Sustainability Toolkit

Corporate Sustainability Disclosure: The Basics

Understanding the foundational principles that guide corporate sustainability disclosures is critical to effective oversight of the reporting process.

Click below (or scroll on mobile devices) to view some of the key questions and issues you need to consider:

What is a sustainability report? +

What is the goal of sustainability reporting? +

What does a sustainability report typically include? +

Does the SEC require sustainability disclosures? +

When is a sustainability issue considered “material”? +

What liability concerns should I be aware of in this area? +

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What is a sustainability report?

A sustainability report is widely defined as a voluntary report published by a company about the environmental, social, and governance impacts of, and goals for, its business operations.

- In 2018, 86% of companies in the S&P 500 published sustainability or corporate responsibility reports – even though none were required by law to do so.

What is the goal of sustainability reporting?

Sustainability reporting helps organizations measure, understand, and communicate their economic, social, and governance performance and set goals for the future.

What does a sustainability report typically include?

Sustainability reports may include both qualitative and quantitative measures of sustainability performance.

- Some corporations have webpages solely dedicated to corporate sustainability, while others have stand-alone sustainability reports that are available in the investor relations sections of their websites.
- Integrated reporting is a framework for corporate reporting where corporate financial and sustainability information are integrated into one report.

Currently, the sustainability reporting market has several competing disclosure regimes that promote broadly applicable standards for sustainability reporting.

- Since no consensus has emerged around the best disclosure framework, the substance, format, and reliability of data disclosed in sustainability reports varies significantly among reporting companies.
- There are a number of efforts to rationalize the diverse array of reporting frameworks.

Does the SEC require sustainability disclosures?

Stand-alone sustainability reports are not required by the SEC or any other governmental agency.

Sustainability reports are voluntary disclosures undertaken by many corporations to communicate with key stakeholders about a company's sustainability strategy and goals.

The SEC does not require reporting companies to make sustainability disclosures in their securities filings unless such information would be material to investors.

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When is a sustainability issue considered “material”?

A disclosure is considered “material” if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision.

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976); Basic Inc. v. Levinson, 485 U.S. 224 (1988), Matrixx Initiatives, Inc. et al. v. Siracusano, et al., 563 U.S. 227 (2011).

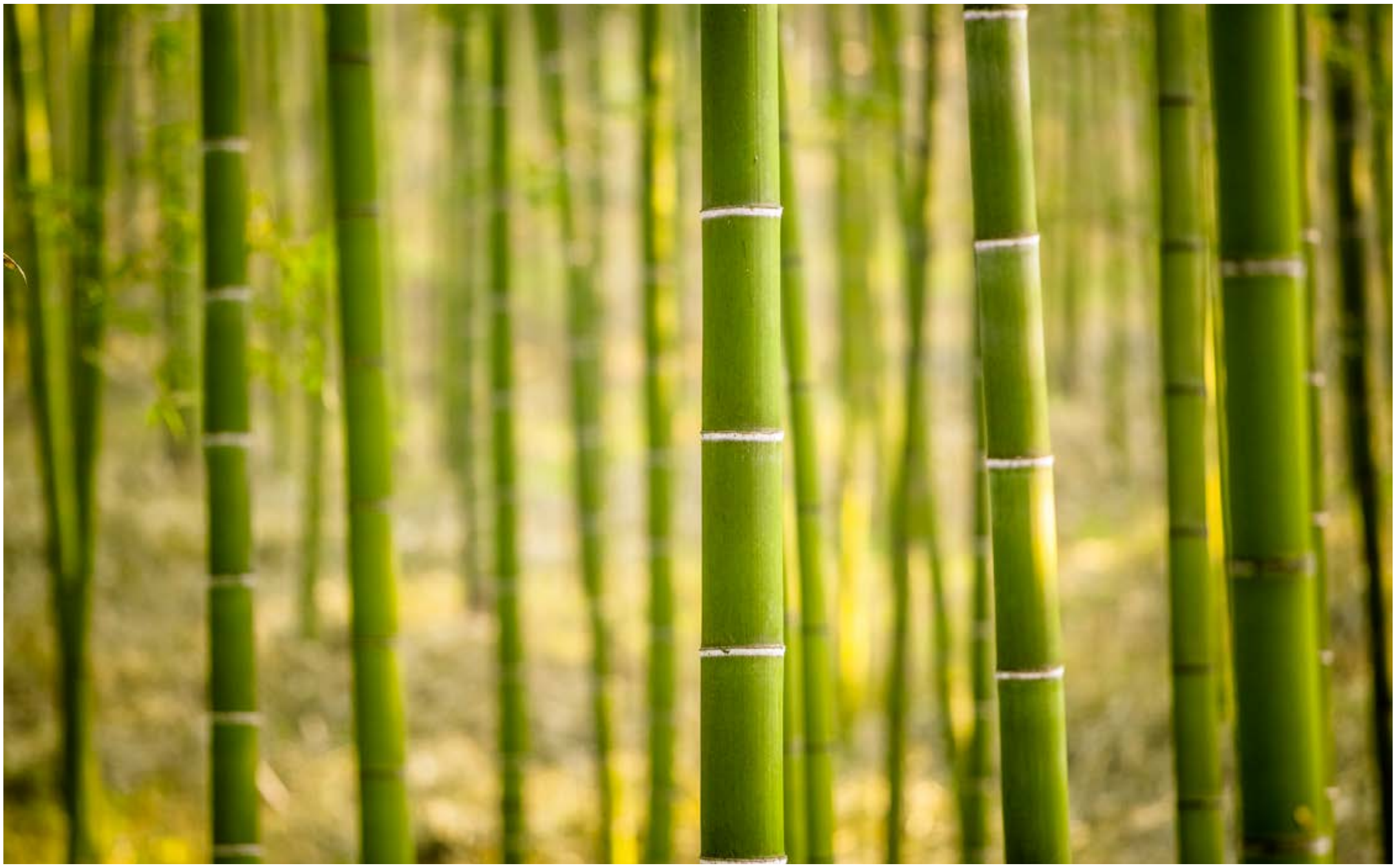
> *“[i]f a matter—whether it is considered an ESG matter or not—is going to affect the company’s bottom line or presents a significant risk to the business, I would expect [boards of directors] to do something about it. If the matter is material, I also would expect the company to disclose the matter and what they are doing about it. This is consistent with general fiduciary obligations of directors and officers, as well as our disclosure rules.”*
>
> Jay Clayton, Chairman of the SEC

A reporting company’s threshold determination of materiality governs whether sustainability information should or should not be disclosed in a company’s periodic reports.

- For example, Regulation S-K Item 303(a)(2) requires that registrants disclose material commitments for capital expenditures, known material trends in the registrant’s capital resources and expected material changes in the mix and relative cost of such resources. In this context, it is easy to imagine how capital expenditures made by a registrant, such as increased investment in renewable energy facilities, could be considered a “known material trend in a registrant’s capital expenditures” and require disclosure in the company’s periodic reports under Item 303(a)(2).

The SEC has favored this market-driven approach over more prescriptive rulemaking in this area. To date, the SEC has not implemented any broadly-applicable disclosure standards for sustainability reporting, but it is actively engaged with standards setters like SASB and other stakeholder groups both domestically and globally on sustainability concerns.

However, in May 2020 the SEC’s 23-member Investor Advisory Committee debated and endorsed the Investor as Owner Subcommittee’s long-awaited recommendations that the Commission begin in earnest an effort to update the reporting requirements of Issuers to include material, decision-useful ESG factors.



What liability concerns should I be aware of in this area?

SEC Rule 10b-5 is the general anti-fraud provision of the federal securities laws which broadly prohibits fraudulent and deceptive practices and untrue statements or omissions of material facts in connection with the purchase or sale of securities.

- Rule 10b-5 applies to any information released to the public by a company. Accordingly, liability under Rule 10b-5 applies to sustainability disclosures in SEC filings and to disclosures in voluntary sustainability reports.

Section 18 of the Securities Exchange Act of 1934 (the "Exchange Act") imposes liability on any person who makes false or misleading statements in documents filed with the SEC.

- Liability under Section 18 is limited to false or misleading statements in documents filed with the SEC (e.g. 10-Ks, 10-Qs and proxy statements), while Rule 10b-5 applies to any information released to the public.

Rule 20(a) of the Exchange Act imposes control person liability for control persons who aid and abet violations of securities law.

- Control person liability usually extends to CEOs and CFOs who are required to certify quarterly and annual reports when the sustainability disclosures hyperlinked in those filings are not accurate.

It is critical that reporting companies carefully align sustainability disclosures in their SEC periodic filings with those made in their voluntary sustainability reports to avoid inconsistencies, misstatements, and overstatements of sustainability performance that could lead to liability under securities law.

- A reporting company's internal review process for its sustainability report requires the same amount of rigor as is applied to disclosures in a company's SEC filings because liability under Section 10(b) liability applies to both documents.

- If only one siloed group is responsible for sustainability reporting, and it does not solicit the input of other groups traditionally engaged in the disclosure controls process, there is a risk of inconsistency in disclosures.

Securities lawyers are uniquely positioned to play an important role in the sustainability report review process due to their familiarity with company SEC filings.

- Securities lawyers should be consulted early and often in the drafting process to review disclosures for accuracy, puffery, and appropriate scope.

Sustainability Toolkit

Explore the topics	Defining Sustainability	Public Policy: Climate Change	Public Policy: COVID-19	Public Policy: Environmental Justice	Public Policy: UN Sustainable Development Goals
Engaging and Advising BODs	Investor Expectations	Corporate Disclosure: The Basics	Corporate Disclosure: Standards and Initiatives	Setting Corporate Goals	M&A and JV Transactions
Green Bonds and SLLs	Carbon Markets	Marketing Claims	Crisis Management	Insurance Implications	Sustainability NGOs