavorable data that discourages investment on all platforms.

In addition to the political problems and large costs associated with the SEC’s proposal, these disclosures also create the risk of publicly traded companies going private to avoid the large costs that will be required for compliance with these proposed disclosure requirements. By providing a business opportunity capable of large investment potential through listing on the sustainable exchange, companies would have an additional incentive for remaining publicly traded and complying with the SEC’s costly rule proposal. When weighed against the cost of going private, this incentive may persuade companies to remain public. This counterweight to the high costs of compliance with the SEC’s new climate-related rule could stabilize public market value by helping to protect against privatization and providing relevant, lucrative business endeavors arising out of this costly compiled information.

5. A Sustainable Exchange as a Timely Address of the Millennial Effect

The exchange would address the millennial effect in a timely manner by highlighting sustainable actors and providing an avenue to support and encourage their good practices. The millennial generation has made its concerns with social, environmental, and governance issues apparent, making a stock exchange that caters to the impending generational wealth shift a great method for investment companies to address the millennial effect. Investment companies have been grappling with theories for how best to attract millennial investors to buy into their various portfolios for years now. The importance of sustainability is already being demonstrated in investment portfolios with increasing frequency, and the need for greater focus and attention to these matters will only increase with time.

270 See, e.g., Energy Industry Reacts to SEC Proposed Rules on Climate Change, supra note 182.
272 Fink, supra note 26.
Even the Big Three\textsuperscript{273} have recently been taking liberal social and environmental positions that counter the traditional conservative theories of finance to attract Millennial investors to buy into their accounts.\textsuperscript{274} BlackRock has promised to divest almost $2 trillion from coal company stocks,\textsuperscript{275} while Vanguard has publicly announced its dedication to addressing climate risks in their investment portfolios.\textsuperscript{276} And over 4000 investment firms, including BlackRock, Vanguard, and State Street, who are cumulatively managing over $120 trillion in assets, are all signatories of the U.N. Principles for Responsible Investment initiative geared towards encouraging socially responsible investments in companies demonstrating sustainable long-term value by prioritizing the environment and society.\textsuperscript{277} Virtually all investment portfolios are steering away from funding fossil fuels\textsuperscript{278} and stock markets like Nasdaq are even implementing stringent diversity requirements.\textsuperscript{279} These social and environmentally friendly shifts in priorities by investment companies and stock markets are demonstrative of the kinds of demands the millennial investor is likely to make in the coming years.\textsuperscript{280}

Generational wealth is not predicted to fully shift to millennials for another thirty years; however, the shift has already begun, and its effects are apparent. This generation is financially delayed as compared to the generations before.\textsuperscript{281} Its members are getting married, having


\textsuperscript{275} Barzuza et al., \textit{supra} note 58, at 1274.

\textsuperscript{276} Id. at 1275.


\textsuperscript{280} Id.

\textsuperscript{281} Andrew Van Dam, \textit{The Unluckiest Generation in U.S. History}, WASH. POST (June 5,
children, buying houses, and beginning their careers dramatically later in life than their parents and grandparents. Investments and financial priorities are also seeing delays. These delays are indicative of the debt this generation bears, the greater expenses of life today, and a likely lower prioritization of investing. Providing an exchange platform centered around companies that practice and maintain sustainable business practices is likely to entice investment from this socially and environmentally conscious generation.

Creating a sustainable stock exchange would remedy the environmental and social data gaps uniformly surrounding publicly traded company disclosures and diminish the data inconsistencies provided by ESG funds, while furthering and correlating with the efforts and success of similar sustainable efforts like the London Green Mark, natural asset companies, and benefit corporations. It would do so by going beyond supplying unworkable information, and instead enforcing a certain standard of care for all listing companies, contributing to the long-term success of investments made on the platform. It would increase liquidity over time by encouraging and incentivizing companies to be more sustainable. Additionally, it would bring the numerous financial endeavors currently promoting social and environmental efforts across the world together into one exchangeable platform where the market capital could converge and conglomerate. The optional sustainable exchange would address the current ESG information gap, while providing investors with peace of mind that the companies listed on the exchange demonstrate a requisite degree of care for environmental, social, and governance issues, while contributing to the success of listing companies by providing a platform that increases available investment capital and highlights sustainable efforts.

B. The Exchange Structure

For an exchange of this nature to be successful and serve its purpose, it must be structured in a manner conducive to enforcing compliance

282 Id.
283 Id.
284 Id.
285 Fisch, supra note 7.
286 See Introducing Natural Asset Companies, supra note 246; see also Green Economy Mark, supra note 233.
that provides investors with the standards companies are held to in a readily interpretable format. Determining the requirements such that they successfully demonstrate sustainable efforts indicative of successful long-term investments must be done according to industry standards, with attention to the unique qualities of the trade. The requirements must be publicized in a manner that allows transparency for both businesses and investors. Structuring the listing requirements and entry system in a manner that achieves these goals is necessary to fulfill the underlying purpose of the exchange.

The platform itself can be implemented in a variety of manners. It could exist as a standalone platform, like Nasdaq or the NYSE, or as a venture of an already established exchange, similar to the London Green Mark or the NYSE NAC market. Additionally, the exchange could operate as a function of B Lab. B Lab offers a unique certification system to companies interested in being certified as benefit corporations that could satisfy the entry requirement process for listing, and the market could operate as a trading platform within the B Lab system. B Lab does not currently offer a trading platform for their public or their private companies; however, it would likely benefit from an exclusive, socially driven trading platform of this nature. Each of these platform structures would successfully serve the purpose of the exchange without compromising the motivating factors behind its creation.

1. Transparent, Stringent Industry-Specific Requirements for Listing

For the sustainable stock exchange to best serve investors, it would need to be structured in a manner that requires compliance with predetermined standards for entry and allows for comparability of sustainable data within and across industries. To achieve the purpose for creating this exchange, entry requirements must be industry-specific, publicly disclosed, and effectively regulated.

Each industry has its own set of standard business practices and with those practices come unique risks related to environmental,

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social, and governance concerns. The vast industrial variety of public companies requires assessment according to industry standards to determine which risks are present in each company. Each industry generates different pollutants, requires different energy inputs, and presents distinct diversity issues. To regulate an oil and gas company with the same requirements as a department store would be ineffective and would not illuminate the practices that have been linked to affecting the long-term sustainable growth of these companies. Because of the unique concerns associated with varying industries, the exchange would standardize the requirements for entry in an industry-based approach to ensure the practices necessary to sustainability across all individual and unique industries are enforced.

To best ensure that the requirements for listing are individualized according to industry, the exchange will rely upon panels of experts from each industry that will standardize relevant sustainability requirements for each. Nonprofit groups, like the Sustainability Accounting Standards Board, have already identified subsets of environmental, social, and governance issues that are most relevant to the economic success of companies across seventy-seven different industries. The data and research for an undertaking of this nature already exists and could be analyzed and accumulated to create the entry requirements to the exchange.

In the alternative, a B Lab certification may also be able to act as a qualifying method for entry after their proposal for more stringent certification requirements is implemented. B Lab provides a process that enables corporations to certify that they are using their businesses as a “force for good.” Their certification process investigates the company’s “history, operating procedures, goals, and public image to determine B

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292 Download SASB Standards, supra note 95 (identifying the sustainability issues relevant to financial performance across seventy-seven industries).

293 Id.


Corp eligibility,” and up to this point, the certification process had been composed of a points-based system that required companies to have eighty points resulting from a plethora of potential criteria relating to environmental and social concerns.296

In 2022, however, B Lab introduced a draft version for modified certification standards requiring companies to meet specific performance requirements based upon the context of the business.297 The requirements fall into the following categories intended to define environmental, social, and governance concerns: purpose and stakeholder governance; worker engagement; fair wages; justice, equity, diversity, and inclusion; human rights; climate action; circularity and environmental stewardship; collective action; impact management; and risk standards.298 After submitting the solicited information, B Lab determines certification eligibility by having an analyst review the company’s profile and assessment.299 Pending the results of the recent comment phase,300 B Lab intends to implement the new standards in the beginning of 2024.301 If their proposed, more stringent certification process is adopted, its strict ESG requirements and third-party analyst review structure302 would serve nicely as an alternative certification option for entry onto the exchange.

Allowing B Lab certifications to satisfy entry requirements to the exchange would enable companies with sustainable goals and practices aligned with those of the exchange to save capital by utilizing funds already spent obtaining a benefit corporation certification to list on the exchange without the additional costs associated with proving compliance. Certifying a company through B Lab is an expensive process that can range anywhere from $500 to $50,000 in annual fees dependent upon

298 Id.
299 Id.
300 The comment phase was from November to December 2022. Id.
301 Id.
company revenues. Enabling the currently proposed qualification process for a B Lab certification to act as both the assessment and demonstration of compliance to the exchange would grandfather in companies already demonstrating the degree of sustainability required for listing. Additionally, offering a trading platform, with shared social goals to those of certified benefit corporations, that exclusively serves sustainable actors and is accessible to these companies without additional compliance cost, may even incentivize some of the thousands of private B Lab certified companies to go public to generate investments and additional company capital. Enabling costs associated with benefit corporation certification to satisfy entry requirements would, thus, likely encourage benefit corporations to publicly trade on the platform and may even incentivize private companies to go public.

Regardless of whether entry is obtained through direct certification from the exchange or from B Lab, the format of the exchange would correct for the current lack of useful information by providing the entry requirements for each industry, the degree required for satisfaction of these requirements, and tiers of sustainability within each industry. To do so, it would provide data pages containing the requirements for entry in each industry and different markings displayed on qualifying companies for each key requirement. The markings would be defined in both general and scientific terms to ensure that the data used for assessing entry requirements is fully transparent for investors, but without requiring interpretation of dense scientific data to make investment decisions. Providing the entry requirements necessary for achieving the various markings necessary to list on the platform will allow for business transparency in a format that does not require scientific analysis from investors to assess whether companies are complying with the sustainable requirements of the exchange.

The structure for this exchange would ensure that companies are being regulated in the most effective manner by requiring compliance with industry-based standards and will benefit investors by transparently sharing these requirements in an easily interpretable format. This structure would allow investors to rest assured that companies listing on the exchange are maintaining the minimum degree of sustainable efforts determined to be effective by experts in the industry, while also enabling

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303 Keenan, supra note 296.
304 See generally Measuring a Company’s Entire Social and Environmental Impact, supra note 288.
higher degrees of satisfaction and demonstration of this success with the various tiers of achievement associated with each marking. The transparently designed nature of the market would provide a check for the system by allowing third-party experts and investors to confirm that the standards being required are satisfactory and valid. Lastly, this structure would promote constant sustainable growth in all listing companies by utilizing marks to further distinguish companies that are making even greater efforts than the minimum required for entry.

2. Exchange Implementation as a Standalone Platform, NYSE Venture, or B Lab Collaboration

The sustainable stock exchange could be implemented as its own standalone platform, NYSE venture, or B Lab collaboration. The amount of capital invested in companies with the London Green Economy Mark and the value of NYSE’s NAC market demonstrates the potential for a market of this nature to generate sufficient capital and investor interest to stand alone. Alternatively, however, the NYSE has recently begun several environmentally focused investment initiatives indicative of the potential for the platform to arise as a venture of the NYSE. B Lab currently provides a way for consumers to purchase products from the companies they support by labeling environmentally and socially satisfactory companies as certified benefit (“B”) corporations. Their interest in connecting consumers with products from socially oriented companies aligns with the exchange’s goal of connecting investors with these same companies. The exchange could also arise from the B Lab platform as an additional element to benefit corporations that enables parties to invest both directly into these companies through the exchange and indirectly by purchasing B-labeled products from the marketplace. Because the NYSE is such a prominent platform with massive value and access to publicly traded companies, however, implementing the sustainable exchange as an NYSE venture would likely be the most desirable, effective, and accessible route for initially implementing this exchange.

305 Green Economy Mark Report 2021, supra note 238; The Solution, supra note 250.
306 See The Solution, supra note 250.
308 While this Article is not expressly directed at any one party, the NYSE may be the most viable to affect change to the degree suggested and is, therefore, one of the parties to whom this Article is directed.
The NYSE currently has over 2400 companies around the world utilizing its platform with over $20 trillion total value in the United States alone. The massive value tied into this market and its direct access to thousands of publicly traded companies would provide an excellent location to implement a sustainable market that would be easily accessible to thousands of companies and millions of investors.

The NYSE has recently taken actions indicative of their interest in promoting sustainable investment ventures. Given their involvement in creating an exchange platform for natural asset companies and the evidenced success of the London Stock Exchange’s similar Green Mark endeavor, the possibility for support by the NYSE in this venture appears entirely possible. A platform focused upon positive environmental and social practices by publicly traded companies aligns with the mission behind the NYSE NAC market. Additionally, the massive value of the NAC market and the London Stock Exchange’s Green Marks demonstrates the investment potential of a market dedicated to sustainable businesses. This venture would generate massive capital and publicity for the NYSE, enhancing the market’s public image and attracting investors. Implementation of this exchange as an NYSE venture would be beneficial to their market, while also promoting the venture’s success via its direct connection to vast capital, companies, and investors.

Spearheading this exchange as an NYSE venture would likely be the most effective method for quickly drawing in capital, companies, and investors. However, this platform is also poised to successfully stand alone, as demonstrated by the trillions of dollars in value of Green Marks and NACs. And B Lab’s interest in promoting sustainable companies via its benefit company certification indicates the potential for a collaborative joint venture platform. Thus, the implementation of this exchange could successfully take form in several different ways, each capable of generating substantial capital, attracting companies and investors, and maintaining the exchange’s central mission to promote sustainability.

310 Id.
311 See The Solution, supra note 250.
312 Introducing Natural Asset Companies, supra note 246.
313 Green Economy Mark, supra note 233.
314 See generally id.
315 Introducing Natural Asset Companies, supra note 246.
316 Green Economy Mark, supra note 233.
317 Green Economy Mark Report 2021, supra note 238.
C. Counterarguments for a Sustainable Exchange: Costs & Possible Greenwashing

While a sustainable exchange would create many benefits for investors and listing companies, it would also impose costs on companies and could incentivize greenwashing by the exchange to generate listings. One of the driving forces behind the proposal for a sustainable stock exchange is to prevent companies from being able to greenwash themselves with voluntary disclosures. However, creating a platform of this nature also risks the potential for contributing to greenwashing. While greenwashing would be difficult in the presence of harsh standards for compliance, if unchecked, the platform could introduce lower-than-necessary standards not actually beneficial to the environment or social growth. Furthermore, without a careful certification process, it could enable companies to continue greenwashing in their application to the platform. To address these concerns, the certification process must be extensive, impartial, and carefully regulated as discussed in Section V.B.

To effectuate an exchange platform premised on compliance with social and environmental standards, companies wishing to list on the platform would be faced with costs of compliance and listing. Companies would be required to ensure their business practices meet the requirements outlined by the platform, as well as be able to demonstrate that these standards are being met. Companies not already in compliance with the baseline requirements of the exchange would have a cost to meet before qualifying for entry onto the platform. This cost could be extensive depending upon the degree of adjustments necessary to meet the requirements. Furthermore, even for those companies whose practices meet the requirements for listing, proof of compliance would be necessary for entrance to the platform. Thus, after conforming to the standards required by the exchange, companies will have additional costs of proving this conformance. There are, however, several solutions that may work to mitigate some of the costs associated with this proposal.

If the SEC adopts their current, extensive environmental disclosure requirements, the costs necessary to comply with producing the data required for generating the disclosures would directly offset the costs affiliated with reporting data to the exchange. Companies would be obligated to produce this information to the SEC, and requiring duplicate

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318 For estimates of similar costs seen in private businesses, see Survey Reveals Costs and Benefits of Climate-Related Disclosure for Companies and Investors, supra note 180.
production of the same data would be unlikely to add cost. All publicly traded companies would be required to collect this data at the risk of SEC investigation and enforcement for noncompliance, enabling those companies who meet the requirements for listing on the sustainable exchange to supply the exchange with the same information gathered for its mandatory SEC disclosures.

In addition to the proposed SEC rule, initiatives by Nasdaq, the NYSE, and B Lab would likely also mitigate costs associated with listing. Nasdaq has created stringent social diversity requirements that require pertinent data input that would also be dually applicable in this setting.\(^{319}\) Furthermore, the NYSE has recently begun implementing its NAC trading platform, indicating possible interest in promoting sustainable ventures such as this one and introducing the subsequent possibility that listing costs could be diminished or depleted for those 2000 companies already listed on the NYSE platform.\(^{320}\) And the possibility for B Lab certifications to demonstrate compliance with the platform’s entry requirements would eliminate costs associated with producing compliant data for those companies already registered as B Lab certified, and would offset costs for companies interested in becoming certified by B Labs by providing an additional profitable use for the certification.

Utilization of the B Lab certification process, the potential for this platform to operate as an NYSE venture, and both Nasdaq and the SEC’s new disclosure requirements will each mitigate the costs necessary to create a platform focused upon proving compliance with strict standards for sustainable business practices. Lastly, even where costs are not offset, the costs affiliated with this exchange would be an entirely voluntary investment, unlike costs associated with SEC compliance, and would act as a valuable use of assets to signal to investors that the company is a sustainable company worth investing in, directly benefitting listed companies by highlighting their positive business efforts and connecting them with interested investors.

CONCLUSION

Sustainability is an increasingly prominent investment theme linked to long-term financial success for investors and businesses. However, data evidencing the sustainable business practices of public companies

\(^{319\text{ Nasdaq’s Board Diversity Rule: What Companies Should Know, supra note 61.}}\)

\(^{320\text{ Introducing Natural Asset Companies, supra note 246.}}\)
is currently difficult to access and irregularly available. SEC disclosures do not currently require disclosure of this data, nor do disclosures generally provide a workable structure for investor interpretation of dense scientific data. In the absence of mandatory sustainability disclosures, companies have been voluntarily disclosing sustainability data. However, the voluntary nature of these disclosures provides inconsistent and incomparable information to investors that enables companies to falsely greenwash themselves.

Investors are not being adequately connected to the sustainable data they desire by voluntary disclosures, nor would introducing a mandatory sustainability disclosure satisfactorily assist investors in gauging the long-term success of companies. Instead, a stock exchange premised upon sustainable business practices regulated and enforced on an industry-specific basis would connect investors to the data they desire in a practicable and advantageous manner. It would encourage sustainable practices in publicly traded companies while connecting investors with satisfactorily compliant companies. It would highlight the positive attributes that make companies well positioned for long-term success and provide investors with peace of mind as to their investments on the exchange. It would also remain relevant in the aftermath of the SEC’s climate-related rule implementation, while offering a coexistent, stable alternative to the risk of capital spent complying with the requirements, free from the political influence exerted over the SEC. For these reasons, a sustainable stock exchange is best positioned to connect investors with sustainable long-term investments, remedy the issues associated with the voluntary disclosures presently being issued, and curtail the practicability issues that would arise with implementation of SEC-mandated sustainability disclosures. Thus, in this era, where top-down environmental regulation is politically infeasible and mandated disclosure is reckless and likely to be held unconstitutional, private ordering through exchanges may be our best chance at a sustainable future.