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ESSAY

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I. INTRODUCTION

Sustainability reporting—the practice of publishing data on environmental, societal, economic, and governance indicators—is standard among almost all major corporations. Ninety-three percent of the largest 250 corporations in the world (the Global Fortune 250, or G250) produce such reports along with over 4000 other organizations.[1] It is also known as corporate social responsibility (CSR) reporting, triple bottom line (TBL) reporting, corporate responsibility (CR) reporting, citizenship reporting, and environmental, societal, and governance (ESG) reporting. This practice is now beginning to spread in the public sector. From small municipalities to large metropolises, city governments have started to collect and publish data on non-financial measures of performance.

This article will begin with a brief history of sustainability reporting, including recent developments related to its adoption by cities. The author will then review two major trends that, considered together, indicate sustainability reporting should be viewed as an emerging legal necessity for municipalities in the United States. First, the exemption shielding cities from the disclosure requirements of securities laws has eroded. Second,

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1. KPMG, THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2013, at 4, 11 (Dec. 2013), http://www.globalsustain.org/files/kpmg_corporate-responsibility-reporting-survey-2013.pdf [https://perma.cc/QMP5-B7QF] [hereinafter KPMG SURVEY 2013].

sustainability disclosures now fit the definition of what must—as a matter of materiality, if not specific mandates—be reported to investors. This means that the cities that have collectively issued over $3.67 trillion in securities[2] should all be disclosing sustainability data. The author concludes that this emerging legal requirement is in the interest of all stakeholders and is pragmatic public policy.

II. SUSTAINABILITY REPORTING: HOW IT BECAME *DE RIGUEUR* FOR COMPANIES

The 1929 stock market collapse highlighted the risks of market failure because of lack of information.[3] It crystallized acceptance of a view that both investors and the rest of society would benefit if publicly traded companies issued regular financial disclosures under the auspices of government enforcement.[4] This led to the passage of the Securities Acts of 1933 and 1934 (hereinafter Securities Acts) and the creation of the Securities and Exchange Commission (SEC).[5]

In 1984, the release of deadly chemical gas from a factory in Bhopal, India, catalyzed awareness that public disclosure of hazardous chemical stockpiles could mitigate the risk of similar calamities in the future.[6] The accident was among the factors that led to passage of the Emergency Planning and Community

2. *See Statistics*, SIFMA: INVESTED IN AMERICA, http://www.sifma.org/research/statistics.aspx [http://perma.cc/NMX9-FZQH] (last updated Nov. 5, 2015). This represents over 9.2 percent of the total bond market in the United States. *Id.*

3. Allen L. White, *Why We Need Global Standards for Corporate Disclosure*, 69 L. & CONTEMP. PROBS. 167, 175–76 (2006).

4. Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 409 (1990).

5. David Monsma & Timothy Olson, *Muddling Through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 STAN. ENVTL. L.J. 137, 145 (2007).

6. Peter H. Sand, *The Right to Know: Freedom of Environmental Information in Comparative and International Law*, 20 TUL. J. INT'L & COMP. L. 203, 209 (2011). Sand also provides a fascinating history of how post-9/11 counterterrorism concerns were used to restrict public access to environmental data about companies gathered by government institutions during the years 2001–2009, though this trend was somewhat reversed in 2009. *Id.* at 221–26.

Right-to-Know Act (EPCRA) of 1986,[7] which, rather than controlling behavior, only requires publication of emergency response plans and the disclosure of stockpiles of specified dangerous chemicals through the Toxic Release Inventory (TRI).[8] This simple requirement—measurement and public reporting of hazardous chemical stockpiles—led to dramatic reductions in the amount of dangerous chemicals kept near communities; a third generation of environmental law, known as informational regulation or regulation-by-disclosure, was born.[9]

Since then, corporate leaders have accepted that disclosure of a broad set of measures of social, environmental, and economic impacts and information on governance serve to benefit companies and their stakeholders.[10] By the second decade of the new millennium, a trend was afoot to merge such disclosures with conventional financial reporting—a practice dubbed integrated reporting—with the hope that such a linkage will help managers, investors, and stakeholders see the synergy between "doing good" and "doing well."[11]

Between 2005 and 2013, according to KPMG's triennial study of the phenomenon, the share of the G250 engaging in sustainability reporting grew from sixty-four to ninty-three

7. *See generally* 42 U.S.C. §§ 11001–50 (2012).

8. *See id.* §§ 11003, 11022–23.

9. David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 384 (2005).

10. *See, e.g.*, EY & BOS. COLLEGE CTR. FOR CORP. CITIZENSHIP, VALUE OF SUSTAINABILITY REPORTING 2 (2014), http://www.ey.com/Publication/vwLUAssets/EY_-_Value_of_sustainability_reporting/$FILE/EY-Value-of-Sustainability-Reporting.pdf [http://perma.cc/S6AF-33LH] (discussing the value of sustainability reporting and why many businesses practice it); *see also* Glob. Reporting Initiative, *Report or Explain: A Smart EU Policy Approach to Non-financial Information Disclosure*, at 3 (May 2013), https://www.globalreporting.org/resourcelibrary/GRI-non-paper-Report-or-Explain.pdf [https://perma.cc/AM7A-E6A9] (discussing motivations for sustainability reporting). *See generally* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1998) (considering whether holding corporations accountable to a "triple bottom-line" of economic prosperity, environmental quality, and social justice constitutes progress).

11. *See* ROBERT G. ECCLES & MICHAEL KRZUS, ONE REPORT: INTEGRATED REPORTING FOR A SUSTAINABLE STRATEGY ix (2010).

percent.[12] Of 4100 companies representing the largest 100 companies in forty-one countries (the global N100), seventy-one percent report corporate responsibility data.[13] These facts led KPMG to assert that such reporting had come of age and become "*de facto* law for business."[14]

The dominant standard for ESG or CR disclosures was developed by the Global Reporting Initiative (GRI); eighty-two percent of reporting entities among the G250 referred to the GRI guidelines in 2013, as did over seventy-eight percent of the N100.[15] The GRI, a multi-stakeholder network of experts, began as a project of two U.S. non-profit organizations, CERES and Tellus, in the 1990s.[16] It expanded under the auspices of the United Nations (UN) and in 2002 became an independent non-profit organization based in Amsterdam.[17] The GRI guidelines are intended as a framework for not only reporting but also engaging with external stakeholder groups.[18] "Since 2010, the UN Global Compact (UNGC) Secretariat has strongly recommended that the more than 10,000 (as of early 2013) signatories of the UNGC (many of them large corporations) use the GRI's reporting framework in their annually required Communications on Progress."[19]

12. KPMG SURVEY 2013, *supra* note 1, at 11. The number of companies in the G250 who engaged in sustainability reporting (either in a stand-alone or annual financial report) grew from sixty-four percent in 2005 to eighty-three percent in 2008 and has stayed over 90 percent since 2011. KPMG, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2011, at 21 http://www.kpmg.com/global/en/issuesandinsights/articlespublications/corporate-responsibility/pages/2011-survey.aspx [http://perma.cc/34CD-BTTD] [hereinafter KPMG SURVEY 2011]; KPMG, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2008, at 15, http://www.kpmg.com/EU/en/Documents/KPMG_International_survey_Corporate_responsibility_Survey_Reporting_2008.pdf [http://perma.cc/2M9M-YQY2] [hereinafter KPMG SURVEY 2008]; KPMG, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2005, at 4 [hereinafter KPMG SURVEY 2005].

13. KPMG SURVEY 2013, *supra* note 1, at 11.

14. KPMG SURVEY 2011, *supra* note 12, at 2.

15. KPMG SURVEY 2013, *supra* note 1, at 31.

16. K. MILES HILL, SUSTAINABILITY REPORTING 10 YEARS ON (2007).

17. *Id.* at 2.

18. *Id.*

19. Adam Sulkowski & Sandra Waddock, *Beyond Sustainability Reporting: Integrated Reporting is Practiced, Required and More Would Be Better*, 10 U. ST. THOMAS L.J. 1060, 1064 (2014) (citing *GRI and UN Global Compact Forge New*

Integrated reporting—the term for blending sustainability-related data into regular financial disclosures—has grown rapidly. In 2008, less than ten percent of the N100 had adopted this practice; by 2011, this proportion had grown to twenty percent, and, by 2013, fifty-one percent included sustainability disclosures in their financial reports.[20]

> Integrated reporting is promoted by the International Integrated Reporting Committee (IIRC), which defines it as "a concise communication about how an organization's strategy, governance, performance and prospects lead to the creation of value over the short, medium, and long term." The IIRC is a global coalition of major accounting firms, the GRI, financial and investment institutions, major corporations, business and accounting associations, academics, U.N. agencies, and other interested parties. Collectively, its members agree that numerous elements [of performance] beyond the scope of conventional financial statements, such as people, natural resources, intellectual capital, market and regulatory control, competition, and energy security help determine an organization's value, and need to be clearly communicated to stakeholders. . . . [M]ore than eighty global businesses (including companies like Coca-Cola, Microsoft, Unilever, and Marks and Spencer) and fifty institutional investors, in addition to major accounting entities and their associations, are involved in developing the integrated reporting framework, [which] suggests [the] long-term viability [of the movement].[21]

The regular KPMG surveys of executives accountable for sustainability reporting is the best source of systematically gathered data on what is motivating the practice.[22] While the most commonly identified motivations have varied depending on the year of the study and sampling of companies, executives have identified several common drivers of reporting, including maintaining a reputation or brand, stimulating innovation and

Alliance, U.N. GLOBAL COMPACT (June 24, 2010), http://www.unglobalcompact.org/news/50-06-24-2010 [http://perma.cc/L99N-FVUU]).

20. KPMG SURVEY 2013, *supra* note 1, at 28.

21. Sulkowski & Waddock, *supra* note 19, at 1064–65 (footnotes omitted).

22. KPMG SURVEY 2013, *supra* note 1; KMG SURVEY 2011, *supra* note 12; KPMG SURVEY 2008, *supra* note 12; KPMG SURVEY 2005, *supra* note 12.

learning, employee motivation, and relations with shareholders.[23] Other experts and academics believe that increased disclosure should foster greater transparency, provide incentives for cleaner technologies,[24] and facilitate dialogue concerning the effects of climate change and other significant risks in the business world.[25] The growth in sustainability reporting can also be attributed to pressure from investors, consumers, and activists.[26]

III. CITIES PUBLISHING SUSTAINABILITY REPORTS—AN EMERGING TREND

As of 2003, there were already dozens of proposed formats for reporting sustainability data.[27] However, at a time that 1054 cities had signed the U.S. Conference of Mayors Climate Protection Agreement, committing them to reduce carbon emissions below 1990 levels by 2012, only ten percent had developed concrete plans for meeting this goal and only a few

23. KPMG SURVEY 2013, *supra* note 1, at 44.

24. *See* Perry E. Wallace, *Disclosure of Environmental Liabilities Under the Securities Laws: The Potential of Securities-Market-Based Incentives for Pollution Control*, 50 WASH. & LEE L. REV. 1093, 1124–29, 1144 (1993) (illustrating that environmental disclosure can foster environmental protection by creating an incentive to solve environmental problems to preserve the market value of securities).

25. *See* Andrea M. Matwyshyn, *Material Vulnerabilities: Data Privacy, Corporate Information Security, and Securities Regulation*, 3 BERKELEY BUS. L.J. 129, 202–03 (2005) (explaining how, in the context of information security, mandated disclosures increase awareness of problems and supports systemic adoption of best practices for both corporations and consumers). *See generally* Adam J. Sulkowski, *Cyber-Extortion: Duties and Liabilities Related to the Elephant in the Server Room*, 21 U. ILL. J. L., TECH. & POL'Y 22 (2007) (explaining how cybersecurity breaches, inadequate preventative measures, and related costs and liabilities are more routine than commonly realized, and are under-reported to all stakeholders).

26. *See generally* Adam J. Sulkowski et al., *Corporate Responsibility Reporting in China, India, Japan, and the West: One Mantra Does Not Fit All*, 42 NEW ENG. L. REV. 787 (2008) (explaining that cultural values could color how managers even discussed their motivations, with Western executives being more inclined to openly state that they engage in sustainability reporting for the sake of their shareholders); Sandra Waddock, *Building a New Institutional Infrastructure for Corporate Responsibility*, 22 ACAD. MGMT. PERSP. 87 (2008).

27. *See generally* Thomas M. Parris & Robert W. Kates, *Characterizing and Measuring Sustainable Development*, 28 ANN. REV. OF ENV'T & RESOURCES 559 (2003).

dozen tracked progress, much less published regular reports, citing a lack of staff or data, or fear of failure.[28]

There are two global associations of cities that are playing key roles in promoting inventories of carbon emissions: C40 Cities (which acquired its moniker when its membership consisted of forty cities)[29] and ICLEI (founded in 1990 as the International Council for Local Environmental Initiatives and now known as Local Governments for Sustainability, even though the group retains the ICLEI acronym).[30] Both efforts are focused on carbon and carbon-equivalent greenhouse gas emissions, but these statistics reflect many aspects of city operations, including waste management, transportation infrastructure, building codes, protected green spaces, and citizen behavior, among other things.

STARS Communities is a more comprehensive reporting and rating framework specifically designed for cities in the United States; major backers include several municipalities, the National League of Cities, federal agencies, plus corporations such as Siemens and foundations such as the Home Depot Foundation.[31] As of 2016, 108 communities in the United States and Canada were listed on their website as having some level of involvement or adoption, ranging from the town of Nederland, Colorado (population 1446) to Toronto (population 2,600,000).[32]

GRI standards have been in some way referenced and listed in GRI's database of reports a total of 252 times by a variety public sector entities since 2004.[33] The oldest continuously reporting municipal entity is Redland City Council, Australia, which was the only public sector entity to publish and list a report in 2004.[34] Some cities in various countries outside of the United States produced a report once or twice but apparently

28. *See* SADHU AUFOCHS JOHNSTON ET AL., THE GUIDE TO GREENING CITIES 189 (Island Press, 2013).

29. C40 CITIES, http://www.c40.org [http://perma.cc/732L-Z8J5].

30. ICLEI; LOCAL GOVERNMENTS FOR SUSTAINABILITY, http://www.iclei.org [http://perma.cc/3JDB-ZDBC].

31. *Sponsorship*, STAR COMMUNITIES, http://www.starcommunities.org/about/sponsors/ [http://perma.cc/PZD2-W6FN].

32. *Id.*

33. *See* GLOBAL REPORTING INITIATIVE, www.globalreporting.org [http://perma.cc/3GCH-9Q3C].

34. *See id.*

discontinued.[35] The Town of Dartmouth and City of Fall River, both in Massachusetts, had the distinction of being the first municipalities in the United States to adopt a GRI standard in late 2012.[36] In 2013, Warsaw, the capital of Poland, became the first entity, public or private, to adopt the latest standard from GRI, the G4.[37] All together sixty-seven public sector entities referenced the GRI standard for their sustainability reporting in 2013, with eleven being published and listed in the name of an entire city.[38]

Most recently, the International Standards Organization (ISO) has published its guidelines for city sustainability reporting.[39] The ISO standard is based on several years of coordination between cities of various sizes, locations, and phases of development.[40] Its 100 indicators may be the best set of universal "vital signs" of governance, sustainability, and quality of life tailored for municipalities to date.[41] Roughly twenty cities are officially committed to piloting the standard, coordinating and sharing information through the World Council on City Data, with other cities taking note and to some extent embracing the themes and disclosure of specific indicators, if they have not already been publishing them.[42]

35. *See id.*

36. Conversation with Mike Wallace, Head of GRI Focal Point USA (December 5, 2012).

37. Conversation with Mike Wallace, Head of GRI Focal Point USA (August 1, 2013).

38. GLOBAL REPORTING INITIATIVE, *supra* note 33.

39. Int'l Standards Org., *Sustainable Development of Communities – Indicators for City Services and Quality of Life*, ISO 37120:2014 (2014), https://www.iso.org/obp/ui/#iso:std:iso:37120:ed-1:v1:en [https://perma.cc/J9K8-MM83].

40. GLOBAL CITY INDICATORS, http://www.cityindicators.org [http://perma.cc/N4PU-E677].

41. *See* Int'l Standards Org., *supra* note 39.

42. World Council on City Data, *The WCCD and ISO 37120: Created by Cities, for Cities* (2014), http://www.cityindicators.org/Deliverables/WCCD%20Brochure_9-16-2014-178620.pdf [http://perma.cc/DBQ4-QUWJ]; *Global City Registry for ISO 37120*, WORLD COUNCIL ON CITY DATA, http://www.dataforcities.org/registry [http://perma.cc/JBP7-A2E3].

IV. CITY SUSTAINABILITY REPORTING: WHY IT IS EMERGING AS A LEGAL NECESSITY

Before commencing a discussion of the legal obligations of cities under securities laws, it is useful to begin by clarifying what is the meaning of the word "city" in the context of this paper. Cities legally are imagined in two ways as a matter of legal theory—either effectively subordinates of a national or sub-national government, or else as sovereigns manifesting the will of a local polity.[43] Some scholars emphasize the differences in the precise meanings of the terms "locality," "local government," and "local authority."[44] Consistent with other authors who have written on the topic of cities and sustainable development, the term "city" will be used loosely here, the significance being that the discussion below could apply to entities that are technically towns or some other form of locality or local government entity.[45]

This section will now review the erosion of the disclosure exemptions for municipal securities, as discussed in articles by Christine Sgarlata Chung,[46] Theresa A. Gabaldon,[47] and Lisa Anne Hamilton,[48] and add the observation that sustainability disclosures fit the definition of materiality. Municipalities in the United States were historically exempted from having to comply with most of the scheme of federal mandatory reporting rules when issuing securities, but have increasingly fallen under the same disclosure paradigm applicable to businesses.[49] This development is key to appreciating why the legal environment of

43. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062, 1067 (1980).

44. *See* Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875, 880 (2006).

45. *See, e.g.*, Frug, *supra* note 43, at 1061–62.

46. Christine Sgarlata Chung, *Municipal Securities: The Crisis of State and Local Government Indebtedness, Systemic Costs of Low Default Rates, and Opportunities for Reform*, 34 CARDOZO L. REV. 1455, 1501–02 (2013).

47. Lisa Anne Hamilton, *Canary in the Coal Mine: Can the Campaign for Mandatory Climate Risk Disclosure Withstand the Municipal Bond Market's Resistance to Regulatory Reform?*, 36 WM. MITCHELL L. REV. 1014, 1016 (2010).

48. Theresa A. Gabaldon, *Financial Federalism and the Short, Happy Life of Municipal Securities Regulation*, 34 J. CORP. L. 739, 769 (2009).

49. *See* Hamilton, *supra* note 47, at 1017–32 (overviewing the municipal bond market and obligations of issuers, brokers, dealers, and underwriters, as well as discussing the climate risk disclosure debate).

municipal financing has fundamentally changed, and why a parallel evolution of disclosure practices in the private sector is now relevant to cities.

The Securities Act of 1933 specifically exempted municipal securities issuers and their securities from the registration, disclosure, and periodic reporting requirements applicable to corporations.[50] The predominant reason for this exemption appears to have been the power of the local government and Wall Street lobbies.[51] However, other key factors included "concerns about the cost[s] of a more robust regulatory regime, perceptions regarding the financial expertise of the institutional investors who then dominated the ranks of purchasers, . . . the lack of perceived abuses as compared to other market segments," and the principle of comity.[52] For almost half a century the distribution of municipal securities remained practically unregulated.[53]

Congress only acted to regulate municipality-issued securities in 1975, after New York City almost defaulted on $600 billion of bonds.[54] It did so by creating the Municipal Securities Rating Board (MSRB) which establishes rules for those involved in the underwriting, trading, and selling of municipal securities.[55] However, it was not until 1989, after two more crises, that disclosures to investors were addressed. First, the Washington Public Power Supply System (WPPSS) defaulted on $2.25 billion of revenue bonds issued to fund the construction of

50. *See* Securities Act of 1933, Pub. L. No. 73-22 § 3(a)(2), 48 Stat. 74, 76 (codified as amended at 15 U.S.C. §77c(a)(2) (2006)).

51. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 187 (3d ed. 2003).

52. Chung, *supra* note 46, at 1501.

53. Municipalities did not fall under the definition of "person" for purposes of Section 10(b) of the Securities Act and therefore Regulation 10(b)5—an omission only corrected in 1975. An Act Amending the Securities Exchange Act, Pub. L. No. 94-29, §3, 89 Stat. 97, 97 (1975) (codified as amended at 15 U.S.C. § 78c(a)(9) (2006)).

54. *See generally* CONG. BUDGET OFFICE, NEW YORK CITY'S FISCAL PROBLEM: IT'S ORIGINS, POTENTIAL REPERCUSSIONS, AND SOME ALTERNATIVE POLICY RESPONSES (1975).

55. Securities Acts Amendments of 1975, Pub. L. No. 94-29, §13, 89 Stat. 97, 132 (codified as amended at 15 U.S.C. § 78o-4(b)(1) (1976)).

nuclear power plants.[56] Neither Congress nor the Commission imposed disclosure obligations upon municipal securities issuers in the wake of the WPPSS default; instead, the SEC, using its authority to deter fraud and manipulation, adopted Rule 15c2-12.[57] Rule 15c2-12 requires underwriters to obtain, review, and distribute to investors copies of municipalities' official statements before primary offerings.[58] In its accompanying statement, the Commission underscored the obligation to review the issuer's official statement as part of due diligence obligations.[59]

Post-offering disclosures by municipalities remained non-mandatory until 1994, just before the bankruptcy and near-default of Orange County in California that had accompanied its venture into derivatives.[60] Through amendments to Rule 15c2-12, the Commission prohibited underwriters from participating in a municipal offering unless the underwriter reasonably determined that the issuer (or an obligated person) had agreed to provide specified annual information and notices of certain events to then-existing information repositories.[61] Amendments also banned the recommendation of the purchase or sale of municipal securities without procedures for the receipt of any related event notices.[62] In 2008, the SEC further amended Rule 15c2-12 to require confirmation that issuing municipalities have agreed to provide disclosures to the MSRB through a system now known as EMMA (Electronic Municipal Market Access).[63]

In June 2010, given ongoing concerns over the quality of disclosures, the Commission further adapted Rule 15c-12 to

56. DIV. OF ENF'T, U.S. SEC. & EXCH. COMM'N, STAFF REPORT ON THE INVESTIGATION IN THE MATTER OF TRANSACTIONS IN WASHINGTON PUBLIC POWER SUPPLY SYSTEM SECURITIES 1 (1988).

57. The Commission adopted rule 15c2-12 under section 15(c)(2) of the 1934 Act. Municipal Securities Disclosure, 54 Fed. Reg. 28,799 (June 28, 1989) (to be codified at 17 C.F.R. pt. 240, 241).

58. 17 C.F.R. § 240.15c2-12 (2015); *see* Municipal Securities Disclosure, 54 Fed. Reg. 28,799.

59. *See generally* Municipal Securities Disclosure, 53 Fed. Reg. 37,778 (Sept. 22, 1988) (to be codified at 17 C.F.R. pt. 240) (proposing Rule 15c2-12).

60. *See* Ann Judith Gellis, *Municipal Securities Market: Same Problems—No Solutions*, 21 DEL. J. CORP. L. 427, 454 (1996).

61. Municipal Securities Disclosure, 59 Fed. Reg. 12,759, 12,759 (March 9, 1994) (to be codified at 17 C.F.R. pt. 240).

62. 17 C.F.R. § 240.15c2-12(c).

63. *Id.* § 240.15c2-12(b)(5)(i).

require that broker-dealers and municipal securities dealers provide additional disclosure about certain events,[64] made such reports mandatory,[65] expanded the number and type of reportable events,[66] and imposed time limits for reporting events.[67] The amendments effectively mandated disclosure requirements for municipal securities.[68] Simultaneously the Commission issued interpretive guidance emphasizing the applicability of antifraud provisions in the context of expanded reporting expectations for cities, especially in cases where there is a lack of continuing disclosure documents.[69]

It is important to note the applicability of Rule 10b-5.[70] Rule 10b-5 is significant for establishing liability for fraud—not just for misstatements but also for omissions, both in required and voluntary disclosures.[71] The Ninth Circuit Court of Appeals has stated that municipal securities are subject to Rule 10b-5.[72] The significance of Rule 10b-5 being applicable is further explained below, as it is one basis for believing that sustainability-related disclosures should be seen as legally mandated. To summarize this section so far: the past three decades have seen an acceleration of the trend of treating municipalities in a manner

64. *Id.* § 240.15c2-12(c); *see* Amendment to Municipal Securities Disclosure, 75 Fed. Reg. 33,100 (June 10, 2010) (to be codified at 17 C.F.R. pt. 240, 241).

65. *See* Amendment to Municipal Securities, 75 Fed. Reg. at 33,100.

66. *Id.*

67. 17 C.F.R. §240.15c2-12(d)(5).

68. Chung, *supra* note 46, at 1506 & n.250 (citing 17 C.F.R. §240.15c2-12(d)(5)).

69. Amendment to Municipal Securities Disclosure, 75 Fed. Reg. at 33,101, 33,123.

70. 17 C.F.R. § 240.10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

71. *See* Rachel Cherington, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10b-5*, 25 U. PA. J. INT'L ECON. L. 1439, 1448 (2004).

72. SEC v. Dain Rauscher, Inc., 254 F.3d 852, 858 n.5 (9th Cir. 2001).

similar to that of other issuers of securities, to the point that one author opined that "functional differences between municipal and nonmunicipal securities regulation may and should be coming to an end."[73]

Now that the exemption of municipalities from securities laws has eroded, the question naturally arises: has sustainability reporting meanwhile evolved into a legal necessity in securities markets? The remainder of this section will proceed by reviewing explicit legal requirements to disclose sustainability-related information. It will then move on to discuss the significance of the materiality principle and investors' demands for such data, finding a general mandate for all securities issuers to disclose sustainability-related information.

In addition to financial statements,[74] the regulations required by the Securities Acts also mandate that companies publish non-financial information, including data related to market conditions,[75] litigation,[76] and trends and events likely to affect financial results.[77] Since 1971, the Securities and Exchange Commission (SEC) has required the filing of environmental information as part of mandatory annual reports under Form 10-K.[78] Relevant guidance includes:

> Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital

73. Gabaldon, *supra* note 48, at 740.

74. 17 C.F.R. § 229.301.

75. *See id.*

76. *Id.* § 229.103.

77. *Id.* § 229.303(a)(1).

78. *See* RESEARCHING THE FEDERAL SECURITIES LAWS THROUGH THE SEC WEBSITE, www.sec.gov/investor/pubs/securitieslaws.htm [http://perma.cc/BR4C-MCM6] (Latest in SEC guidance on disclosure issues); *see also* MARK MANSLEY, OPEN DISCLOSURE: SUSTAINABILITY AND THE LISTING REGIME 34 (2003); ROBERT REPETTO ET AL., ENVIRONMENTAL DISCLOSURE REQUIREMENTS IN THE SECURITIES REGULATIONS AND FINANCIAL ACCOUNTING STANDARDS OF CANADA, MEXICO AND THE UNITED STATES 4 (2002); Robert H. Feller, *Environmental Disclosure and the Securities Laws*, 22 B.C. ENVTL. AFF. L. REV. 225, 225–39 (1995); Elizabeth Anne Glass Geltman, *Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Laws*, 16 HARV. ENVTL. L. REV. 130 (1992); Wallace, *supra* note 24, at 1093.

expenditures, earnings and competitive position of the registrant and its subsidiaries.[79]

Disclosures are further mandated by the SEC in the context related to human rights: companies must publish whether they are active in operations against which the United States has imposed sanctions.[80] Furthermore, "other provisions, by requiring mention of managerial training related to legal standards, by extension require the mention of foreign minimum mandated disclosures."[81] The Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter the Dodd-Frank Act) mandates specific sustainability-related disclosures[82] and requires that the SEC collect and publish them online.[83] These include audited reports on minerals sourced from conflict zones,[84] tracking of mining safety standard violations,[85] and payments to governments related to oil and gas extraction rights.[86] On

79. 17 C.F.R. § 229.101(c)(1)(xii). *See generally* Michael A. Meloy, *Disclosure of Environmental Liability in SEC Filings, Financial Statements, and Debt Instruments: An Introduction*, 5 VILL. ENVTL. L.J. 315 (1994); Gerard A. Caron, Comment, *SEC Disclosure Requirements for Contingent Environmental Liability*, 14 B.C. ENVTL. AFF. L. REV. 729 (1987).

80. Eric Engle, *What You Don't Know Can Hurt You: Human Rights, Shareholder Activism, and SEC Reporting Requirements*, 57 SYRACUSE L. REV. 63, 84 n.135 (2006) (citing SEC Scrutinizing Foreign Registrants Regarding Dealings in Countries Under U.S. Sanctions, Prac. L. Inst. Order No. F0-00AN, at 81 (Dec. 2001)).

81. Sulkowski & Waddock, *supra* note 19, at 1068.

82. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1504(q)(2), 124 Stat. 1376, 2220–21 (2010) [hereinafter Dodd-Frank Act]. *See generally* David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327 (2011) (providing an overview and discussion of the Act); Emily Veale, Note, *Is There Blood On Your Hands-Free Device?: Examining Legislative Approaches to the Conflict Minerals Problem in the Democratic Republic of Congo*, 21 CARDOZO J. INT'L & COMP. L. 503 (2013).

83. Dodd-Frank Act § 1504(q)(3) ("To the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted under the rules issued under paragraph (2)(A).").

84. *Specialized Corporate Disclosure*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml [http://perma.cc/UQ33-GWNX]; *see also* Dodd-Frank Act § 1502 (discussing conflict minerals).

85. *Specialized Corporate Disclosure*, *supra* note 84; *see also* Dodd-Frank Act § 1503 ("Reporting Requirements Regarding Coal or Other Mine Safety").

86. *Specialized Corporate Disclosure, supra* note 84; *see also* Dodd-Frank Act § 1504 ("Disclosure of Payments by Resource Extraction Issuers").

January 27, 2010, the SEC provided public companies with interpretive guidance for climate change related disclosure requirements.[87] It clarified that businesses should disclose to investors any serious risks due to climate change or related policies, regulations, legislation, international accords, or business trends.[88] Some assert that explicit SEC guidelines have already improved transparency in this area (and comparability of performance between firms), with regard to corporate greenhouse gas emissions.[89] Existing rules have mandated reporting on the "reasonably likely" material costs of complying with environmental statutes and regulations.[90] Interpretive guidance does not add new requirements, but rather clarifies expectations.[91] Only one commissioner objected to this clarification, arguing that climate risks are beyond the expertise of the SEC.[92]

The materiality principle, correctly understood from both a historical and contemporary perspective, further compels publicly

87. Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change (Jan. 27, 2010), http://sec.gov/news/press/2010/2010-15.htm [http://perma.cc/HE47-WBVP].

88. Nickolas M. Boecher, *SEC Interpretive Guidance for Climate-Related Disclosures*, 10 SUSTAINABLE DEV. L. & POL'Y 43, 43 (2010); Mary Schapiro, SEC Chairperson, Statement Before the Open Comm'n Meeting on Disclosure Related to Business or Legislative Events on the Issue of Climate Change (Jan. 27, 2010) [hereinafter Schapiro, Statement Before Open Comm'n]; *see* Jeffrey A. Smith et al., *The SEC's Interpretive Release on Climate Change Disclosure*, 4 CARBON & CLIMATE L. REV. 147, 147–48 (2010); *see also* Camden D. Burton, *Recent Development, An Inconvenient Risk: Climate Change Disclosure and the Burden on Corporations*, 62 ADMIN. L. REV. 1287, 1288–89 (2010).

89. *See* Jeffrey M. McFarland, *Warming Up to Climate Change Disclosure*, 14 FORDHAM J. CORP. & FIN. L. 281, 281–82 (2009); *see also* Perry E. Wallace, *Climate Change, Fiduciary Duty, and Corporate Disclosure: Are Things Heating Up in the Boardroom?*, 26 VA. ENVTL. L. REV. 293, 293–99 (2008); Elizabeth E. Hancock, Note, *Red Dawn, Blue Thunder, Purple Rain: Corporate Risk of Liability for Global Climate Change and the SEC Disclosure Dilemma*, 17 GEO. INT'L ENVTL. L. REV. 233, 233–35 (2005).

90. Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6294 (Feb. 8, 2010), www.gpo.gov/fdsys/pkg/FR-2010-02-08/pdf/2010-2602.pdf [https://perma.cc/L3JG-W6VY]. The four areas in which climate change may result in disclosure obligations: Legislation and Regulation; International Accords; Indirect Consequences of Regulation or Business Trends; and Physical Impacts of Climate Change. *Id.*

91. Schapiro, Statement Before Open Comm'n, *supra* note 88.

92. Boecher, *supra* note 88, at 43.

traded companies to disclose information related to sustainability. The SEC defines materiality as information related to "those matters about which an average prudent investor ought reasonably to be informed."[93] This is consistent with the Supreme Court's seminal decision in *Basic Inc. v. Levinson*, in which the Court stated that the materiality requirement is satisfied when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[94] The standard of "reasonableness" is the focus of an inquiry by Steven Lydenberg, who points out that, in the context of torts, a reasonable person is—by long-standing tradition—defined as minimizing risks of harm, and that a reasonable investor has these same concerns.[95] The key point with respect to investors, however, is that unless the relevant information is available to them, they are unable to make a reasonable assessment of their investments. In addition to academics and the SEC, practitioners have also gone on record to state that environmental risks are material.[96]

Rule 10b-5 is critically relevant, especially when considered in tandem with the materiality principle's disclosure mandate.[97]

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93. 17 C.F.R. § 229.1-02(o) (2015) (defining "material").

94. Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988).

95. STEVEN LYDENBERG, HAUSER CTR. FOR NONPROFIT ORGS., ON MATERIALITY AND SUSTAINABILITY: THE VALUE OF DISCLOSURE IN THE CAPITAL MARKETS 13 (2012), http://www.sasb.org/wp-content/uploads/2012/10/On-Materiality-and-Sustainability.pdf [http://perma.cc/XQN8-STG8].

96. Engle, *supra* note 80, at 91 n.160 (citing Letter from Honorable John B. Stephenson, Ranking Minority Member, Comm. on Env't & Public Works, to Senator Jon S. Corzine (D.-N.J.) (July 14, 2004), *reprinted in* U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-808, ENVIRONMENTAL DISCLOSURE: SEC SHOULD EXPLORE WAYS TO IMPROVE TRACKING AND TRANSPARENCY OF INFORMATION 1 (2004) ("Environmental risks and liabilities are among the conditions that, if undisclosed, could impair the public's ability to make sound investment decisions. For example, the discovery of extensive hazardous waste contamination . . . [or] impending environmental regulations could affect a company's future financial position.")).

97. 17 C.F.R. § 240.10b-5,

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud,(b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the

As succinctly summarized by Rachel Cherington, "[b]ecause Rule 10b-5 requires veracity in corporate statements, even when there is no affirmative duty to disclose such information, the rule reaches a broader cross-section of corporate statements than those required in the periodic and annual statements."[98] Misstatements or major omissions, even with regard to information that is voluntarily proffered, can potentially amount to a fraud upon investors.[99]

To date, several scholars have specifically identified climate change as a context where related corporate disclosures are clearly required.

> Perry Wallace has argued that, given the likely catastrophic consequences of climate change and existing fiduciary duties of managers, companies should, given existing rules and principles, [be making] greater non-financial disclosures. This line of reasoning, agreed upon by David Monsma and Timothy Olson, holds that company responses to climate change are material knowledge to investors and that regulation S-K, correctly interpreted, requires related disclosures. Jeffrey McFarland agrees with this logic, stating that U.S. securities laws should be interpreted as requiring at least a disclosure of liability exposure, including amounts of emissions and actions taken to reduce the risk of related possible losses. As further evidence that U.S. securities laws. . . [already] require extensive reporting on the side effects of doing business, some point to instances where disclosures in the U.S. were greater than in countries that have explicitly stipulated what must be reported to such an extent that some think that. . . U.S. [materiality] standards [and their encouragement of disclosure]s are even worthy of emulation.

> circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. *Id.*

98. Cherington, *supra* note 71, at 1448.

99. This strong possibility—at least in theory—of eventually being accused of defrauding investors for withholding or misrepresenting data on ESG and sustainability performance stands in strong contraposition to an apparent lack of consequences (to date) for constructing LEED-certified buildings that may not actually perform as expected. Adam J. Sulkowski, *LEEDigation: The Risks, Why We Don't See More, and Practical Guidance Related to Green Building Contracts*, 39 REAL EST. L.J. 192, 195–96 (2010).

> . . . .
> Perhaps most persuasively, the argument that the materiality principle [and Rule 10b-5] behoove[] greater ESG reporting is supported by the amount of demand for such disclosures by investors.[100]

If materiality ultimately is a question of what reasonable investors would want to know, there is no better proof that sustainability meets this minimum standard than large numbers of investors explicitly stating this demand.

> Seven hundred twenty-two investors controlling $87 trillion in assets have expressed a desire through the Carbon Disclosure Project for greater climate-related disclosure, and the amount of investments represented continues to grow. . .
>
> Over 1,000 financial firms with assets under management of approximately $33 trillion had signed on to the U.N.'s six Principles for Responsible Investment (PRI) as of 2012. Among other things, the signatories committed to incorporate environmental, social, and governance (ESG) issues into their investment analyses and decision making, be active owners around these issues, seek appropriate ESG disclosure by companies in which they invest, and collaborate to promulgate the PRI broadly, while reporting on their own activities.
>
> Twelve percent of managed assets are invested in stocks that are currently screened based on ethical criteria. The U.S. SIF (Social Investment Forum) reported in its 2012 Trends Report that some $3.74 trillion is now under the responsible investment umbrella, with $3.3 trillion (out of a total of $33.3 trillion total investment) incorporating ESG data. The investors and fund managers associated with these funds, and with the PRI, are now at least in theory making investment decisions partially based on non-financial but potentially material disclosures, and firms [are] responding to this market demand for more information. Such investors are becoming more vocal—of 600 shareholder resolutions being tracked by Ernst & Young in 2013, 44 percent related to environmental and societal issues.
>
> One measure that investors are taking ESG disclosures seriously is that a large and growing share of G250 companies goes further than. . . measuring and publishing such data. Almost half pay for third-party verification, with a majority of

100. Sulkowski & Waddock, *supra* note 19, at 1071–72 (footnotes omitted).

> these engaging one of the major international accountancy firms. One-third of the G250 [have] issued restatements regarding their ESG data, indicating that they perceived a critical mass of stakeholders—including shareholders—follow and actually pay attention to the veracity and reliability of this information. Another indicator that companies realize there is a demand for this data is the widespread drive to make it more accessible across multiple communications media; only 20 percent communicate their sustainability data solely through stand-alone sustainability reports.
>
> Forty-seven percent of the G250 companies [have] report[ed] financial gains from their ESG activities, most often citing improvements in revenue and cost savings as the underlying factors. Perhaps the biggest indicator that investors care—and are one of the biggest drivers of the sustainability reporting movement—is that companies listed on stock exchanges are the most likely to report such data (as opposed to state- or foundation-controlled or privately-held or family-owned companies or co-operatives). Investors have spoken, experts and authorities have opined, and company actions have reflected that ESG data is material—to such an extent that it appears on Bloomberg screens. Reasonable investors consider it essential to the mix of information upon which they rely.[101]

Therefore, sustainability data fits the definition of material information that must be published by issuers of securities, including cities.[102]

V. WHY SUSTAINABILITY REPORTING IS GOOD POLICY FOR MUNICIPAL GOVERNMENTS

Cities have become a focus of attention in discussions of sustainability because of two trends: the internationalization of cities and the localization of sustainable development.[103] Legal theorists have largely embraced this as a positive development.[104]

101. Sulkowski & Waddock, *supra* note 19, at 1072–73 (footnotes omitted).

102. To state that security laws already require sustainability disclosures is not to suggest that more explicit or specific mandates would not be good public policy. *See* Sulkowski & Waddock, *supra* note 19, at 1084.

103. Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537, 596 (2009).

104. *See, e.g.*, Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. L. 1, 1–4 (2006). *See generally* Yishai Blank,

Especially given the lack of progress at the national and international levels to advance policies that would curb global environmental problems, local governments have been recognized as both the level where political will can most effectively be channeled into constructive action and where solutions have been executed.[105]

Those cities that have adopted the use of indicators and reporting have reported greater success in meeting goals.[106] Other observed benefits include the engagement and activation of stakeholders, and learning which strategies work and why.[107] Reporting cities have also cited gains in terms of educating and inspiring citizens, helping diverse stakeholders speak using a common terminology, and coordinating actions in the same direction.[108] The Boston Green Ribbon Commission, authors of Benchmarking Boston's Sustainability Performance Management Systems, assert that reporting helps to stimulate constituent involvement in setting goals, implementing and coordinating actions, tracking progress, and aligning budgets with strategy.[109] Additionally, it can help in assigning individual evaluation metrics related to goals, the ability of systems to collect and analyze data, facilitating discussion of progress internally and externally, and furthering the cause of boosting accountability and recognition.[110] Further, data from fifty-eight countries shows that mandating sustainability disclosures improves, among other things, governance and ethical conduct as well as reducing energy and water use and waste.[111] In other words, the benefits of

Comparative Visions of Global Public Order (Part 2): Localism in the New Global Legal Order, 47 HARV. INT'L L. J. 263 (2006).

105. *See, e.g.*, Patricia E. Salkin, *Can You Hear Me Up There? Giving Voice to Local Communities Imperative for Achieving Sustainability*, 4 ENVT'L & ENERGY L & POL'Y J. 256, 295 (2009).

106. JOHNSTON ET AL., *supra* note 28, at 190.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting* 1, 11 (Harvard Bus. Sch. Research, Working Paper No. 11-100, 2011), http://www.stakeholderforum.org/fileadmin/files/The%20consequnces%20of%20Mandatory%20Sustainability%20Reporting.pdf [perma.cc/23KU-CVGJ].

sustainability reporting are observed in contexts where the practice is legally required.[112]

If cities embraced measuring and publishing environmental impact data on a widespread basis, it could be a critical step toward curbing costly, needless, and destructive environmental side effects of how we conduct our daily affairs—including those that are contributing to climate change. This statement is supported by several facts and observations. First, a growing majority of the planet's population of over seven billion people live in cities.[113] People enjoy a greater degree of access to—and control over—local government in comparison to national government. Because the long-predicted impacts of climate change are being acutely felt in the world's cities—especially in major coastal metropolises—there is greater impetus and political will in favor of immediate constructive change and adaptation in cities, as evidenced by PlaNYC.[114] This has manifested itself in ambitious goals that have been set and significant tangible actions taken by cities.[115] Building codes—which often are established locally—affect the efficiency (both financially and in terms of resource usage) of buildings, the operation of which is one of humanity's biggest environmental effects. Many energy, water, sewage, waste, transportation, and other infrastructures are managed by municipalities or at other sub-national levels and, as public infrastructure functions are often outsourced, reporting can involve (and thereby put appropriate constructive pressure on) for-profit infrastructure service companies. In other words, cities can demand companies and other organizations start measuring, reporting, and reducing negative impacts. Finally, the international community already accepts the critical role of cities, with the schedule of UN Climate Summits and

112. *Id.* at 1.

113. *See* WORLDOMETERS, http://www.worldometers.info/ [http://perma.cc/2WGR-TUMU].

114. Former New York Mayor Michael Bloomberg's leadership in the preparation of PlaNYC, the development of the C40 coalition of cities, and in implementing sustainability reporting is one highly visible illustration of this. *See* PLANYC PROGRESS REPORT 2014, at 56, http://www.nyc.gov/html/planyc2030/downloads/pdf/140422_PlaNYCP-Report_FINAL_Web.pdf [http://perma.cc/H6MX-VTZL].

115. *See, e.g.*, *id.* at 55.

related negotiations and forums now regularly including events highlighting actions at sub-national levels.[116]

VI. CONCLUSION

Sustainability reporting is already *de rigueur* among large companies and is now starting to be adopted by municipalities. This article has summarized this recent trend and explained why it is both part of an emerging legal obligation for cities and a pragmatic development in terms of public policy. The exemption of municipalities from U.S. securities laws has been eroding, and, given trends in investor expectations, city governance, and the exigencies of managing a city and its finances in changing environmental contexts, we should expect to see sustainability reporting become an expectation. Given the benefits of sustainability reporting—everything from boosting the efficiency of government to improving access to capital to reducing unnecessary negative environmental impacts—the movement of municipalities to engage in sustainability reporting should be embraced by anyone with an interest in improved governance.

116. Mayors on the Frontline of Battle Against Climate Change – UN, UN AND CLIMATE CHANGE (May 29, 2014), http://www.un.org/climatechange/blog/2014/05/29/mayors-on-frontline-of-battle-against-climate-change-un/ [http://perma.cc/W69M-8FGF]; *see, e.g.*, *Warsaw Dialogue on Scaling-Up Local and Subnational Climate Action*, CITY OF WARSAW (Jan. 23, 2014), https://www.um.warszawa.pl/en/articles/climate-change-conference-2013-warsaw [http://perma.cc/2GN5-RCCW].