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Toward a Non-Binary Vision of Disclosure Regulation

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Heminway, Joan MacLeod. (2023). *Toward non-binary vision of disclosure regulation*. Jotwell: *The Journal of Things We Like (Lots)*, 2023(6), 1-1.

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Heminway, Joan MacLeod. "Toward a Non-Binary Vision of Disclosure Regulation." Jotwell: *The Journal of Things We Like (Lots)*, vol. 2023, no. 6, June 2023, pp. 1-1. HeinOnline.

OSCOLA 4th ed.

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Toward A Non-Binary Vision of Disclosure Regulation

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Date : June 30, 2023

Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 **Tex. L. Rev.** 273 (2022).

Public company law and practices in the United States are rooted in line-item and gap-filling disclosure regulation. Although the precise place and value of disclosure in business law and regulation has been—and (appropriately) continues to be—debated, mandatory disclosure has been a cornerstone of the U.S. federal securities laws applying to public companies since the enactment of the [Securities Act of 1933](#). Together with liability (including antifraud) provisions and substantive regulation, mandatory disclosure rules have been one of the three core regulatory tools employed at the federal level to promote capital formation and fair, honest markets for securities, while at the same time providing core protections for investors.

At its core, Lisa Fairfax's *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure* embraces mandatory disclosure rules in the spirit in which they have been enacted and employed in U.S. federal securities regulation. The article also, however, articulates the independent and cooperative value of voluntary disclosure as an important piece of the regulatory puzzle. In essence, Fairfax suggests that "the modern publicness of corporate information has eroded the walls between voluntary and mandated disclosure, making it impossible not to consider voluntary disclosure as an integral aspect of mandated disclosure and the overall disclosure regime in which corporations operate." Importantly, Fairfax illustrates this proposition in the context of one of the most hotly contested areas of current regulatory debate: ESG (environmental, social, and governance) disclosures, including [the U.S. Securities and Exchange Commission's climate change disclosure proposal](#). Her insightful and diplomatic treatment of the subject matter is a breath of fresh air in ongoing debates about both the regulation of ESG disclosures specifically and mandatory disclosure as a component of securities regulation more generally.

Dynamic Disclosure first offers background on the SEC's climate change proposal as part of the overall history and usage of mandatory disclosure in U.S. federal securities regulation. It then proceeds to outline the debate between and among the proposal's supporters and detractors and to offer an alternative perspective on the debate, essentially embracing points made by both sides. Fairfax supports her thesis with theory and matter-of-fact reasoning, citing to a wide variety of sources.

Along the way, she also treats us to a clear and cogent primer on ESG disclosures. She is careful to note the foundational roles played by line-item and gap-filling mandatory disclosure rules that already compel the disclosure of ESG information in certain settings. Especially important in this regard are the disclosure requirements adopted by the U.S. Securities and Exchange Commission in [Item 303 of Regulation S-K](#) and the gap-filling mandatory disclosure rules in [Rule 408 under the Securities Act of 1933](#) and [Rule 12b-20 under the Securities Exchange Act of 1934](#). Interestingly, Fairfax does not mention in this same breath the overall disclosure nudge that potential liability under [Section 10\(b\)](#) of and [Rule 10b-5](#) under the 1934 Act provide in compelling ESG disclosures (although she later notes that Section 10(b) encourages the production of accurate and complete disclosures).

I most enjoyed Part III of *Dynamic Disclosure*, in which Fairfax makes her case for dynamic disclosure—the naturally amicable coexistence of voluntary disclosure and mandatory disclosure. This part of the article also usefully communicates four benefits of voluntary disclosure: flexibility as to content and timing; the provision of a laboratory for disclosure experimentation; accessibility/digestibility; and adaptability/timeliness. Finally, before addressing a few possible remaining concerns about dynamic disclosure (possible disclosure overload, a lack of comparability, and the potential for inaccuracies), Part III illustrates the characteristically interconnected nature of voluntary and mandatory disclosure.

Fairfax indicates that her work in *Dynamic Disclosure* "seeks to shift the disclosure debate away from a binary choice between mandatory and voluntary disclosure." The article skillfully serves that purpose. Indeed, it is inspirational—and illuminating—to read legal scholarship that is not advocating a sterile, exclusive solution in a my-way-or-the-highway manner. Fairfax's thesis and analysis are refreshingly nuanced and pragmatic, and she illuminates an important topic. Good legal scholarship doesn't get much better than that.

Cite as: Joan MacLeod Heminway, *Toward A Non-Binary Vision of Disclosure Regulation*, JOTWELL (June 30, 2023) (reviewing Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 **Tex. L. Rev.** 273 (2022)), <https://corp.jotwell.com/toward-a-non-binary-vision-of-disclosure-regulation/>.