A–B–C–D–ESG: Navigating the Effect of ESG in Mergers & Acquisitions

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I. INTRODUCTION

Throughout history, corporations have always wielded substantial influence on their shareholders, the surrounding communities, the environment, and society. In an ever-evolving industry that continuously develops new methods to evaluate companies, it is inevitable for a standard to emerge that allows these companies to measure one another's various environmental, social, and governance (ESG) factors. Providing the market with

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standardized ESG disclosure standards will give buyers and sellers a consistent and comparable tool to guide their investment decisions. After a few record years of merger & acquisition (M&A) volume and increased investor interest in a standardized disclosure process, ESG factors have become increasingly important in the investment industry.[1] These factors are changing the way M&A deals are started, negotiated, and completed. Once something becomes an issue or an area of newfound importance, the government is most often not far behind in regulating it.[2] Until 2022, there has been no required standard or proposed rule for standardized disclosure of ESG factors—but now the U.S. Security and Exchange Commission (SEC) has proposed and finalized new rules and amendments to disclosure requirements for public companies and certain investment advisers and funds.[3] In March 2024, the SEC adopted new climate disclosure rules to respond to consistent demand and investors' preferences for a new age of reliable climate-related information in the industry.[4]

Although the M&A industry has functioned for decades without an obvious need for a standardized ESG disclosure process, this Note contends that due to the drastically evolving industry, the SEC's new rules are coming at a time of utmost need and will be a net positive in the industry for both buyers and sellers. Buyers and sellers, going forward, should expand their ESG due diligence and voluntary reporting. First, to comply with the new rules, and second to proactively prepare for a likely wave of ESG-focused regulation to avoid detrimental consequences that can arise before, during, and after an M&A deal. Last, not only should public companies take this action, but decision-makers in private equity should take proactive measures as well.

Through proper due diligence, all companies can prepare and inform themselves of potential ESG risks during M&A deals. Part II of this Note provides background information on ESG, M&A, the relationship between ESG and M&A, past ESG disclosure regulation, and the SEC's new amendments and rules;[5] Part III argues that the new rules

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1. *See* KPMG LLP, 2021 WAS A BLOWOUT YEAR FOR M&A 1–3 (2022), https://assets.kpmg.com/content/dam/kpmg/dp/pdf/2021/december/blowout-year-global-ma.pdf [https://perma.cc/MF8G-JT3Y] (citing some of the highest levels of M&A activity in 2021).

2. *E.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641 (responding to the 2008 financial crisis as an example of the government's regulatory action).

3. *See, e.g.*, *Proposed SEC Climate Disclosure Rule*, BLOOMBERG L. (Aug. 15, 2022), https://pro.bloomberglaw.com/brief/proposed-sec-climate-disclosure-rule/ (on file with the *Journal of Corporation Law*) (describing the "issuer rule . . .requir[ing] public companies to provide certain climate related financial data, and greenhouse emissions insights, in public disclosure filings" as well as the "investor rule" requiring more disclosures of ESG-foucsed funds and firms); 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/A7DQ-C5PZ] (announcing "proposed rule changes that would require registrants to include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that are reasonably likely to have a material impact on their business, results of operation or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements"); Press Release, SEC, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices (May 25, 2022), https://www.sec.gov/news/press-release/2022-92 [https://perma.cc/WZH2-HGGG] (discussing changes in rules to "promote consistent, comparable, and reliable information for investors concerning funds' and advisers' incorporation of environmental, social and governance (ESG) factors").

4. Press Release, SEC, SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 6, 2024), https://www.sec.gov/news/press-release/2024-31 [https://perma.cc/4CH8-BH6A].

5. *See infra* Part II.

are a positive change for the M&A industry by providing supporting rationales of how investors can use this newfound ESG importance to create value and prevent possible future ESG-related issues;[6] Part IV recommends proactive measures that buyers and sellers in the capital markets and private equity sector should take to ensure successful M&A deals moving forward.[7]

II. BACKGROUND

Informally, ESG factors have likely played a role in investors' decision-making processes for decades—this is shown through environmental due diligence, measuring society's perception of a company, and evaluations of a target company's overall culture and internal structure.[8] Although it may not have been as precisely defined as ESG, the idea that investors have always been conscious about whether or not a company took specific actions concerning their community or environment is not entirely new. Today, issues of corporate and social responsibility, environmental advocacy, and inclusion programs by companies have substantially impacted mergers and acquisitions.[9] As the industry changes and evolves, the key players and institutions involved must adapt to find long-term success in this new market.

A. What is "ESG?"

Environmental, Social, and Governance (ESG), is a term derived from the term Corporate Social Responsibility (CSR) that was named in 1953 by American economist Howard Bowen.[10] In the 1970s "the concept of the 'social contract' between businesses and society was introduced by the Committee for Economic Redevelopment."[11] CSR predated this idea by nearly 20 years. Although ESG has arguably been informally in existence since the 19th century[12], the term did not formally appear until 2004 when the United Nations (UN) Secretary General invited financial institutions "to develop guidelines and recommendations on how to better integrate environmental, social and corporate governance issues in asset management, securities brokerage services, and associated research functions."[13]

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6. *See infra* Part III.
7. *See infra* Part IV.
8. *See* Anna Francesca Macesar, *A Brief History of ESG*, AKEPA (Feb. 13, 2024), https://thesustainableagency.com/blog/the-history-of-esg/ [https://perma.cc/5YJY-2JAM] (discussing the rise in demand for better business practices among activists).
9. *See* Andrew R. Brownstein & Carmen X.W. Lu, Wachtell, Lipton, Rosen & Katz, *ESG and M&A in 2022: From Risk Mitigation to Value Creation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 24, 2022), https://corpgov.law.harvard.edu/2022/01/24/esg-and-ma-in-2022-from-risk-mitigation-to-value-creation [https://perma.cc/ZB39-6FRS] (explaining ESG-Oriented M&A and how ESG considerations are shaping strategy, culture and growth prospects, environmental-related targets, and more).
10. John R. S. Fraser, Rob Quail & Betty J. Simkins, *Environmental, Social and Governance (ESG) and the Roles of Management, Internal Audit, and Enterprise Risk Management*, S & P GLOBAL MKT INTEL. 1, 4 (June. 20, 2022), https://ssrn.com/abstract=4141378.
11. *Id.*
12. Macesar, *supra* note 8.
13. THE UNITED NATIONS GLOBAL COMPACT, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD i (2004),

This invitation to financial institutions came through the release of a report called *Who Cares Wins*.[14] Eighteen financial institutions from nine countries with assets under management totaling over $6 trillion U.S. dollars participated in the joint initiative with the UN following the report.[15] This outreach by the UN is not wholly surprising, given that "[s]ince its founding in 1945, the UN has catalyzed and sponsored a number of initiatives relating to the world economy, development, the environment, human rights, and related issues affecting business and markets."[16] The *Who Cares Wins* report made a deliberate effort to cement the term ESG and to differentiate it from other commonly used industry terms.[17] The report did this by stating that "we have refrained from using terms such as sustainability, corporate citizenship, etc., to avoid misunderstandings deriving from different interpretations of these terms" and instead decided "to spell out the *environmental*, *social* and *governance* issues which are the topic of this report."[18]

Although ESG data and the use of the term ESG in investor communications did not gain mass popularity overnight, the use of ESG in various UN initiatives backed by the support of institutions around the world slowly helped spread the term through investment communities and stakeholders worldwide.[19] Shortly after the *Who Cares Wins* report was released, fewer than 1% of earnings calls mentioned the term ESG; however, by 2021 ESG was mentioned in nearly one-fifth of all earnings calls and an estimated 72% of institutional investors started to implement some form of ESG factors.[20] It is important to recognize and define what the various letters of the acronym ESG capture and signify. The 'E' is used to reflect corporations' promises for making progress towards environmental issues such as climate change; the 'S' is important for social issues such as the labor movement and workplace developments; and the 'G' refers to the governance structure in corporations and included factors such as decision-making and the distribution of rights and responsibilities among different participants in corporations.[21] Although the initial *Who Cares Wins* report defined the letters within ESG—many regulators and investors still struggle to define ESG.[22] The SEC itself recognized the difficulty in defining ESG and said that there are a "variety of perspectives concerning what ESG investing means, the issues or objectives it encompasses."[23] The cloud surrounding ESG leads to this Note's

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https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FFinancial_markets%2Fwho_cares_who_wins.pdf [https://perma.cc/RP4X-KSY2] [hereinafter WHO CARES WINS].

14. *Id.*

15. *See id.* at i–iv (describing the institutions that joined the initiative with the UN).

16. Elizabeth Pollman, *The Making and Meaning of ESG* 7 (Eur. Corp. Governance Inst., Working Paper No. 659, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857.

17. *See* WHO CARES WINS, *supra* note 13, at 1–2 (stating the reasons for avoiding certain terms that may be interpreted to be an ESG synonym).

18. *Id.* (emphasis added).

19. Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765, 1794–95 (2021) (describing how UN initiatives were critical in gaining support for the continued use of ESG factors).

20. *See* Debbie Carlson, *Mentions of 'ESG' and Sustainability are Being Made on Thousands of Corporate Earnings Calls*, MARKETWATCH (July 19, 2021), https://www.marketwatch.com/story/mentions-of-esg-and-sustainability-are-being-made-on-thousands-of-corporate-earnings-calls-11626712848 [https://perma.cc/Z6VC-53XJ].

21. *See* WHO CARES WINS, *supra* note 13, at 6 (listing examples of issues within each part of ESG).

22. Mark T. Uyeda, Comm'r, SEC, Remarks at the California '40 Acts Group (Jan. 27, 2023) https://www.sec.gov/news/speech/uyeda-remarks-california-40-acts-group [https://perma.cc/42QD-2ZL9].

23. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About

argument for continued regulation from the SEC to create standardized disclosure requirements to aid the M&A industry.

B. What is "M&A?"

To fully understand ESG and its impact on the investment industry, one must understand the nature and practice of mergers & acquisitions (M&A). M&A is a general term that describes the consolidation of companies' assets through various types of financial transactions, including mergers, acquisitions, consolidations, tender offers, purchase of assets, and management acquisitions.[24] M&A is one of the most common strategies for corporations looking to either expand their market share by acquiring another company or to strengthen their businesses as market uncertainties unfold across the globe.[25] Additionally, M&A activities are one of the most significant drivers of globalization, as the deals affect not only the firms involved in the transaction, but also investment bankers, stock markets, governments, and the rest of the world around them.[26] The recognition of the impacts of M&A dates back to the 1700s when Adam Smith noted "[s]eldom do businessmen of the same trade get together but that it results in some detriment to the general public."[27] As far back as the 1700s, businessmen recognized the important relationship between businesses and the general public. Fast forward to the 20th century, and M&A activity has seen explosive growth in what the industry calls "waves."[28] M&A activity has reached some of its highest levels, with global deals totaling $5.1 trillion worth of M&A transactions in 2021, up from $3.8 trillion in 2020.[29] This activity is due to easier access to capital, low interest rates, and a recovering global economy post-COVID-19 pandemic.[30] With this historic M&A activity occurring across the globe, investors on both the buying and selling side of the deal have started to adjust their practices, with ESG becoming an essential aspect of the decision-making process.[31]

Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (proposed May 25, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279).

24. Adam Hayes, *Mergers and Acquisitions (M&A): Types, Structures, Valuations*, INVESTOPEDIA (Feb. 20, 2024), https://www.investopedia.com/terms/m/mergersandacquisitions.asp [https://perma.cc/5BCK-98MV].

25. *See* Barclay Palmer, *Why Do Companies Merge With or Acquire Other Companies?*, INVESTOPEDIA (Jan. 14, 2024), https://www.investopedia.com/ask/answers/why-do-companies-merge-or-acquire-other-companies [https://perma.cc/J4AQ-FDQ4] (explaining the general motivations behind M&A activity).

26. *Id.* at 207–08.

27. *Id.* at 208.

28. *See* Marina Martynova & Luc Renneboog, *A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?* 32 J. BANKING & FIN. 2148, 2148 ("It is a well-known fact that mergers and acquisitions (M&As) come in waves.").

29. KPMG LLP, *supra* note 1, at 1.

30. *Id.*

31. *See* Brownstein & Lu, *supra* note 9 (explaining how the integration of ESG into M&A will affect investor decision-making).

C. ESG's Past and Current Role in M&A Deals

Most decision-makers in M&A transactions are conscious of and consider ESG factors in the fact-finding stage of the due diligence process.[32] On the buy-side, disclosure helps mitigate potential risks and allows the buyer to potentially contract around concerns.[33] For the sell-side, this initial disclosure can help them negotiate costs and leverage items in the closing process.[34]

Common items in the initial disclosure include certain material items that can affect the integration of the two companies or cause future liabilities for the buyer.[35] These material items can include environmental issues such as possession or disposal of hazardous materials that could violate environmental laws; social issues such as violations or potential violations of workplace and labor laws, or even certain treatments of animals in the manufacturing or testing processes.[36] The governance part of ESG plays a significant role in most M&A deals as well. Governance-related disclosures often include lists of equity holders, directors, managers, and stakeholders.[37] Having these lists can help investors better understand the dynamics and operational side of a business, assisting the decision-making and easing the integration process before, during, or after a deal is completed.[38] As will be discussed later, one of the most important processes in M&A today is the integration of the companies after the deal has been completed.[39]

Companies have considered general ESG factors during an acquisition in the past; however, these factors have become a priority in most M&A deals in the current market.[40] For example, ice cream company Ben & Jerry's was acquired by Unilever PLC (NYSE: UL) in 2000, and a dispute arose between the two nearly 20 years after the successful transaction.[41] In the original acquisition, Ben & Jerry's was set up to "have a unique level of autonomy over its business, an arrangement that seemed to work for the more than two decades. . .[,]" however, in 2020, Ben & Jerry's told Unilever it would stop selling its products in the West Bank over human rights concerns.[42] Unilever disagreed and then

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32. Christopher Auguste et al., *ESG's Impact on M&A*, JD SUPRA (July 25, 2022), https://www.jdsupra.com/legalnews/esg-s-impact-on-m-a-7975911 [https://perma.cc/6XLT-94HZ] ("The vast majority of M&A transactions already consider and are conscious of certain ESG factors.").

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Auguste et al., *supra* note 32.

38. *See* Marina Martynova & Luc Renneboog, *The Performance of the European Market for Corporate Control: Evidence from the 5th Takeover Wave* (Eur. Corp. Governance Inst., Working Paper No. 135, 2006), https://onlinelibrary.wiley.com/doi/10.1111/j.1468-036X.2009.00497.x (explaining how certain disclosure requirements can affect all stages of the M&A process).

39. *See* discussion *infra* Part III.A.3 (discussing post-merger integration and how increased disclosure can aid in the success of the process).

40. Chris Leitch, *ESG More Critical Than Ever in M&A*, BAKER TILLY (June 30, 2021), https://www.bakertilly.global/insights/esg-more-critical-than-ever-in-ma [https://perma.cc/59TJ-4DNA] ("These [ESG] issues not only damage the public perception and bottom line of a business, but they make a business far less attractive to investors or buyers looking at M&A.").

41. Clara Hudson, *Ben & Jerry's Israel Fight Carries ESG Lesson for Deal Makers*, BLOOMBERG L. (Aug. 10, 2022), https://news.bloomberglaw.com/esg/ben-jerrys-israel-fight-carries-esg-lesson-for-deal-makers (on file with the *Journal of Corporation Law*).

42. *Id.*

"moved to sell the ice cream brand's Israel business to a local licensee, essentially circumventing the boycott . . . ."[43] Soon after this contentious move, Ben and Jerry's sued the parent company for an injunction to block the sale.[44] Notably, a Ben & Jerry's co-founder said that the autonomous structure was the "most critical provision" in the merger agreement with Unilever and was indispensable to the contract.[45] Further, Ben & Jerry's stated that their sole objection was that Unilever's actions "will undermine our *social* mission and the essential integrity of the brand, which threatens our reputation, and ultimately, our business as a whole."[46]

Ben & Jerry's dispute with their parent company is important to ESG and M&A because it illustrates how crucial agreement on ESG factors during negotiations can be at the outset of an M&A deal, and how the lasting effects can arise years—even decades—later. The human rights concerns that arose could have been possibly avoided by proactive disclosure and diligence early in the deal stage. In a standard merger of related companies[47], the acquiring company is likely to impose its own culture and practices on the acquired company, with the ideal outcome of the two (or more) company cultures and practices synergizing together in the most seamless transition possible.[48] However, as Ben & Jerry's situation illustrates, conflicts can arise at any time during the relationship, between the acquirer and the acquired, leading to potentially detrimental issues.[49]

This scenario raises questions as to how actors in the M&A industry should prioritize ESG factors, and how they can best seek to avoid ESG conflicts within the life of the deal itself, and the life of the merging companies. This general understanding of the relationship between M&A and ESG will help to understand the SEC's current ESG disclosure requirements with the agency's proposed enhanced ESG disclosures.

D. The Prior Lack of ESG Requirements

ESG issues have become increasingly important in the M&A industry—however, until 2024, there have been no consistent standards for how those risks are measured or reported, and have been extremely difficult to measure during the due diligence process.[50]

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43. *Id.*

44. *Id.*

45. *Id.*

46. Hudson, *supra* note 41 (emphasis added).

47. "Related" companies or mergers refer to companies engaged in similar business, meaning the acquirer likely knows a lot about the target's industry or product. Afsaneh Nahavandi & Ali R. Malekzadeh, *Acculturation in Mergers and Acquisitions*, 13 ACAD. MGMT. REV. 79, 81 (1988).

48. *Id.*

49. *See* Hudson, *supra* note 41 (explaining how Ben & Jerry's relationship with its parent company is running into issues almost 20 years after the initial acquisition).

50. Anna Avila, *Is 'Voluntary' ESG Reporting Still Optional?*, BBJ GROUP (Feb. 7, 2023), https://www.bbjgroup.com/blog/is-voluntary-esg-reporting-still-optional [https://perma.cc/CRR7-QTRW] ("Within the United States, no legal or regulatory schemes require any company, public or private, to make annual, public ESG disclosures."); *see also Proposed SEC Climate Disclosure Rule*, *supra* note 3 ("Currently, the SEC does not require extensive line-item disclosure of ESG matters."); SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors, *supra* note 3 (discussing the first kind of ESG-focused disclosure requirement and how investors across the industry support a standardized disclosure); SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices, *supra* note 3 (highlighting the SEC's proposed amendment that includes ESG disclosure requirements).

During an M&A deal, both the acquiring and target companies conduct due diligence to: confirm information that was disclosed and brought up during the deal negotiations, identify potential defects in the deal, obtain additional information that would be useful in valuing the deal, and make sure that the deal complies with the acquiring company's deal criteria.[51] Due diligence is a key part of the deal process, and if conducted properly, benefits both the buyer and the seller by providing important information about the other.[52] In sum, "due diligence helps investors and companies understand the nature of the deal, the risks involved, and whether the deal fits with their portfolio."[53]

One way the M&A industry has seen ESG disclosure in the U.S. markets before the SEC's 2024 disclosure rules is through voluntary reporting—and due to the mentioned increase in ESG interest, a rise in voluntary reporting has been present across the United States in recent years.[54] The other important way U.S. companies have started to report ESG metrics is due to the "strong encouragement of shareholders" through a proxy vote.[55] Although voluntary reporting from these companies is important, the previous lack of a required industry standard resulted in inconsistent and subjective reporting, which made it difficult for outside investors to compare companies when identifying possible M&A deals.[56] Due to these issues resulting from varying disclosure metrics, the need for an objective, clear, and uniform standard became increasingly apparent. As a result of many deals falling through or drastically changing because of misleading, unclear, and inconsistent ESG disclosures, the SEC has taken notice and finalized rule changes to the agency's ESG disclosure requirements.[57]

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51. Raposo Bernardo, *Focus On: ESG Due Diligence in M&A Transactions*, THE LEGAL 500 (Oct. 7, 2022), https://www.legal500.com/doing-business-in/esg-due-diligence-in-ma-transactions [https://perma.cc/TY89-VNC7]

52. *See* CHENOY CEIL, ROLE OF DUE DILIGENCE IN MERGERS AND ACQUISITION 3–4 (2013), https://ssrn.com/abstract=2294836 (explaining the role and purpose of due diligence in mergers & acquisitions).

53. *Due Diligence*, CFI, https://corporatefinanceinstitute.com/resources/valuation/due-diligence-overview [https://perma.cc/S7GQ-ANWT].

54. *See* Avila, *supra* note 50 (discussing how the industry has seen an increase in voluntary disclosure of ESG metrics).

55. *See id.* (stating how most large U.S. companies who make ESG disclosures either do so voluntarily or through a shareholder proxy vote).

56. *See* Catherine M. Clarkin, Melissa Sawyer & Joshua L. Levin, Sullivan & Cromwell LLP, *The Rise of Standardized ESG Disclosure Frameworks in the United States*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June. 22, 2020), https://corpgov.law.harvard.edu/2020/06/22/the-rise-of-standardized-esg-disclosure-frameworks-in-the-united-states [https://perma.cc/MC7J-45WG] ("[I]nvestors have expressed concern that the lack of a standardized ESG disclosure framework, which makes it difficult for investors to meaningfully evaluate and compare companies' ESG practices and risks . . . .").

57. *See, e.g.*, The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (proposing amendments to the Securities Act and Exchange Act that would require registrants to provide climate-related information on their registration statements and reports); Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, *supra* note 23 (proposing amendments to the Advisors Act and Investment Company Act requiring certain parties to provide additional information regarding ESG investment practices).

E. The SEC's New Rules and Amendments

This Part will discuss the SEC's rule changes relating to ESG disclosure; however, it is important to note that the rules do not affect the entire scope of ESG disclosure among companies involved in M&A. The rules are focused mainly on environmental disclosures, but this Note argues that these rules are merely a fraction of what the industry can expect to come shortly from the SEC—turning what was viewed as "optional disclosures" into an industry requirement. In March of 2022, the SEC proposed changes to climate disclosure rules "that would require registrants [with the SEC] to include certain climate-related disclosures in their registration statements and periodic reports . . . ."[58] In March of 2024, the rules were finalized.[59] These changes impact all SEC registrants, but for this Note's purposes, "[c]ompanies entering the US capital markets for the first time by initial public offering[,] [a]cquisition targets of public companies in a Form S-4[.]"[60] In sum, the rules affect public companies and private companies looking to be acquired by SEC registrants. Due to this, the private equity sector of the market may also feel the effects of the rule. The impact on private companies may be that private equity firms will demand that the target company provide similar disclosures akin to the SEC's new rule—preparing the firm in advance for a later exit of the acquired company. This is uniquely important regarding ESG because of the long-term nature of ESG risks in M&A, as opposed to other risks that are generally on a three-to-five-year period.[61]

Furthermore, it would be irrational to think that the SEC won't target private equity in the future—as seen from the SEC's increased scrutiny of the private equity industry.[62] The impact of the new rule gives both buyers and sellers the ability to have information about the other including "information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements."[63] The rule further requires affected companies to provide certain climate-related data along with greenhouse gas emissions insight in their public disclosure filings.[64]

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58. SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors, *supra* note 3.

59. SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors, *supra* note 4.

60. *ESG Reporting: What the SEC Proposal on Climate Change Disclosures Means for Business*, ERNST & YOUNG LLP 1, 7 (Mar. 28, 2022), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/webcast/ey-esg-reporting.pdf [https://perma.cc/698V-3E32] (paraphrasing the section in the SEC proposed rule titled "Registrants Subject to the Climate-Related Disclosure Rules and Affected Forms" and explaining who the rule applies to).

61. *Four Ways ESG is Reshaping M&A*, DELOITTE (2023), https://www2.deloitte.com/us/en/pages/mergers-and-acquisitions/articles/esg-in-m-and-a.html [https://perma.cc/GCY4-722N].

62. *See How Can Private Equity Position Itself for the US SEC's Climate Disclosure Rules?* ESGTREE, https://esgtree.com/how-can-private-equity-position-itself-for-the-us-secs-climate-disclosure-rules [https://perma.cc/26NG-EZ4A] (explaining how private equity is indirectly affected by the SEC's climate disclosure rules).

63. SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors, *supra* note 3.

64. *Proposed SEC Climate Disclosure Rule*, *supra* note 3.

In May 2022, the SEC announced additional proposed amendments to rules and ESG disclosure form requirements.[65] These changes, however, were instead directed at "registered investment advisers, advisers exempt from registration, registered investment companies, and business development companies."[66] In March 2024, the Commission adopted the amendments—however, in April 2024, the SEC voluntarily stayed the rule pending judicial review.[67] The proposal would enhance disclosure requirements by requiring specific disclosures regarding ESG strategies, implementing a layered and standardized approach for ESG funds to allow investors to compare ESG funds, and requiring environmentally focused funds to disclose their greenhouse gas emissions associated with their portfolio investments.[68] The SEC stated that the proposed rule and form amendments were meant to "promote consistent, comparable, and reliable information for investors concerning funds' and advisers' incorporation of environmental, social, and governance (ESG) factors."[69] This rule would have a direct impact on acquisitions, as the funds would have to disclose environmental information based on their portfolio investments moving forward—which could have a big impact on the selection of future acquisitions and decision-making surrounding divestments of past acquisitions.

The SEC has taken notice of the ever-growing interest in ESG and may be starting what can only be assumed to become a long line of enhanced ESG disclosure requirements and standardized procedures in the industry. Even if these new disclosure standards alone do not entirely change the current industry, the mandatory and standardized reporting by corporations for ESG factors will likely increase in the coming years. The remainder of this Note will analyze the new rules and discuss their importance and overall effect on the M&A industry in both the capital markets and private equity sector. This Note will discuss the effect without getting into the potential executive agency rule-making legal issue that may arise based on the Supreme Court's decision in *West Virginia v. EPA*.[70] This Note will assume arguendo that the SEC has the rule-making power to implement these changes, notwithstanding the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, which struck down the longstanding "Chevron" doctrine.[71] Further, this Note will recommend ways in which companies can benefit from the proposals and how companies can take proactive steps in preparation for the upcoming changes.

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65. SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment *Practices*, *supra* note 3

66. *Id.*

67. In the Matter of Enhancement and Standardization of Climate-Related Disclosures for Investors, Exchange Act Release No. 99,908, SEC File No. S7-10-22 (Apr. 4, 2024).

68. *Id.*

69. *Id.*

70. *See generally* West Virginia v. EPA, 597 U.S. 697 (2022) (limiting the Environmental Protection Agency's rule-making ability, thus limiting the scope of the agency's regulatory power). This decision may have further implications on how much power any executive agency may wield when drafting regulations.

71. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (Overruling *Chevron*).

III. ANALYSIS

A. New Rules, Amendments, and Future Regulation

The SEC's new rules and amendments are the most standardized and impactful ESG regulation the industry has ever seen, marking what is likely the beginning of the SEC's disclosure-related rulemaking wave.[72] After historically high deal volume and deal value in M&A,[73] dealmakers on both sides will have to continue to proactively adjust their processes as the hands of the government start to play a stronger role in controlling the industry.[74] Notably, the SEC has not formally updated its guidance on disclosures for more than a decade, making the recent rules of even more importance.[75] As the market reacts to the SEC's new rules, the impact is yet to be shown. Although the rules focused on in this Note are environmental-based disclosures, I argue that this is just the beginning of a wave of heavy ESG-focused regulation from the SEC. Therefore, this Note intends to answer the important question of how M&A deals will be affected as regulation intensifies.

1. The Increase in Available Information is Better for Buyers, Sellers, and Outside Investors

One notable impact the increase of SEC rules and amendments will likely have on the M&A industry is the net increase in available information. This will allow M&A dealmakers to compare target companies with a more standardized and comparable measurement.[76] Due to the lack of a standardized way to measure ESG considerations across the industry, it has been difficult for companies to integrate ESG issues into important stages of the deal process.[77] Not only has the incomparable and inconsistent information proven to result in difficulties in the deal process, but these same companies end up facing higher costs in responding to investor demand (including potential

72. Al Barbarino, *Top SEC Official Suggests More ESG Enforcement is Coming*, LAW360 (July 13, 2021), https://www.law360.com/articles/1402762/top-sec-official-suggests-more-esg-enforcement-is-coming (on file with the *Journal of Corporation Law*).

73. *See* KPMG LLP, *supra* note 1 (stating that 2021 was a record year for M&A in terms of overall number of deals and volume of deals).

74. Douglas Abernethy & Nick Cline, M&A REPORT 2022 1 (2022), https://www.lw.com/admin/upload/SiteAttachments/IFLR%20M-A%20Report%202022%20-%20Germany,%20UK%20and%20US.pdf [https://perma.cc/W7SV-QGJP].

75. *See* Jason Halper et al., *Investors and Regulators Turning up the Heat on Climate-Change Disclosures*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 4, 2021), https://corpgov.law.harvard.edu/2021/10/04/investors-and-regulators-turning-up-the-heat-on-climate-change-disclosures/#7 [https://perma.cc/5CWX-ACP3] (discussing the SEC's last climate-related disclosure guidance from 2010).

76. *See, e.g.*, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors, *supra* note 3 (highlighting how the March proposals would require certain climate-related disclosures that were not required before, and the May proposals would require certain disclosures for funds and advisers that market themselves as having an ESG focus, thereby providing additional information to buyers, sellers, and investors).

77. Statement, John Coates, Acting Dir., Div. of Corp. Fin., SEC, Statement on ESG Disclosures Proposal, ESG Disclosure—Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets (Mar. 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121 [https://perma.cc/A8CC-9SNY] ("[T]here is no consensus ESG disclosure system. Rather, [companies] are faced with numerous, conflicting and frequently redundant requests for different information about the same topics.").

acquisition companies) due to the lack of a unanimous ESG disclosure system.[78] The common thread binding together the SEC's new rules is "ensuring investors receive the information they need to make the most informed investment decisions."[79] Now that the rules are implemented and future regulation follows, ESG considerations will have a greater chance of being used in crucial stages of the M&A deal process to assist investment decisions and inform target company selection. To maximize the value of disclosure, the SEC's disclosure framework is likely to be "most effective when investors benefit from objective, quantitative metrics that provide the highest degree of comparability."[80] The changes in the disclosure framework will thus give investors a measurement to better understand ESG disclosures in the diligence process, and therefore, better understand the value these factors can provide.

2. *Rising Investor Focus on ESG Will Drive Company Valuations and Create Opportunities for 'Positive' ESG Companies*

As the potential for increased accessibility and volume of ESG information for investors becomes more likely, the impact on the valuation of companies in M&A transactions will follow.[81] In a world where ESG regulation would be in full force, acquirers and target companies will not just be encouraged to prove their ESG credentials, but expected to do so.[82] This opens up the opportunity for ESG-focused target companies to increase their acquisition value, as acquirers now have the means to justify paying a "premium" for these investments.[83] This phenomenon is called the "ESG premium" throughout the industry, and it represents the collective opinion from industry leaders and investment professionals that "environmental, social, and governance programs individually create value over both the short term and the long term."[84] Studies have shown that executives and investors "would be willing to pay about a 10 percent median premium to acquire a company with a positive record for ESG issues over one with a negative record."[85] Even more noteworthy is that the executives and investors in the study who believed that ESG *does not affect* value, *still* agreed that they would pay a 10% premium

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78. *See id.* (explaining the many weaknesses in the ESG disclosure system).

79. Jaime Lizárraga, Comm'r, SEC, Meeting Investor Demand for High Quality ESG Data (Oct. 17, 2022), https://www.sec.gov/news/speech/lizarraga-speech-meeting-investor-demand-high-quality-esg-data [https://perma.cc/EF8D-VTBV].

80. *Id.*

81. *See* Brownstein & Lu, *supra* note 9 ("Going forward, ESG will not simply be a tool for identifying and mitigating risks, but also a lever for value creation.").

82. *See id.* (explaining how companies proving their ESG data "will further assist investors and businesses in quantifying the ESG impact of their investments).

83. *See* MCKINSEY & CO., THE ESG PREMIUM: NEW PERSPECTIVES ON VALUE AND PERFORMANCE 1 (Feb. 2020), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Sustainability/Our%20Insights/The%20ESG%20premium%20New%20perspectives%20on%20value%20and%20performance/The-ESG-premium-New-perspectives-on-value-and-performance.ashx [https://perma.cc/4M64-F962] (discussing ESG premiums within M&A).

84. *Id.* at 2.

85. *Id.*

for "strong" ESG companies.[86] This intriguing finding underscores a paradoxical stance among executives and investors in the study—while they maintained the belief that ESG has no direct impact on value (or *any* impact for that matter), they still expressed a willingness to pay a 10% premium for companies deemed to have positive or strong ESG practices. This surprising contradiction supports a repeated theme of this note—there is a growing recognition within the industry that prioritizing ESG factors is becoming increasingly valued and influential in business decisions, and standardized frameworks are needed to assist in these decisions.

Over the past decade, there has been a substantial increase in ESG interest among investors—with the percentage of investors and C-suite leaders in the United States affirming that ESG programs create value nearly doubling from 2009 to 2019.[87] As the industry continues to shift towards a positive view of ESG considerations and sees their value in target acquisitions, companies may begin to "market" themselves accordingly if they are in the position to be acquired.[88] Thus, it is more important, now than ever, for the industry to have standardized ESG disclosures to provide consistency in the market. Specifically, because of the SEC's new rules, companies will be bound to disclose environmental factors in ESG in a more standardized process and some may be rewarded for those disclosures through the increased value potential in future M&A deals.

3. Required Disclosures May Save M&A Deals

As mentioned above, ESG issues can arise before, during, and after the successful completion of an M&A deal.[89] With increased disclosure requirements and more objective criteria from the SEC, stakeholders will have more of an idea of what the company's (either the buyers or sellers) ESG factors currently look like, giving them metrics to compare when issues arise in the future. Requiring more in-depth and objective disclosures can help reshape shareholder, stakeholder, and analyst reception to transactions that arise pre- and post-merger, and to aid in overall post-merger integration. According to KPMG's survey on due diligence, 74% of investors reported that their M&A evaluation criteria included ESG considerations, but only 51% had a confident understanding of ESG risks when evaluating an acquisition.[90] This lack of understanding undoubtedly stems from the previous absence of ESG standards in the industry.

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86. *See id.* at 4 (stating the participants in the study who do not believe in ESG value creation would still pay a premium for ESG-positive companies).

87. *Id.* at 3.

88. Jim Tyson, *M&A Sparked by ESG Surges 111% in H1 2022*, CFO DIVE (Aug. 24, 2022), https://www.cfodive.com/news/ma-sparked-esg-surges-111-percent-h1-2022/630432 [https://perma.cc/R6G6-EA84] ("An intensifying debate among C-suite executives, regulators, asset managers, investors and lawmakers over the benefits and costs of ESG measurement and regulation will likely encourage the emergence of ESG-focused companies in coming months . . . ." After the SEC's proposals take effect, this debate will have no choice but to shift in favor of ESG reporting and regulation as the industry can no longer forego disclosures due to the coming SEC requirements.).

89. *See supra* Part III.

90. *KPMG Study: Most U.S. Investors Want a Dedicated ESG Due Diligence Product That Can Analyze Risks and Opportunities*, KPMG (July 27, 2023), https://info.kpmg.us/news-perspectives/industry-insights-research/kpmg-esg-due-diligence-survey-2023.html [https://perma.cc/7DYD-XZFM].

When companies fail to disclose specific environmental or social issues, the risk of post-transaction litigation is heightened.[91] Although the rules do not touch on social issues and how they should be disclosed, this Note contends that the SEC should require (and likely will in the future) a standardized form of disclosure for these issues. For example, in the Ben & Jerry's case, both Unilever and Ben & Jerry's may have had a better understanding of each other's stances on specific types of social issues before the agreed merger.[92] In this scenario, the companies could have possibly prevented the merger altogether or discussed terms regarding autonomy when it came to social governance decisions.[93] Now, it would be unfounded to say that an increase in certain ESG disclosures will completely remove any future ESG-related M&A integration issues; however, an increase in the flow of information between parties on both sides of a transaction seems to only have the logical effect of benefitting the parties in terms of transparency and likelihood long-term success. Deals are focused on diligence and obtaining accurate information about the other side—thus, increasing the amount of accurate and objective information is one step toward preventing future integration issues.

The ability of companies involved in M&A transactions and third parties with investment interests in the transaction to be able to have more information and a standardized measure to guide and shape their reception of certain transactions in the life of a company can be extremely valuable. For the shareholders and analysts, the more ESG information they have about a company, the presumably better reaction they will have to ESG issues down the line. In general, this relationship directly correlates to a company's stock value, as analysts report their findings to the financial markets, and shareholders/investors thus react accordingly.[94] This increase in information acts as proactive communication to the outside world, giving the markets time to prepare and better understand a company's decision.

4. As a Practical Matter, Companies are Likely to Conform to New Requirements

As time has shown with any major movement, increased regulation in the corporate sector is likely to be followed by industry pushback.[95] The ESG movement had 11 "anti-ESG" proposals filed by shareholders at S&P 500 companies in 2022, however, the proposals "averag[ed] less than 3% vote support and fail[ed] to meet the 5% threshold for

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91. *ESG Factors are Carrying Increasing Importance in Mergers and Acquisitions Dealmaking*, AON, (Sept. 15, 2023), https://www.aon.com/en/insights/articles/esg-factors-are-carrying-increasing-importance-in-mergers-and-acquisitions-dealmaking [https://perma.cc/U48E-6HEX] ("Failure to disclose environmental and social issues, or realize there is a disconnect between ESG commitment and action, creates a post-transaction risk of litigation.").

92. *See* discussion *supra* Part II.C (discussing ESG's past and current role in M&A deals).

93. *Id.*

94. Sundaresh Ramnath, Steve Rock & Philip Shane, *The Financial Analyst Forecasting Literature: A Taxonomy with Suggestions for Further Research*, 24 INT'L J. FORECASTING 34, 68 (2008) ("[Determining stock prices] lies in the way the market . . . [reacts to] individual analysts' forecasts of a company's future earnings, the characteristics of the information impounded in that consensus, and the additional information the market incorporates into its model for valuing a company's equity securities." The "additional information" being the ESG factors discussed in today's analyses.).

95. Martha Carter et al., *ESG and the Bear: What to Make of the 2022 Proxy Season*, TENEO (Aug. 15, 2022), https://www.teneo.com/insights/articles/esg-and-the-bear-what-to-make-of-the-2022-proxy-season [https://perma.cc/TH9Y-QBE4].

resubmission in 2023."[96] This indicates that, although there will be inevitable pushback to the SEC's new disclosure rules from a minority of shareholders, the majority of investors overwhelmingly support ESG compliance, correspondingly encouraging (or *coercing* through industry pressure) companies to take the necessary measures to comply and respond to the needs of the industry. Additionally, as a reflection of investor demand and response to the SEC's rules, "[r]oughly 75 percent of the comment letters submitted to the SEC by June [of 2022] were in support of mandatory climate disclosure . . . ."[97]

Further, having a *standardized* and *required* process of reporting and disclosing will help combat investors' distrust in ESG reporting.[98] The effect of the regulations will force companies to disclose environmental risks in a way that investors expect and understand, leaving less room for data manipulation and empirical exaggeration due to personalized and subjective disclosure metrics created at the will of each company. Not only will the regulations be a blanket requirement for companies and investors that fit under its reach, the SEC also announced the creation of the "Climate and ESG Task Force in the Division of Enforcement" with the role of "develop[ing] initiatives to proactively identify ESG-related misconduct."[99] Together, the rules and the ESG task force will work to ultimately compel companies and investors in the industry to comply with the requirements and adapt to changes in industry demand as ESG maintains its role at the forefront of the industry.

5. ESG Issues Will Continue to Play an Important Role in the Industry Moving Forward

As the theme of this note has illustrated, ESG's role (in whole or in part) in M&A is here to stay. This proposition is supported by the increase in regulation, heightened investor interest, and indisputable empirical data showing the drastic increase in M&A deals involving ESG-related companies.[100] During this regulation revolution, companies in the growing ESG sector will have to choose between expanding their current ESG suite to become more attractive to M&A deals, or fighting the regulations and slowly falling behind in the race of an everchanging M&A industry. Early adopters who prioritize ESG before further regulation occurs can enjoy competitive advantages above their peers.[101] As noted above, the impact of ESG on the M&A industry is substantial in many areas, and key players in the "industry need to be prepared to address ESG considerations at every phase

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96. *Id.*

97. Grant Harrison, *Regulators Rein in the ESG Bandwagon*, GREENBIZ (Mar. 28, 2022), https://www.greenbiz.com/article/regulators-rein-esg-bandwagon [https://perma.cc/K4KX-3YDG].

98. Mark Segal, *Edelman Survey: Investors Don't Trust Company ESG Disclosures or Commitments ESG Today*, ESGTODAY (Nov. 18, 2021), https://www.esgtoday.com/edelman-survey-investors-dont-trust-company-disclosures-or-commitments [https://perma.cc/XS22-XTJ7] (noting that 86% of the institutional investors surveyed said that companies frequently exaggerate their ESG progress in disclosures).

99. Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 [https://perma.cc/6HT7-ZAGU].

100. Tyson, *supra* note 88 ("The number of deals involving ESG-related companies rose to 93 from January to June this year compared with 44 during the first half of last year and 36 during the first half of 2019 . . . .").

101. *See* Peter Wolf, Mayer Brown & Richard Xu, *ESG Impacts on Chemical Industry M&A*, BLOOMBERG L. (Oct. 2022), https://www.bloomberglaw.com/external/document/XBODG5IO000000/esg-professional-perspective-esg-impacts-on-chemical-industry-m [https://perma.cc/LKL2-7U6G] (discussing ESG's impact on chemical companies and how the companies that have adjusted their strategies based on their ESG performance are enjoying a competitive advantage).

of a transaction . . . ."[102] As the market will soon realize, "[t]he focus on ESG performance is not a passing fad" and sophisticated players in the market are already taking advantage of the new industry focus.[103] Moving forward, the more time spent on detailed ESG disclosures by both buyers and sellers will increase potential value creation and problem avoidance before, during, and after an M&A transaction.

IV. RECOMMENDATION

The above analysis highlights the impact the ESG disclosure requirements from the SEC will have on the M&A industry, discusses the likelihood of further regulation, and explains how the rules and future regulation will result in a positive outcome for the industry. This section illustrates the steps that dealmakers in the industry should take to properly utilize the benefits resulting from the increase in ESG regulation. Following the increase in interest from investors, stakeholders, and analysts, and the overall positive shift in importance that ESG considerations have taken in the eyes of the M&A industry,[104] the rules can be a net positive for the market if industry players are proactive in their responses moving forward. Dealmakers (both buyers and sellers) should take the steps necessary to first comply with the disclosure requirements and then take advantage of this peak in ESG interest when considering engaging in future M&A deals. Not only should dealmakers meet the *status quo* and comply with the standard disclosure requirements, but they should spend more time on in-depth due diligence, detailed preparation of ESG disclosures, and future-looking M&A purchase agreements so that the overall deal value can be reflected by the parties ESG factors, and the parties can secure the desired amount of autonomy from one another (if chosen) moving forward.

A. Increased Due Diligence, In-Depth Disclosures, and Specialized M&A Agreements

As explained in Part III.5, with the finalized rules, companies no longer have the choice to disclose environmental metrics in their own way or to refrain from disclosing at all; the disclosure requirements will compel them to disclose the necessary information and data to meet the new standards.[105] Following the environmental disclosure standards, the SEC should (and will likely) continue to regulate ESG disclosure by creating other disclosure requirements that reach other aspects of ESG. With new disclosure standards and a continued increase in ESG interest, buyers and sellers in the M&A industry will expect more detailed ESG disclosures to capitalize on value creation and coordinate seamless integration between acquiring companies and their targets—leaving only the companies that fail to do so behind.

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102. *Id.*

103. *Id.*

104. *See* Carter et al., *supra* note 95 (summarizing ESG regulations and investing trends in 2022).

105. *See* discussion *supra* Part III (discussing the required environmental disclosure based on the SEC's proposed rule).

1. Using ESG Factors as Tools for Value Creation in M&A

First, companies that are actively involved in acquisitions will expect more in-depth disclosure of the target companies' ESG factors due to the new potential for value creation in positive ESG factors and consequently the increased risk of value depletion in negative factors.[106] The disclosure requirements will become the push that companies need to provide ESG-driven investors with the relative information they need when making investment decisions. Although not all investors' needs will be met through the new disclosure requirements, this will give investors the necessary overview of standardized and comparable ESG factors. As the industry has proven, ESG factors are no longer just a superfluous part of the M&A deal. They are now considered critical in the eyes of market leaders.[107] Further, as the industry starts to follow the reporting criteria, this new standardized framework may serve as the foundation for an even more developed and dependable disclosure standard in the future.

Consequently, it seems inevitable that as more and more ESG-driven investors engage in the market,[108] companies will start to provide more valuable and detailed disclosures at the outset to put themselves at the forefront of an acquisition from these investors. Investors are already willing to pay premiums for positive ESG factors in companies,[109] and this premium seems likely to continue as the market integrates ESG into a more permanent role after the proposed rules take effect. Moving forward, companies should look at these required ESG disclosures as an opportunity to capitalize on the new ESG-focused market and implement strategies to consistently increase their positive ESG factors.

Additionally, for a company to properly take advantage of finding value in ESG factors, they must be actively monitoring and understanding the market around them.[110] This is an important characteristic of ESG to note; it is unlike many other evaluation tools used in the M&A industry due to its ability to be "shaped" and defined by society and investors.[111] An ESG factor that was once strong and viewed as positive, can conversely become a red flag for a company later in its life based on the industry and societal expectations changing. This change is based on the general assumption that throughout time, society evolves, and different perspectives start to take over. As society's viewpoints start to shift, the same will be true for investors. Investors will demand that corporations

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106. Brownstein & Lu, *supra* note 9.

107. Baker McKenzie, *ESG and the Rise of Sustainable Dealmaking*, FIN. TIMES, https://channels.ft.com/en/duediligence/esg-rise-of-sustainable-dealmaking [https://perma.cc/RN4E-A2AP].

108. The growth in social media coupled with younger investors and consumers has brought many ESG issues to the public, making issues "viral." *Id.* Thus, with better disclosure, companies will be able to make better decisions from the outset, instead of revealing issues at a point where the deal has already been completed.

109. *Id.*

110. For example, the 'S' in ESG has "progressively widened over the past two decades, which reflects the evolving business environment . . . ." Glenn Fitzpatrick, Jonathan Neilan & Peter Reilly, *Time to Rethink the S in ESG*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 28, 2020), https://corpgov.law.harvard.edu/2020/06/28/time-to-rethink-the-s-in-esg [https://perma.cc/74Y7-R6RQ].

111. Following the growth in the 'S' in ESG, investment firms, and advisers started to not only articulate the importance of the 'S' in the industry, but they also chose to define "what it should mean for companies." *Id.* This ability for investors to pressure the industry into focusing on certain ESG elements does not seem to be a fading trend. *Id.* "Blackrock, the world's largest asset manager . . . has committed to maintain its pressure on companies this [investment] season on climate, governance and other ESG issues." *Id.*

make decisions related to ESG factors that please their consumers to maximize profits and increase share prices.

The factors and issues included under the broad umbrella of ESG may also continue to change and adjust as society evolves. There is not a blueprint for being viewed as a "positive ESG company."[112] Determining a positive ESG factor is inherently future-focused—issues of importance and non-financial characteristics that are considered to be "positive" for a specific company have changed throughout history and will inevitably continue to shift as society develops.[113] Therefore, for parties involved in the M&A industry looking to use ESG factors as a guide when making investment decisions (buy, sell, merge, divest, etc.), the parties must proactively give ESG a significant role within their company and steadily monitor and assess the market around them to understand what creates and what depletes value.

2. *Integrating Companies within M&A*

Second, to avoid future conflicts based on ESG issues, parties involved in M&A deals should spend more time conducting due diligence to draft more detailed M&A agreements. These agreements should be carefully drafted to include important ESG considerations to ease the post-deal integration process. Exit opportunities based on a company's ESG stance can have a drastic impact on the proper functioning of a company post-merger.[114] Moving forward, buyers and sellers in the M&A industry should use the newly provided standard disclosure requirements to design an M&A contract that will provide possible remedies, exit opportunities, warranties, and other forms of protection for the parties involved. Further, buyers should create diligence requests that focus on ESG disclosure that falls outside of the SEC's requirements to capture all the necessary information regarding a target company's ESG characteristics. ESG considerations are much different than financial considerations and may be harder to identify through standard disclosure processes, investors should request any specific considerations that the disclosure requirements may leave out or are acutely important to their company.[115] It is important to note that, although the SEC's proposed rules would give the M&A industry an important new tool for investor decision-making going forward, ESG regulations and standards will likely continue to change through varying future trends and legislation.[116] This further

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112. Michelle Dunstan, *What is ESG and Why Do We Care?*, JANUS HENDERSON INVS. (July 31, 2023), https://www.janushenderson.com/en-us/investor/article/what-is-esg-and-why-do-we-care [https://perma.cc/GHR7-MZDJ] (noting that ESG investment strategies differ between investors, making a "positive ESG" company something that can be different among a variety of investors).

113. *See id.* (discussing how an ESG analysis is about what a company is going to do in the future).

114. *See supra* Part II.C. As seen in the Ben & Jerry's example, integration issues may arise decades after a completed M&A transaction due to competing views on issues under the "ESG umbrella." Hudson, *supra* note 41.

115. "Depending on the buyer's ESG strategy and the gravity of the issue, such issues may [kill M&A deals], impact the business plan and hence the valuation of a target business or require a deal structure that carves out [particular toxic issues]." Jochen Ellrott, *How Does ESG Impact M&A?*, FRESHFIELDS (June 15, 2022), https://www.freshfields.us/insights/knowledge/briefing/2022/06/how-does-esg-impact-ma [https://perma.cc/D6E8-2T9Z].

116. Barbarino, *supra* note 72 (discussing the likelihood of further SEC enforcement and regulation focusing on ESG).

supports the reasons provided above, and the companies and investors that embrace the ESG revolution with open arms will be the ones that see the lasting positive effects.[117]

Lastly, companies and investors need to remain active in the markets to be able to create value with ESG factors.[118] These industry players must be able to properly understand and spot negative ESG factors within both their own company and a possible target investment. Even though there may be a more standardized disclosure process, dealmakers in the M&A industry must be able to identify areas of issue. Dealmakers must actively monitor the industry, society, and all other stakeholders involved. They must conduct diligence continuously to understand what the industry values and what areas within ESG are more heavily critiqued or praised.

V. CONCLUSION

ESG factors will continue to play an increased role in M&A deals. Due to this inevitable front-seat role for ESG considerations moving forward, regulators will continue to propose, adapt, and implement industry standards for ESG disclosure requirements. As standards change and industry leaders react, dealmakers in the M&A industry have an opportunity to capitalize on the increased investor interest through value creation and more in-depth M&A agreements. These new standards and the likelihood of continued regulation from the SEC will provide a clearer and more direct measure of comparison for buyers and sellers preparing for deals. If dealmakers want to remain competitive and create value for their respective companies or funds, they must actively monitor the industry's sentiment towards the different sectors of ESG to provide investors, analysts, and shareholders with the information they need for their investment decisions.

117. Commissioner Mark T. Uyeda stated in the opening of the California 40' Acts Group, that ESG investing is still such an unanswered area of investing and future regulation "should be careful not to tip the scale in favor of any particular political or social cause . . . ." *See* Uyeda, *supra* note 22 (arguing that the current ESG framework is sufficient). Overall, the commissioner's comments highlight the unknown future of ESG regulations and how regulations may shift depending on the current administration and their views.

118. *See supra* Part III.A.I (discussing how the influx of information in the market will allow companies to take advantage of the information and create value but can only do this by remaining active in the markets).