

GREEN DISCLOSURES: ENHANCING THE ENVIRONMENTAL ASPECT OF SUSTAINABILITY REPORTING*

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“Now it is required that those who have been given a trust must prove faithful.”

—1 Corinthians 4:2

I. INTRODUCTION: PUBLICLY-LISTED COMPANIES AT THE INTERSECTION OF PUBLIC DISCLOSURES AND ENVIRONMENTAL CONCERNS

Publicly-listed companies (“PLCs”) ought to acknowledge that they play influential roles in society and, by embracing that stature, they must assume concomitant social responsibilities.

While “[t]he State recognizes the indispensable role of the private sector,”¹ the Constitution acknowledges that “[t]he use of property bears a social function, and all economic agents shall contribute to the common good.”² Hence, PLCs must pitch in to “promote social justice in all phases of national development”³ and craft a “just and dynamic social order[.]”⁴

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¹ CONST. art. II, § 20.

² Art. XII, § 6.

³ Art. II, § 10.

⁴ Art. II, § 9.

From the disclosure perspective, the Constitution requires the State to “provide the policy environment for the [...] emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information[.]”⁵ On a related note, “[t]he State recognizes the vital role of communication and information in nation-building.”⁶ PLCs are no less the concern of such broad principles as the Securities Regulation Code was crafted precisely to ensure “full and fair disclosure about securities[.]”⁷ Hence, securities laws were crafted to “promote full disclosure in the securities market and prevent unscrupulous individuals, who by their positions obtain non-public information, from taking advantage of an uninformed public.”⁸

On the other hand, PLCs have increasingly upscaled their operations, which in turn pose significant environmental concerns. Principle 16 of Securities and Exchange Commission (SEC) Memorandum Circular No. 19, Series of 2016, or the code of Corporate Governance for Publicly-Listed Companies (“Code of Corporate Governance”), states:

The company should be socially responsible in all its dealings with the communities where it operates. It should ensure that its interactions serve its environment and stakeholders in a positive and progressive manner that is fully supportive of its comprehensive and balanced development.

The public has increasingly undertaken efforts to hold PLCs accountable, partaking in strategies such as shareholder activism, which is actively investing in their shares and participating in management decisions in order to steer company policy towards environmentally-sound business decisions.⁹ Thus, the likes of ExxonMobil have felt the surge of such trend when its shareholders approved a resolution asking the company to report on how climate change policies would affect the conduct of business.¹⁰

⁵ CONST. art. XVI, § 10.

⁶ Art. II, § 24.

⁷ Rep. Act No. 8799 (2000), § 2.

⁸ SEC v. Interport Resources Corp. [hereinafter “Interport”], G.R. No. 135808, 567 SCRA 354, 388, Oct. 6, 2008.

⁹ Gordon Clark, Tessa Hebb & James Salo, *Social and Environmental Shareholder Activism in the Public Spotlight: US Corporate Annual Meetings, Campaign Strategies, and Environmental Performance, 2001–04*, 40 ENV'T. & PLAN. A 1370, 1370 (2008); Lydia DePillis, *Shareholder Activism is on the Rise, but Companies are Fighting Back*, AMERICAN COUNCIL FOR CAPITAL FORMATION WEBSITE, available at <http://accf.org/2019/01/31/shareholder-activism-is-on-the-rise-but-companies-are-fighting-back/>

¹⁰ Energy in Depth - Climate & Environment, *How Activist Shareholders Can Harm Investors*, ENERGY IN DEPTH WEBSITE, Oct. 22, 2019, available at <https://eidclimate.org/shareholder-activism-explained/>

The United Nations (UN) Environment Programme (“UNEP”) advocates for the active engagement of civil society, which has been key to the global progress towards sustainable development. Access to information on environmental matters has been recognized “at the forefront of strengthening citizens’ environmental rights so that members of the public and their representative organizations can play a full role in addressing the multi-dimensional challenges facing our world today[.]”¹¹

Aligning with the objective to engage civil society, the SEC recently adopted SEC Memorandum Circular No. 4, Series of 2019, or the Sustainability Reporting Guidelines for Publicly-Listed Companies (“Guidelines”), bringing the two concerns of information disclosures and environmental sustainability together and placing PLCs at the center of these issues. In adopting these Guidelines, the SEC prompts PLCs to report on business information which pose significant impact on the environment. Such disclosures are meant to facilitate stakeholder engagement which, in turn, strives to promote more environmentally-sustainable company practices.

However, there remain misgivings on just how efficacious these Guidelines will be. Thus, this work provides an overview of such Guidelines, focusing on the pivotal concept of materiality which governs much of the disclosure process. Surveying foreign experience on the matter, and juxtaposing such findings with the Guidelines as crafted, much can still be done in order to calibrate the Guidelines in order to achieve its avowed purpose. Hence, this work propounds mechanisms to fine-tune environmental disclosures to genuinely reflect material information, proposes clear directions as to the use of such disclosures, and pitches the crafting of industry-specific disclosures in order to provide greater relevance and accuracy in such disclosures.

II. SUSTAINABILITY REPORTING

A. Underlying Principles and Overarching Policies

On 25 September 2015, the UN adopted A/RES/70/1 entitled “Transforming Our World: The 2030 Agenda for Sustainable Development” (“UN Resolution”), in which it described the agenda to be “a plan of action

¹¹ UNITED NATIONS ENVIRONMENT PROGRAMME, PUTTING RIO PRINCIPLE 10 INTO ACTION: AN IMPLEMENTATION GUIDE 2 (2015).

for people, planet and prosperity.” It was an agenda to be implemented by all countries and stakeholders acting in collaborative partnership.¹²

The UN Resolution identified 17 sustainable development goals (“SDGs”), which are “integrated and indivisible, global in nature and universally applicable[.]”¹³ It also recognized the link between sustainable development and other relevant ongoing processes in the economic, social, and environmental fields.¹⁴

The Philippines, guided by the UN Resolution, has set its own national policies and priorities to achieve sustainable development. In late 2015, after the adoption of the UN Resolution, the Philippines drafted the Philippine Development Plan 2017-2022 (“Philippine Development Plan”) recognizing the need to ensure sustainable development. It embodied the action plan to achieve *AmBisyon Natin 2040*, the country’s collective long-term vision and aspirations, which is summarized as “*matatag, maginhawa at panatag na buhay*” or “a strongly rooted, comfortable, and secure life.”¹⁵

B. The Philippine Securities and Exchange Commission’s Guidelines

In late 2016, following the adoption of the UN Resolution and the drafting of the Philippine Development Plan, the SEC promulgated the Code of Corporate Governance to promote the development of a strong corporate governance culture.¹⁶ Under Principle 10 on Increasing Focus on Non-Financial and Sustainability Reporting, the PLC should ensure that material and reportable sustainability issues are disclosed. Following Principle 10, Recommendation 10.1 is for the Board of Directors to have a clear and focused policy on the disclosure of non-financial information, with emphasis on the management of economic, environmental, social, and governance (“EESG”) issues of its business.¹⁷

The recommendation of sustainability reporting as part of the matters for disclosure of publicly-listed corporations was the initial step forward by

¹² Transforming Our World: The 2030 Agenda for Sustainable Development, pmbli, U.N. Doc. A/RES/70/1 (2015).

¹³ *Id.* at 13, ¶ 55.

¹⁴ *Id.*

¹⁵ NEDA, *About AmBisyon Natin 2040*, NAT’L ECON. AND DEV. AUTHORITY (AMBISYON NATIN 2040) WEBSITE, at <http://2040.neda.gov.ph/about-ambisyon-natin-2040/> (last updated 2016).

¹⁶ SEC Mem. Circ. No. 19 (2016).

¹⁷ *Id.*

the SEC towards the attainment of the SDGs. Another step forward was made in 2019 when the SEC issued the Guidelines with the objective of promoting sustainability reporting:¹⁸

The Guidelines is intended to help PLCs assess and manage non-financial performance across Economic, Environmental and Social aspects of their organization and enable PLCs to measure and monitor their contributions towards achieving universal targets of sustainability, such as the United Nations Sustainable Development Goals, as well as national policies and programs, such as *AmBisyon Natin 2040*.¹⁹

The Guidelines provide the definition of sustainability put forward by a report of the World Commission on Environment and Development:²⁰ “Sustainability is defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’ It focuses on how a company manages its economic, environmental and social impacts, risks and opportunities.”²¹

Sustainability reporting is the practice of reporting on non-financial matters with significant economic, environmental, and social impact. Sustainability reports enable corporations to assess their performance and set goals to continuously improve their impact on sustainable development. When sustainability reports are made public and available to stakeholders, such as shareholders, there is wider transparency and accountability that motivate corporations to fulfill their responsibilities in sustainable development.²²

The Guidelines require a PLC to attach to its annual report a sustainability report drafted in accordance with internationally recognized frameworks and standards. The Guidelines adopt the “comply or explain” approach for the first three years from implementation. During this “comply or explain” period, a corporation can provide explanations for items where it still has no available data on. The penalty for non-attachment of the sustainability report to the annual report is subject to a scale of fines provided under SEC Memorandum Circular No. 06, Series of 2005.²³

¹⁸ SEC Mem. Circ. No. 04 (2019).

¹⁹ *Id.*

²⁰ *Id.* at 2 n.3.

²¹ *Id.* at 2.

²² *Id.*

²³ SEC Mem. Circ. No. 06 (2005).

C. Sustainability Reporting and Environmental Protection

Principle 4 of the Rio Declaration on Environment and Development (“Rio Declaration”) integrates environmental protection into the sustainable development process.²⁴ The UNEP instructs that “policies and activities in various spheres, including environmental protection, must be integrated in order to achieve sustainable development.”²⁵

Aligned with Rio Principle 4, among the essential components of sustainability reporting is environmental disclosure. As defined in the Guidelines, “[e]nvironmental disclosures relate to how the company manages the natural resources it needs for its business, as well as how it minimizes its negative impacts to the environment, including biodiversity.”²⁶ The four types of environmental disclosures specified in the Guidelines are Resource Management, Ecosystems and Biodiversity, Ecological Impacts, and Environmental Impact Management Reporting.²⁷

The inclusion of environmental disclosures is aligned with the Philippines’ international commitments concerning the protection and conservation of the environment.

In 1992 at Rio de Janeiro, Brazil, more than 178 governments present at the UN Conference on Environment and Development adopted Agenda 21 and the Rio Declaration, affirming their commitment to take action to achieve sustainable development. As early as 1992, the UN has recognized the role of information and public discourse in sustainable development and environmental protection, introducing material on the same such as Chapter 40, Agenda 21 (“Information for decision-making”)²⁸ and Principle 10, Rio Declaration (“Access to information, public participation and access to justice in environmental matters”).²⁹ In 2010, the UNEP published the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental

²⁴ 1992 Rio Declaration on Env’t and Dev. [hereinafter “Rio Declaration”], at 2, princ. 4, U.N. Doc. A/CONF.151/26 (Vol. I) (1992).

²⁵ NICHOLAS ROBINSON & LAL KURUKULASURIYA, UNITED NATIONS ENVIRONMENT PROGRAMME, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW 25 (2006).

²⁶ SEC Mem. Circ. No. 04 (2019), at 45.

²⁷ *Id.*

²⁸ U.N. Conference on Env’t & Dev., Means of Implementation, ch. 40, U.N. Doc. A/CONF.151/26 (Vol. III) (1992).

²⁹ Rio Declaration, at 2, princ. 10.

Matters (“Bali Guidelines”) to serve as a guide in putting Rio Principle 10 into action.³⁰ Thus, through these international instruments, the principle of right to information was extended to environmental governance with the objective of enabling public discourse in policy-making regarding environmental issues.³¹

The implementation of Rio Principle 10 has been considered a means for states to enhance their application of the principle of prevention, allowing the same to apply to environmental matters. The UNEP, citing the International Court of Justice Pulp Mills in the River Uruguay case, recognized that the principle of prevention extends to environmental matters:

The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” (Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that *this obligation “is now part of the corpus of international law relating to the environment”* (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996).³²

The role of sustainability reporting in achieving sustainable development is evident in Rio Principle 10. Sustainability reporting is a means for public disclosure of environmental matters. Public discourse allows the collection of feedback on past actions and impacts of businesses on the environment, for the purpose of exacting accountability and improving present and future actions and impacts. Through sustainability reporting and the purposes it serves, the government and the private sector can work together in ensuring the protection of the environment, which is a necessary component of sustainable development.

³⁰ UNITED NATIONS ENVIRONMENT PROGRAMME, GUIDELINES FOR THE DEVELOPMENT OF NATIONAL LEGISLATION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (2010).

³¹ Ria Lambino, *The Adoption and Institutionalization of an Environmental Disclosure Program in the Philippines: A Policy Analysis* (May 2014) (dissertation for Kyoto University, on file with the Kyoto University Research Information Repository).

³² *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 I.C.J. 14, ¶ 101 (Apr. 20). (Emphasis supplied.)

SEC Chairperson Emilio B. Aquino recognized the benefits of sustainability reporting in achieving the SDGs: “For one, it allows companies to identify, assess and effectively manage sustainability risks and opportunities; and gives them an opportunity to make necessary changes in their strategies and business plans to ensure their long-term viability and competitiveness.”³³

Information disclosure has been viewed as a significant policy tool, and in fact has been termed the “third wave of environmental regulation,” following command and control and market-based regulation.³⁴ Through sustainability reporting, sustainable development initiatives can be mobilized systematically through statutes, or organically through internal learning and public pressure.³⁵ Sustainability reporting helps businesses gain insight on their processes and identify areas of improvement.³⁶ Thus, studies have found that environmental disclosures would bring about better environmental performance, thereby promoting sustainable development.³⁷

In the Voluntary National Review of the SDGs reported to the UN in 2019, the Philippines recognized the Guidelines as one of the relevant policy issuances adopted to attain the SDGs.³⁸ Considering the role of sustainability reporting in the attainment of the SDGs and the realization of the AmBisyon Natin 2040, the SEC issued the Guidelines with the following objectives:

Make sustainability reporting relevant and value adding for Philippine PLCs[;] Help PLCs to identify, evaluate and manage their material Economic, Environmental and Social (EES) risks and opportunities[;] Help PLCs to assess and improve their non-financial performance across EES aspects of their organization to optimize business operations, improve competitiveness, and long-term success[;] Provide a mechanism that would allow PLCs to communicate with its stakeholders, including investors or its

³³ SEC, *SEC Institutes Sustainability Reporting for Listed Companies*, SECURITIES AND EXCHANGE COMM’N WEBSITE, available at http://www.sec.gov.ph/wp-content/uploads/2019/02/2019PressRelease_SEC-institutes-sustainability-reporting-for-listed-companies-02262019.pdf

³⁴ Lambino, *Supra* note 31, at 2.

³⁵ *Id.*

³⁶ GLOBAL REPORTING INITIATIVE, INDIAN INSTITUTE OF MANAGEMENT BANGALORE, & TATA CONSULTANCY SERVICES, *SUSTAINABILITY INTEGRATION: CORPORATE REPORTING PRACTICES IN INDIA 20* (2016).

³⁷ Rizal Yaza, Sigit Arie Wibowo, Ulfaturrahmah & Dayana Jalaludin. *Environmental Disclosure Practices After Mandatory Disclosure Policy in Indonesia*, 12 J. BUS. & RETAIL MGM’T RES. 88, 91 (2018).

³⁸ THE 2019 VOLUNTARY NATIONAL REVIEW OF THE PHILIPPINES 30 (2019).

potential investors[;] Enable PLCs to measure and monitor its contributions towards achieving universal targets of sustainability, such as the United Nations Sustainable Development Goals (UN SDG), as well as national policies and programs, such as AmBisyon Natin 2040[.]³⁹

After the enactment of the Guidelines, the Philippines reported to the UN that information gaps still persist and need to be addressed:

Critical knowledge and data gaps persist. The government needs to be equipped with the right tools and approaches based on best-available science to effectively address the emerging challenges posed by climate change and prioritize adaptation investments and actions. Moreover, appropriate indicators to measure adaptive capacity and resilience are still lacking. *More support is needed to generate accurate, timely, and local-specific climate risk information, and raise greater awareness and understanding on the use of such information especially by the LGUs and communities.*⁴⁰

Thus, there is a need to revisit the Guidelines and determine how they can be made more effective and relevant in the country's attainment of the SDGs.

D. Analogous Local Regulations

To better grasp the Philippines' own sustainability reporting regime, it would be worth surveying other similar domestic disclosure systems.

Presidential Decree No. 1586 ("PD 1586") established an Environmental Impact Statement ("EIS") System to be regulated by the Department of Environment and Natural Resources (DENR) and the Environmental Management Bureau (EMB). Under PD 1586, before an entity can engage in an environmentally-critical project, it must first secure an Environmental Compliance Certificate ("ECC").

To obtain an ECC, the project proponent must disclose all relevant information necessary for a methodical assessment of the environmental impacts of its project.⁴¹ The Environmental Impact Assessment ("EIA")

³⁹ SEC Mem. Circ. No. 04 (2019), at 1-2.

⁴⁰ THE 2019 VOLUNTARY NATIONAL REVIEW OF THE PHILIPPINES 31 (2019). (Emphasis supplied.)

⁴¹ DENR EMB-EIAMD, REVISED PROCEDURAL MANUAL FOR DENR ADMINISTRATIVE ORDER NO. 30 SERIES OF 2003 (DAO 03-30) [hereinafter, "Revised Procedural Manual"] § 1 (2007); Pres. Dec. No. 1586 Rules & Regs. (2007).

process is used to integrate environmental concerns in the planning process of projects.⁴² The project proponent is required to make commitments in its Environmental Management Plan (“EMP”) to prevent or mitigate the assessed environmental impacts of the project.⁴³ After the implementation of the project, the project becomes subject to monitoring, validation, and evaluation/audit procedures to ensure compliance with the conditions set in the ECC and EMP.⁴⁴

In 2003, the DENR promulgated DENR Administrative Order No. 2003-14 (“DAO 03-14”), creating the Philippine Environment Partnership Program (“PEPP”) to support industry self-regulation towards improved environmental performance.⁴⁵ DAO 03-14 requires entities governed by environmental laws to conduct mandatory self-monitoring and compliance. The DENR enforces the PEPP through public recognition and incentives for companies that have a record of superior environmental performance.⁴⁶ Moreover, DAO 03-14 requires the submission of audited and certified environmental reports on a quarterly and annual basis to the applicable Environmental Authority (e.g. Laguna Lake Development Authority, EMB).⁴⁷

Later in 2003, the DENR promulgated DENR Administrative Order No. 2003-26 (“DAO 03-26”) adopting the Industrial ECOWATCH System (“ECOWATCH”) as part of its compliance monitoring policies. Under the ECOWATCH program, industrial, commercial, and/or manufacturing establishments are rated using color-coded rating criteria. DAO AO 03-26 requires self-monitoring and compliance by covered firms and encourages voluntary reporting through an incentive system.⁴⁸

In early 2016, the Philippine Stock Exchange issued the Corporate Governance Guidelines for Companies Listed on the Philippine Stock Exchange, the purpose of which is to provide a mechanism by which investors can be informed of the corporate governance practices of listed companies.⁴⁹ Under Guideline No. 8 for the protection of the environment, Guideline No. 8.1 includes the establishment and disclosure of a clear policy statement that

⁴² Pres. Dec. No. 1586 Rules & Regs., § 1.

⁴³ § 1.

⁴⁴ § 2.3.

⁴⁵ DENR Adm. Order No. 14 (2003).

⁴⁶ § 5.

⁴⁷ § 7.

⁴⁸ DENR Adm. Order No. 26 (2003).

⁴⁹ Phil. Stock Exchange, Inc. Mem. Circ. No. 2016-0003 (2016).

articulates the company's protection of the environment, and Guideline No. 8.5 the implementation of an environment-related program.⁵⁰

In late 2016, the SEC promulgated the Code of Corporate Governance to promote the development of a strong corporate governance culture.⁵¹ Under Principle 10 on Increasing Focus on Non-Financial and Sustainability Reporting, the company should ensure that material and reportable sustainability issues are disclosed. Following Principle 10, Recommendation 10.1 is for the Board of Directors to have a clear and focused policy on the disclosure of non-financial information, with emphasis on the management of EESG issues of its business.⁵²

E. Comparison with Other Jurisdictions

1. Canada

The British Columbia Securities Commission's ("BCSC") National Instrument 51-102 ("NI 51-102") provides for Continuous Disclosure Obligations of issuers of securities. There are five key disclosure requirements in NI 51-102 that relate to environmental matters: environmental risks, trends and uncertainties, environmental liabilities, asset retirement obligations, and financial and operational effects of environmental protection requirements.⁵³

To further NI 51-102, the Canadian Securities Administrators ("CSA") issued CSA Staff Notice 51-333 entitled "Environmental Reporting Guidance" to assist issuers in determining what environmental matters need to be disclosed. As in most jurisdictions, the determining factor is materiality, the test of which is stated as follows: "Information relating to environmental matters is likely material if a reasonable investor's decision whether or not to buy, sell or hold securities of the issuer would likely be influenced or changed if the information was omitted or misstated."⁵⁴

The Ontario Securities Commission ("OSC") recently conducted a targeted review of compliance with the continuous disclosure requirements and published the results thereof in OSC Staff Notice 51-716, in which it

⁵⁰ *Id.*

⁵¹ SEC Mem. Circ. No. 19 (2016).

⁵² *Id.*

⁵³ Canadian Securities Administrators [hereinafter "CSA"] Staff Notice 51-333 (2010), § 2.2.

⁵⁴ § 2.1.

noted the inconsistencies in the manner and content of environmental disclosures made by the issuers.⁵⁵

2. *United States*

Regulation S-K, entitled “Standard Instructions For Filing Forms Under Securities Act Of 1933, Securities Exchange Act Of 1934 And Energy Policy And Conservation Act Of 1975[.]” requires the disclosure by corporations of matters that are material to investors.

Under Regulation S-K, environmental matters that must be disclosed include the material effects of complying with environmental laws,⁵⁶ material environmental litigation,⁵⁷ and potentially material environmental problems identified in Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”).⁵⁸

While Regulation S-K repeatedly refers to the “materiality” standard, it fails to define the same. The U.S. Supreme Court defined materiality in the case of *TSC Industries v. Northway, Inc.*⁵⁹ in this manner: “The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.” In *Basic, Inc. v. Levinson*,⁶⁰ the U.S. Supreme Court further clarified that materiality will depend on the balancing of the probability of the event occurring and the anticipated magnitude of the said event.

3. *Singapore*

In Singapore, sustainability reporting is not a mandatory requirement under the Listing Manual, but a mere voluntary exercise. However, there has been progress towards mandatory reporting because of the increasing global interest in sustainability issues.⁶¹

⁵⁵ Ontario Sec. Comm’n [hereinafter “OSC”] Staff Notice 51-716 (2008).

⁵⁶ Eva Su & Nicole Vanatko, *Climate-Related Risk Disclosure Under U.S. Securities Laws*, CONGRESSIONAL RESEARCH SERVICE IN FOCUS, Sept. 10, 2019, available at <https://fas.org/sgp/crs/misc/IF11307.pdf>

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Hereinafter “*TSC Industries*,” 426 U.S. 438, 445 (1976).

⁶⁰ Hereinafter “*Basic*,” 485 U.S. 224, 238 (1988).

⁶¹ SINGAPORE EXCHANGE, GUIDE TO SUSTAINABILITY REPORTING FOR LISTED COMPANIES 7 (2016).

4. China

In China, sustainability reporting has been incorporated in various stock exchanges since 2000. Moreover, the Ministry of Environmental Protection issued a draft of the Guidelines for Environmental Information Disclosure of Listed Companies, requiring listed companies in polluting industries to regularly disclose environmental information and release environmental reports.⁶²

In 2014, China issued a comprehensive revision of its Environmental Protection Law. Chapter 5 of the said law focused on “Information Disclosure and Public Participation[.]” which was considered the first step towards national-level policy that guarantees the right to information on environmental matters.⁶³

However, while the regulatory framework in China appears promising, “greenwashing” has been a widespread practice resulting in the overall poor quality of environmental information disclosure.⁶⁴

5. Indonesia

In Indonesia, through Peraturan Pemerintah No. 47/2012 (“PP 47/2012”), the government required companies to disclose their social and environmental activities in their annual report. This regulation was promulgated in recognition that business industries are the biggest contributors of carbon emissions in the world.⁶⁵

It has been observed that PP 47/2012 changed the landscape of environmental disclosure since companies were put under public pressure to obtain legitimacy through disclosure.⁶⁶

III. MATERIALITY

At the core of sustainability reporting is the concept of materiality. On a practical note, materiality aids a PLC in sifting through volumes of

⁶² Rongbing Huang & Yubo Huang, *Does Internal Control Contribute to a Firm's Green Information Disclosure? Evidence from China*, 12 SUSTAINABILITY 1, 1-2 (2020).

⁶³ United Nations Environment Programme, *supra* note 11, at 21.

⁶⁴ Huang & Huang, *supra* note 62, at 2.

⁶⁵ Yaza et al., *supra* note 37, at 89.

⁶⁶ *Id.* at 98.

information in order to determine which data ought to be disclosed.⁶⁷ Especially considering the cumbersome procedure of auditing, accounting, and reporting company data,⁶⁸ materiality helps identify information that is “sufficiently important”⁶⁹ so as to cause an “impact”⁷⁰ on the environment.

On a more existential aspect, materiality assessments provide companies with introspection, allowing them to effectively manage sustainability risks and opportunities, improve their management systems, motivate their workforce, and craft a sustainable vision, strategy, and business plan.⁷¹ One empirical study found that sustainability reporting has prompted some companies to adopt environmental, water, and waste management systems.⁷² After all, the long term vision in such endeavor is to promote innovation hand-in-hand with value generation,⁷³ where value goes beyond mere financial indicators.⁷⁴

Finally, materiality also provides external advantages. Materiality assessments facilitate stakeholder engagement⁷⁵—in some ways a feedback mechanism—as these allow companies to communicate environmental disclosures they deem important, in turn motivating interested parties to raise their concerns through various channels. Marks & Spencer’s “Look Behind the Label” campaign, an initiative to assure customers of responsible production practices,⁷⁶ was, in fact, motivated by such engagement.⁷⁷ Of course, materiality assessments are also about regulatory compliance and

⁶⁷ SEC Mem. Circ. No. 04 (2019), at 8.

⁶⁸ Jeff Leinawever, *Is corporate sustainability reporting a great waste of time?*, THE GUARDIAN, Jan. 6, 2015, available at <https://www.theguardian.com/sustainable-business/2015/jan/06/corporate-sustainability-reporting-waste-time>

⁶⁹ SEC Mem. Circ. No. 04 (2019), at 14.

⁷⁰ *Id.* at 8.

⁷¹ *Id.* at 7-8.

⁷² Ioannis Ioannou & George Serafeim, *Corporate Sustainability: A Strategy?*, at 2 (Jan. 2019) (working paper for Harvard University on file with the Harvard Business School).

⁷³ Armando Calabrese, Roberta Costa, Nathan Ghiron & Tamara Menichini, *Materiality Analysis in Sustainability Reporting: A Tool for Directing Corporate Sustainability Towards Emerging Economic, Environmental and Social Opportunities*, 25 TECHNOL. ECON. DEV. ECON. 1016, 1017 (2019).

⁷⁴ SEC Mem. Circ. No. 19 (2016), recommendations 10.1, 12.4.

⁷⁵ SEC Mem. Circ. No. 04 (2019), at 8.

⁷⁶ Marks & Spencer, *M&S Launches New 'Look Behind the Label' Campaign and Unveils Plans to Sell Fairtrade Clothing*, MARKS & SPENCER WEBSITE, Jan. 30, 2006, available at https://corporate.marksandspencer.com/media/press-releases/archive/2006/30012006_mslaunchesnewlookbehindthelabelcampaignandunveilsplanstosellfairtradeclothing.

⁷⁷ MAYA FORSTATER, SIMON ZADEK, DEBORAH EVANS, ALAN KNIGHT, MARIA SILLANPÄÄ, CHRIS TUPPEN & ANNE-MARIE WARRIS, *THE MATERIALITY REPORT: ALIGNING STRATEGY, PERFORMANCE AND REPORTING* 14 (2006).

monitoring to ensure that companies abide by laws and regulations concerning the environment.⁷⁸ In this regard, materiality assessments carry out the Constitutional mandate of “equitably diffusing wealth and political power[.]”⁷⁹ since access to information provides leverage over company action. In fact, in the U.S., powerful actors such as the government, international organizations, and activist investors have made environmental issues the subject of shareholder resolutions.⁸⁰

On the whole, materiality assessment is really about accountability: internally, as a company’s self-policing mechanism over its own practices; and externally, by providing stakeholders and the government a channel through which to influence company decisions. Materiality assessment strives for Justice Louis Brandeis’ truism that “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁸¹

The distillation of materiality in the Guidelines is not completely straightforward. Granted, the Guidelines define materiality as “the principle that determines which relevant topics are sufficiently important that it is essential to report on them.”⁸² Thereafter, another portion of the Guidelines provides a general standard in determining which pieces of information might be considered material:

1. Materiality

An organization is faced with a wide range of topics on which it can report. Relevant topics, which potentially merit inclusion in the report, are those that can reasonably be considered important for reflecting the organization’s economic, environmental, and social impacts, or influencing the decisions of stakeholders. In this context, ‘impact’ refers to the effect an organization has on the economy, the environment, and/or society (positive or negative). A topic can be relevant — and so potentially material — based on only one of these dimensions.⁸³

⁷⁸ *Id.*

⁷⁹ CONST. art. XIII, § 1.

⁸⁰ Ioannou & Serafeim, *supra* note 72, at 10.

⁸¹ LOUIS BRANDEIS, OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT 92 (1914).

⁸² SEC Mem. Circ. No. 04 (2019), at 14.

⁸³ SEC Mem. Circ. No. 04 (2019), at 8.

Still, in another portion, the Guidelines provide further, more specific tests that will aid a PLC’s materiality assessment, wherein a topic may be considered material if it falls into any of the following:

1. It is a **KEY CAPITAL/RISK/OPPORTUNITY** that impacts value creation
2. Your **KEY BUSINESS ACTIVITIES** impact the topic
3. Your **SUBSIDIARIES/CONTRACTORS/SUPPLY CHAIN** contribute significant impacts to this topic
4. Your **PRODUCTS/SERVICES** contribute impacts to this topic
5. There is a **TREND** that points to a future where this topic will become material to you

The assessment of materiality associated with sustainability issues should take into account their influence on the stakeholders assessments and decisions and the significance of the company’s economic, social and environmental impacts.⁸⁴

Finally, the Guidelines even provide an illustrative Materiality Matrix for Sustainability Issues which ranks the importance of sustainability issues based on their impact on the PLC and its stakeholders:⁸⁵

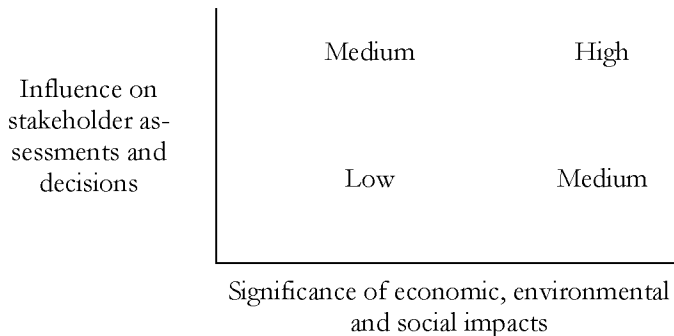


FIGURE 1. Materiality Matrix for Sustainability Issues.

Complicating the Guidelines’ articulation of materiality is their reference to certain globally accepted standards and principles on

⁸⁴ *Id.* at 15-16 (Bold and underscoring in the original.)

⁸⁵ *Id.*

sustainability reporting, each of which proffer a differing concept of materiality.⁸⁶

Global Reporting Initiative (“GRI”)	Integrated Reporting Framework	Sustainability Accounting Standards	Task Force on Climate-related Financial Disclosure (“TCFD”)
“Material aspects” are those that reflect the organization’s significant economic, environmental and social impacts; or that substantively influence the assessments and decisions of stakeholders	A matter is material if it could substantively affect the organization’s ability to create value in the short, medium, or long term	Financially material issues that are reasonable to likely to impact the financial condition or operating performance of the typical company within an industry and therefore are most important to investors	Public companies’ legal obligation to disclose material information in their financial filings—including material climate-related information

TABLE 1. Global Sustainability Reporting Standards Referenced in the Guidelines.

Of all these definitions, the Guidelines’ own definition of materiality closely resembles that of the GRI’s. The GRI framework borrows principles from financial reporting, although it merely provides general suggestions instead of specific guidelines.⁸⁷ On the other hand, the International Integrated Reporting Council’s (“IIRC”) Framework places emphasis on value generation, adding therein a temporal aspect that stretches out over a period of time. The IIRC Framework’s methodology consists of (1) establishing the scope of materiality assessments; (2) filtering, evaluating, and prioritizing matters based on quantitative and qualitative relevance; and (3)

⁸⁶ *Id.* at 2-5, 14.

⁸⁷ Susie Wu, Changliang Shao & Jiquan Chen, *Approaches on the Screening Methods for Materiality in Sustainability Reporting*, 10 SUSTAINABILITY 1, 3 (2018).

setting the reporting boundary and finalizing disclosures.⁸⁸ The Sustainability Accounting Standards Board's parameters place more emphasis on financial and investor concerns. It is only the TCFD's materiality definition that encapsulates the environmental concern, albeit specifically referring to climate-related data.

In incorporating, by way of reference, these globally accepted standards, the SEC appears to prompt PLCs to rely on these as secondary or supplementary material on matters where the Guidelines provide little instruction.

On the specific aspect of the environment, the Guidelines appear to be concerned with input and output flows, connecting such operations with ideas such as resource management, ecosystem and biodiversity, environmental impact, and environmental compliance:

Environmental disclosures relate to how the company manages the natural resources it needs for its business, as well as how it minimizes its negative impacts to the environment, including biodiversity. The company's ability to access materials needed for its operations is critical to company's long-term success.⁸⁹

Nevertheless, the Guidelines are accompanied by an annexed Reporting Template, containing, among others, a section on the environment. This portion of the Reporting Template is basically a comprehensive checklist of sorts, traversing various aspects of a PLC's operations such as: energy, water, and materials consumption; site of operations; emissions, solid and hazardous wastes, and effluents; and even a tally of legal cases related to environmental compliance, as well as pecuniary fines paid, if any.⁹⁰

Still and all, materiality assessments pose three interrelated challenges that could foreseeably hinder the Guidelines' purposes: interpretation, operationalization, and application.⁹¹

⁸⁸ *Id.*

⁸⁹ SEC Mem. Circ. No. 04 (2019), at 12.

⁹⁰ SEC Mem. Circ. No. 04 (2019), at 24-32.

⁹¹ Granted, SEC Mem. Circ. No. 4 (s. of 2019) had only been recently adopted, so the success thereof has yet to be fairly appraised. Still, that can only mean that the Philippines is already late in the game, as some jurisdictions have adopted sustainability reporting guidelines more than 20 years ago. It would be worthwhile, therefore, to survey the accumulated criticisms of foreign practice and determine whether on the face of the Philippines' own guidelines, the latter might suffer from the same issues.

On the matter of interpretation, traditional notions of materiality are still confined to a myopic and firm-centric view of sustainability. Among the mass of information, some firms tend to focus on short-term impacts, emphasize only backward-looking accuracy, and reveal a narrow understanding of persons interested in company disclosures.⁹² Moreover, competing frameworks essentially mean an absence of a standard, which in turn leads to a measurement uncertainty. Different measures of materiality, therefore, lead to “boilerplate” language,⁹³ or the disposition towards rote, unimaginative, and non-communicative motherhood statements.

Ambiguity, therefore, engenders selectivity, and results in a “paradox” whereby companies simply declare themselves to be sustainable even amid pressing environmental issues such as climate change.⁹⁴ Amidst ambiguity, companies are susceptible to “greenwash,” or convey false information.⁹⁵ This presents immediate concerns as people necessarily proceed on available information, and greenwashing distorts their incentives and actions.

In this regard, the Guidelines provide almost no mechanisms to address “boilerplate” and “greenwashing” tendencies. Concededly, the Guidelines require disclosures to be balanced, in that there be no bias in the selection or presentation of information, and that the report must reflect both the positive and negative aspects of the organization’s performance. Also required is a measure of completeness, in that PLCs must consider the extent, specificity, and preciseness of information. Moreover, such disclosures must be reliable, requiring PLCs to gather, record, compile, analyze, and report in a manner subject to examination. Information must also be accurate, including citation of sources, data, and methodology used for stakeholders to assess. Finally, the same must be consistent and comparable over time, and across similarly situated entities.⁹⁶

But for the most part, PLCs are left to their own devices in carrying out their materiality assessments. Non-attachment of the sustainability report is merely penalized as an Incomplete Annual Report, for which the first

⁹² Forstater et al., *supra* note 77, at 14.

⁹³ Jill D’Aquila, *The Current State of Sustainability Reporting: A Work in Progress*, THE CPA JOURNAL, July 2018, available at <https://www.cpajournal.com/2018/07/30/the-current-state-of-sustainability-reporting/>.

⁹⁴ Peter Seele & Marc Chesney, *Toxic Sustainable Companies: A Critique on Current Corporate Sustainability Ratings and a Definition of ‘Financial Toxicity’*, 7 J. SUSTAINABLE FIN. & INVEST. 139 (2017).

⁹⁵ Robin Hicks, *Is sustainability reporting working?*, ECO-BUSINESS, June 29, 2017, available at <https://www.eco-business.com/news/is-sustainability-reporting-working/>.

⁹⁶ SEC Mem. Circ. No. 04 (2019), at 9-10.

offense is a reprimand/warning, the second offense a one-time PHP 30,000 fine plus PHP 500 for each day of delay, and the third offense a one-time PHP 60,000 fine plus PHP 1,000 for each day of delay.⁹⁷ Note, however, that the violation is relevant only for non-submission, but contemplates neither supply of inaccurate information nor under-reporting.

On the specific concern for the environment, one portion of the Guidelines theoretically maps out a PLC's interconnection with the environment through resource management, ecosystem and diversity, environmental impact, and environmental compliance, adding that "[t]he company's ability to access materials needed for its operations is critical to the company's long-term success."⁹⁸ Apart from such framework being limited to mere input and output flows, the allusion to "the company's long-term success"⁹⁹ appears to omit the environmental impact of day-to-day operations.

One empirical research has found that as a matter of company practice, materiality assessments remain incomplete and inconsistent,¹⁰⁰ with 250 of the world's largest companies, including BMW and Schneider-Electric, demonstrating substantial variations in the definition, identification, and presentation of materiality.¹⁰¹ Among the reasons for the variances in materiality assessment methodology is that companies differ on the distinct categories of stakeholders and perspectives they wish to appeal to.¹⁰²

Moreover, the sheer burden of weeding out material information tempts companies to reduce materiality assessments into a mere "box-ticking" exercise.¹⁰³ Thus, some companies would even attempt to turn the debate around and blame the whole idea of sustainability reporting itself: that reporting becomes burdensome, data is incomplete, value chain assessments are too complex, sustainability reporting is too costly, and that capital markets prefer condensed information to volumes of reports.¹⁰⁴

⁹⁷ SEC Mem. Circ. No. 06 (2005).

⁹⁸ SEC Mem. Circ. No. 04 (2019), at 12.

⁹⁹ SEC Mem. Circ. No. 04 (2019)

¹⁰⁰ Wu, Shao & Chen, *supra* note 87, at 1.

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 3-6.

¹⁰³ Hicks, *supra* note 95.

¹⁰⁴ Ralph Thurm, *Reforming sustainability reporting: for and against*, THE GUARDIAN, Mar. 11, 2013, available at <https://www.theguardian.com/sustainable-business/reforming-sustainability-reporting-pros-cons>.

In this regard, the Guidelines' materiality standards are highly subjective, providing little to no specific anchors on information particularly material, and with no clamor to really "internalize" social costs that the PLC might wreak.

Again, the Guidelines define materiality as "the principle that determines which relevant topics are sufficiently important that it is essential to report on them."¹⁰⁵ Such principle is rather broad and provides little guidance as to what constitutes material information. In another portion, "impact" is defined as that which "can reasonably be considered important for reflecting the organization's economic, environmental, and social impacts, or influencing the decisions of stakeholders[.]"¹⁰⁶ Hence, there is a demonstrable attempt at internalizing externally-dictated values regarding the environment. Yet, in still another portion, there appears to be certain specified tests that, while not quite indicative enough, are quite company-centric with its focus on key capital, risks, and opportunities; key business activities; subsidiaries, contractors, supply chains, products, and services; as well as trends.¹⁰⁷

In some ways, companies are also tone-deaf to their stakeholders' environmental concerns—that is, if they can even properly identify their relevant stakeholders to begin with.¹⁰⁸ In this regard, the Guidelines are unclear as to whom and for what particular purpose the sustainability reports will be disclosed. While the reporting company is enjoined to "provide insight into the nature and quality of the organization's relationships with its key stakeholders, including how and to what extent the organization understands, takes into account and responds to their legitimate needs and services[.]"¹⁰⁹ such obligation would be for naught if stakeholders, such as non-governmental organizations or government agencies with an environment mandate, are unable to access and act on such reports.

While sustainability reporting has seen improvement and progress, a 2015 survey of Dow 30 Companies' sustainability reporting practices finds its efficacy inconclusive.¹¹⁰ For materiality assessments to work, companies that engage in environmentally risky activities must bear the inherent risks.¹¹¹ To

¹⁰⁵ SEC Mem. Circ. No. 04 (2019), at 14.

¹⁰⁶ SEC Mem. Circ. No. 04 (2019), at 8.

¹⁰⁷ SEC Mem. Circ. No. 04 (2019), at 15-16.

¹⁰⁸ Forstater et al., *supra* note 77, at 15-16.

¹⁰⁹ SEC Mem. Circ. No. 04 (2019), at 8.

¹¹⁰ Elena Munoz, Lijuan Zhao & David Yang, *Issues in Sustainability Accounting Reporting*, 6 ACCT. AND FIN. RES. 64, 70 (2017).

¹¹¹ Seele & Chesney, *supra* note 94, at 11.

fine-tune materiality assessments for meaningful feedback mechanisms between companies and stakeholders, companies need to genuinely engage different stakeholders, gathering their insights on environmental issues so that company strategies can conform to evolving notions of sustainability.¹¹² This way, companies can transcend mere profit-making and progress into shared value generation;¹¹³ that is, sustainable outcomes for both the company and the environment.

IV. RECALIBRATING THE SUSTAINABILITY REPORTING REGIME

Still and all, sustainability reporting and materiality assessments have a long way to go in terms of design and implementation. There already exists an abundance of foreign practice, experience, and literature, pointing to some flaws and shortcomings of such corporate disclosure tools. Moreover, various parties have already proffered numerous refinements to the disclosure regime. This section is therefore devoted to some schemes which hope to pre-empt some of the anticipated inadequacies in the Philippines' own Guidelines.

A. Making Sustainable Development a Shared Concept through Stakeholder Engagement in Sustainable Reporting

In the UN Resolution adopted by the UN General Assembly on September 25, 2015, the UN recognized that the global sustainability agenda requires global solidarity that brings together “[g]overnments, the private sector, civil society, the United Nations system and other actors and mobilizing all available resources.”¹¹⁴

While global solidarity and collective activism in different sectors are required for sustainable development, these have not been substantially realized in the Philippines. In 2017, the National Economic and Development Authority (NEDA) reported that the private sector's participation in environment and natural resources (“ENR”) management remains largely untapped “due to the lack of a clear mechanism to guide the private sector in complementing government efforts.”¹¹⁵

¹¹² Calabrese et al., *supra* note 73.

¹¹³ *Id.* at 1033.

¹¹⁴ See *supra* note 23, at 10, ¶ 39.

¹¹⁵ PHILIPPINE DEVELOPMENT PLAN 2017-2022 320.

The need for government collaboration in fulfilling environmental duties was recognized by the Supreme Court in *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*,¹¹⁶ wherein it issued a writ of continuing mandamus to compel the relevant government agencies to perform their duties for the rehabilitation of Manila Bay. However, at present, government collaboration has also been very limited, with government agencies mostly working independently.

The realities in the Philippines reflect the global observation that there is a general lack of capacity in developing countries for the collection, assessment, and dissemination of data, and reinforce the need for improved coordination among environmental data and information activities.¹¹⁷ It is proposed that this is where the SEC should assume a more effective role in the collective goal to attain sustainable development through stakeholder engagement in sustainable reporting.

The SEC is empowered to engage stakeholders as it exercises its regulatory powers over corporations. The Securities Regulation Code expressly provides that the SEC has the power to “[e]nlist the aid and support of and/or deputize any and all enforcement agencies of the Government, civil or military as well as any private institution, corporation, firm, association or person in the implementation of its powers and functions under this Code.”¹¹⁸ Thus, the SEC’s engagement of stakeholders is not only permissible, but in fact recognized as a means for it to implement its regulatory powers and functions.

It is submitted that the SEC should enlist the aid and support of relevant government bodies, non-government organizations, and the private sector to improve the sustainability reporting system. Through this initiative, information exchange can be more fluid, leading to the mobilization of action and the exacting of accountability in the performance of the common but differentiated responsibilities for the attainment of the SDGs.¹¹⁹

The Supreme Court, emphasizing the vital role of information in enabling society to cope with the exigencies of the times, identified the need to maintain the flow of information by protecting the same in both its acquisition and dissemination, since an interruption to either process would

¹¹⁶ Hereinafter “MMDA”, G.R. No. 171947, 574 SCRA 661, Dec. 18, 2008.

¹¹⁷ See *supra* note 28.

¹¹⁸ Rep. Act No. 8799 (2000), § 5(h).

¹¹⁹ Global Reporting Initiative, *Government and Business: Mutually Reinforcing Initiatives*, GLOBAL REPORTING INITIATIVE WEBSITE, available at <https://www.globalreporting.org/resource/library/Government-and-business-mutually-reinforcing-initiatives.pdf>

inevitably cause the flow to cease.¹²⁰ The UN considers everyone a user and provider of information in sustainable development;¹²¹ thus everyone is involved to an extent in the flow cycle of information relating to sustainable development. This work identifies three information flow channels and proposes suggestions to improve the fluidity of information towards the objective of making sustainable development a shared concept.

B. First Information Flow: From the Publicly-Listed Company to the SEC – Compliance with the Guidelines

The first information flow is from the PLC to the SEC, in compliance with the Guidelines. The Guidelines pioneered a system of mandatory disclosure of environmental matters by PLCs. However, the Guidelines could further be improved in a manner that compels substantial disclosure that is not merely pro forma or greenwashed. Three general means of improvement are proposed below: (1) refining the definition of “materiality”; (2) enhancing the concept of “right to information”; and (3) adopting heavier enforcement mechanisms.

1. Refining the Definition of “Materiality”

As discussed above, the ambiguous definition of “materiality” has resulted in unfavorable and counter-productive outcomes due to the open-ended characterization that is dependent on the discretion of the reporting PLC.¹²² It is submitted that the SEC can refine the definition of “materiality” by determining the shared conceptualization of materiality based on stakeholder feedback and company reporting trends; adopting foreign standards of materiality; and introducing a presumption of materiality.

i. Determining the Shared Conceptualization of Materiality Based on Stakeholder Feedback and Company Reporting Trends

The shared conceptualization of materiality in environmental matters is based on stakeholder feedback, which can be obtained through the second information flow as discussed below.¹²³ It can also be determined through a

¹²⁰ *Baldoza v. Dimaano*, A.M. No. 1120-MJ, 71 SCRA 14, 19, May 5, 1976.

¹²¹ *See supra* note 28.

¹²² *Id.* at 13.

¹²³ *See infra* Part. IV.C.

study of company reporting trends, wherein the SEC could identify what is material on the basis of the most frequently cited environmental matters.

What is material is dependent on a shared conceptualization of the PLC and its stakeholders. The Supreme Court in *SEC v. Interport Resources Corp.*¹²⁴ supports this view, defining “materiality” as follows:

A discussion of the ‘materiality concept’ would be relevant to both a material fact which would affect the market price of a security to a significant extent and/or a fact which a reasonable person would consider in determining his or her cause of action with regard to the shares of stock.¹²⁵

Thus, what is material depends on what stakeholders would consider significant in affecting the value of a PLC. By soliciting feedback on the sustainability reports and identifying reporting trends, the SEC could better assess what environmental matters are material such that it would affect the value of a PLC.

ii. Adopting Foreign Standards of Materiality and Introducing a Presumption of Materiality

The SEC can also draw guidance from foreign jurisdictions by adopting standards of materiality and introducing a presumption of materiality. Below are some suggested models being applied in foreign jurisdictions.

a. United States

In *Interport*, the Supreme Court looked at US jurisprudence and cited the landmark case of *Basic*, wherein the U.S. Supreme Court cautioned against confining materiality to a rigid formula.¹²⁶ The *Basic* case adopted the jurisprudential definition of “materiality” introduced in *TSC Industries*, “whereby an omitted fact is material if there is a substantial likelihood that its disclosure would have been considered significant by a reasonable investor[.]”¹²⁷

¹²⁴ *Interport*, 567 SCRA 354.

¹²⁵ *Id.* at 385.

¹²⁶ *Id.*

¹²⁷ *Basic*, 485 U.S. 224, 224.

As provided under Regulation S-K, environmental disclosures include the material effects of complying with environmental laws,¹²⁸ material environmental litigation,¹²⁹ and potentially material environmental problems identified in the MD&A.¹³⁰

While the U.S. does not explicitly mention the concept of presumption of materiality, such is implied in jurisprudence. In *Basic*, the U.S. Supreme Court considered the significance of probabilities in determining materiality. In the circumstances of contingent or speculative information or events, “[m]ateriality ‘will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.’”¹³¹ Thus, even contingent or speculative information or events may be considered material, depending on what the balancing of probability and magnitude would yield.

b. Canada

Under Canadian regulation, there are five key disclosure requirements that are considered material environmental matters. These are: environmental risks, trends and uncertainties, environmental liabilities, asset retirement obligations, and financial and operational effects of environmental protection requirements.¹³²

In Canada, there is an express guideline on the presumption of materiality. Section 2.1 of CSA Staff Notice 51-333 provides for the “Err on Side of Materiality” principle: “If there is any doubt about whether particular information is material, we encourage issuers to err on the side of materiality and disclose the information.”¹³³

While the foreign models appear useful in improving the first information flow from the PLC to the SEC, precaution must be taken to avoid the observed issues related to the foreign policy transfer in the design and implementation of ECOWATCH.¹³⁴ Should the foreign models be adopted, these must be aligned with the feedback collected from relevant stakeholders and trends identified in sustainability reports. This alignment exercise would

¹²⁸ Su & Vanatko, *supra* note 56.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Basic*, 485 U.S. 224, 238.

¹³² CSA Staff Notice 51-333, § 2.2.

¹³³ § 2.1.

¹³⁴ Lambino, *supra* note 31.

serve as a precaution against a failed policy transfer of models that may be relevant and successful outside the Philippines, but which may not be suitable for domestic application.

In the alternative, should the SEC be unable to sufficiently refine the definition of “materiality,” an article published in the Boston College Environmental Affairs Law Review suggests for the former to establish minimum thresholds which, if exceeded, would require disclosure. It is recommended for the objective measures to be based on the following: “(1) usefulness to investors; (2) objectivity of the information; and (3) the degree to which the measure avoids the burden of producing new, i.e. otherwise unrequired, documents.”¹³⁵

2. *Enhancing the Concept of “Right to Information”*

The SEC can and should compel substantial disclosure of environmental matters because these are matters of public concern upon which the people have a right to information as guaranteed in Section 7, Article III of the Constitution:

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.¹³⁶

Matters of public concern embrace “a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally whet the interest of an ordinary citizen.”¹³⁷ The Supreme Court has identified some matters of public concern, including the civil service eligibility of a sanitarian,¹³⁸ nature of use of public property,¹³⁹ and negotiation of government contracts.¹⁴⁰

¹³⁵ Robert Feller, *Environmental Disclosure and the Securities Laws*, 22 B.C. ENVTL. AFF. L. REV. 225 (1995).

¹³⁶ CONST. art. III, § 7.

¹³⁷ *Bantay Republic Act v. COMELEC*, G.R. No. 177271, 523 SCRA 1, 15, May 4, 2007.

¹³⁸ *Legaspi v. CSC* [hereinafter “Legaspi”], G.R. No. L-72119, 150 SCRA 530, May 29, 1987.

¹³⁹ *Gonzales v. Narvasa*, G.R. No. 140835, 337 SCRA 733, Aug. 14, 2000.

¹⁴⁰ *Guingona v. COMELEC*, G.R. No. 191846, 620 SCRA 448, May 6, 2010.

In the deliberations of the Constitutional framers, Constitutional Commissioner Fr. Joaquin Bernas remarked that the right to information is “very broadly stated so that it covers anything that is of public concern [...] [I]t challenges citizens to be active in seeking information rather than being dependent on whatever the State may release to them.”¹⁴¹

Environmental matters are arguably of public concern because environmental damage is intergenerational¹⁴² and transboundary.¹⁴³ It is intergenerational because the present generation has a responsibility as trustee and guardian of succeeding generations, and must therefore protect the environment as it will be inherited by future generations.¹⁴⁴ It is transboundary because environmental damage, such as pollution, is not geographically confined, but can transcend borders.¹⁴⁵ The need for public access to environmental information became more apparent with disasters such as the Bhopal gas leak in 1984 and the Chernobyl nuclear disaster in 1986.¹⁴⁶

The Philippines itself has recognized environmental matters to be matters of public concern as it has allowed citizen standing in environmental suits.¹⁴⁷ The rationale behind this is that humans are stewards of nature, thus, there need not be personal and direct interest in enforcing environmental laws.¹⁴⁸

Further, in the case of *Maynilad Water Services, Inc. v. The Secretary of the Department of Environment and Natural Resources*,¹⁴⁹ the Supreme Court introduced the public trust doctrine, which “holds that certain natural resources belong to all and cannot be privately owned or controlled because of their inherent importance to each individual and society as a whole.” Thus, the Supreme Court again considered environmental matters to be of importance to the general public, in light of the principle that natural resources belong to all.

¹⁴¹ *Akbayan v. Aquino* [hereinafter “Akbayan”], G.R. No. 170516, 558 SCRA 468, 640, July 16, 2008 (Puno, C.J., *dissenting*), *citing* V RECORD CONST. COMM’N. 26 (Sept. 24, 1986).

¹⁴² *Oposa v. Factoran* [hereinafter “Oposa”], G.R. No. 101083, 224 SCRA 792, 803, July 30, 1993.

¹⁴³ *Trail Smelter Case (U.S. v. Can.)* [hereinafter “Trail Smelter Case”], 3 R.I.A.A. 1905 (1941).

¹⁴⁴ *Oposa*, 224 SCRA at 805.

¹⁴⁵ *Trail Smelter Case*, 3 R.I.A.A.

¹⁴⁶ *See supra* note 11, at 12.

¹⁴⁷ ENV’T PROC. RULE, Rule 2, § 5.

¹⁴⁸ *Resident Marine Mammals v. Sec. Reyes*, G.R. No. 180771, Apr. 21, 2015.

¹⁴⁹ Hereinafter “Maynilad”, G.R. No. 202897, Aug. 6, 2019.

Furthermore, the right to information has been considered essential to the exercise of other rights,¹⁵⁰ such as the exercise of free expression.¹⁵¹ Access to information on matters of public disclosure promotes transparency in policy-making and in government operations, and enables the people to effectively exercise other constitutional rights.¹⁵²

Similarly, it is submitted that the right to information is also essential to the exercise of the right to a balanced and healthful ecology guaranteed under Section 16, Article II of the Constitution.¹⁵³ The State itself has recognized this when it became party to the Rio Declaration, Principle 10 of which considers access to information an essential component of sustainable development.¹⁵⁴

Thus, there is a need to enhance the concept of “right to information” by recognizing its extension to environmental matters and its instrumentality in the exercise of the right to a balanced and healthful ecology. As such, the SEC should proactively take initiative in enhancing the right to information of the people by improving its sustainability reporting requirements to avoid the tampering or withholding of information through non-disclosure and greenwashing practices.

More specifically, it is suggested that the SEC should compel the disclosure of matters related to possible or pending environment litigation and liabilities, such as the disclosure requirement adopted in the U.S.¹⁵⁵ An article published in the *Environmental Law Review* of the Lewis & Clark Law School provides a compelling policy argument in favor of such disclosure:

The guidance should also expressly require that publicly traded companies disclose not only pending litigation related to climate

¹⁵⁰ *Chavez v. PEA* [hereinafter “Chavez”], G.R. No. 133250, 384 SCRA 152, 184, July 9, 2002; *IDEALS, Inc. v. PSALM* [hereinafter “IDEALS”], G.R. No. 192088, 682 SCRA 602, 635, Oct. 9, 2012.

¹⁵¹ *Chavez*, 384 SCRA at 184.

¹⁵² *IDEALS*, 682 SCRA at 635.

¹⁵³ CONST. art. II, § 16.

¹⁵⁴ See *supra* note 24, at 2, princ. 10: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

¹⁵⁵ Su & Vanatko, *supra* note 56.

change that presents a material risk, but rather disclose *all* pending climate change litigation, including any climate change-based actions taken by regulators or public interest groups, who might challenge permits or other governmental approvals that the company sought to construct or modify major stationary sources of greenhouse gases[.]

Under Item 103, publicly traded companies are required to disclose not only material environmental enforcement litigation, but to include all enforcement litigation brought by the government against a publicly traded company that may result in a monetary sanction, exclusive of interest and costs, of more than \$100,000. With the inclusion of a similar, expansive disclosure obligation related to climate change litigation in this new guidance, rather than merely relying on a determination of materiality, companies will avoid the temptation to limit or minimize disclosure by simply declaring that such litigation will not have an adverse material impact and therefore no disclosure is necessary to the SEC or to the investing public. Through the disclosure of all climate change-related litigation, investors will gain relevant information to judge for themselves the risk associated with publicly traded companies as investments.¹⁵⁶

The required disclosure should include possible cases subject to arbitration proceedings or settlement among private parties. The rationale behind the disclosure of the said matters is that these are arguably matters of public concern subject to the people's right to information. While corporations might raise the argument of right to privacy, the Supreme Court, in applying the public trust doctrine, has already affirmed the superiority of public rights over private rights for critical resources.¹⁵⁷ In fact, the public trust doctrine can be asserted even against the government itself.¹⁵⁸

Thus, the right to information on environmental matters can and should be enhanced by the SEC towards the objective of improving the first information flow from the PLC to the SEC.

¹⁵⁶ Mark Latham, *Environmental Liabilities and the Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change Related Risks*, 39 ENV'T'L L. REV. SYNDICATE. (Emphasis supplied.)

¹⁵⁷ *Maynilad*, G.R. No. 202897.

¹⁵⁸ *Id.*

3. Adopting Heavier Enforcement Mechanisms

The SEC is arguably lenient in its enforcement of the Guidelines as the same only impose penalties for the submission of an Incomplete Annual Report,¹⁵⁹ which range from reprimand/warning for the first offense to a fine of PHP 60,000.00 plus PHP 1,000.00 per day of delay of filing the amended report.¹⁶⁰ Thus, a PLC may avoid or delay the filing of a sustainability report by opting instead to pay the fine.

To be more effective in the enforcement of the Guidelines, it is proposed that the SEC impose heavier penalties. Under the Revised Corporation Code, the SEC is empowered to impose penalties heavier than a fine, including the issuance of a permanent cease and desist order, suspension or revocation of the certificate of incorporation, and dissolution of the corporation and forfeiture of its assets.¹⁶¹

The imposed penalty must reflect the extent of participation, nature, effects, frequency, and seriousness of the violation. As the SEC enhances the right to information in sustainability reporting,¹⁶² it follows that non-disclosure or fraudulent disclosure of material environmental matters should now be considered more serious. The willful non-disclosure or fraudulent disclosure of material environmental matters should be penalized more severely than an incomplete report.

The SEC may consider adopting penalties similar to those imposed under SEC Memorandum Circular No. 25, Series of 2019, or the 2019 Guidelines for the Protection of SEC-Registered Non-Profit Organizations from Money Laundering and Terrorist Financing Abuse (“2019 NPO Guidelines”) for willful violation of the said guidelines or related orders of the SEC in relation to the mandatory disclosure form that registered non-profit organizations are required to submit. The imposable penalties under the 2019 NPO Guidelines are any of the following: fine, suspension or revocation of the certificate of incorporation, and other penalties within the power of the SEC to impose.¹⁶³

The imposition of heavier penalties by the SEC would strengthen the enforcement of the Guidelines and improve sustainability reporting practices.

¹⁵⁹ SEC Mem. Circ. No. 04 (2019) at 14.

¹⁶⁰ SEC Mem. Circ. No. 04 (2019) at 14.

¹⁶¹ Rep. Act No. 11232 (2019), § 158.

¹⁶² *See supra* note 26.

¹⁶³ SEC Mem. Circ. No. 04 (2019) at 13.2.

In the U.S., it was observed that the U.S. SEC successfully enforced its environmental disclosure requirements by taking more stringent actions, such as administrative proceedings and civil suits.¹⁶⁴ For example, in *SEC v. Allied Chemical Corp.*,¹⁶⁵ the respondent company consented to liability for its failure to disclose environmental liability information; and in *Levine v. NL Industries*,¹⁶⁶ the court affirmed that potential costs for environmental liabilities must be disclosed. An article published in the Boston College Environmental Affairs Law Review argues that increased enforcement by the SEC would surely impact corporate disclosure since “[t]he attitude of companies towards compliance with regulatory requirements is always influenced, consciously or not, by companies’ perception of whether the regulator is aggressively enforcing those requirements.”¹⁶⁷ The said article subscribes to the view that an aggressive enforcement posture will reverse the complacent attitude of corporations in complying with sustainability reporting requirements.¹⁶⁸

Through the identified measures to reinforce the first information flow, it is hoped that PLCs would improve their sustainability reporting practices, if not voluntarily, through aggressive enforcement action by the SEC.

C. Second Information Flow: Between the SEC and Stakeholders – Widespread Dissemination to Engage Stakeholders in Public Discourse

To enable the second information flow, sustainability reports should be widely distributed to the general public in order to engage them in public discourse. The UNEP encourages access to environmental information because it is viewed as an instrument for meaningful public participation in sustainable development.¹⁶⁹

There is a need to establish a feedback mechanism for the improvement of sustainability reporting practices in order to mobilize collective action towards sustainable development. Otherwise, the Guidelines,

¹⁶⁴ Robert Repetto, Andrew MacSkimming & Gustavo Carvajal Isunza, *Environmental Disclosure Requirements in the Securities Regulations and Financial Accounting Standards of Canada, Mexico and the United States*, COMMISSION FOR ENVIRONMENTAL COOPERATION (2002).

¹⁶⁵ Cited in *Id.* as *SEC v. Allied Chemical Corp.* [No. 77-0373, 4 March 1977].

¹⁶⁶ Cited in Repetto, MacSkimming & Isunza, *supra* note 164, as *Levine v. NL Industries* [20 Env. Law Rep. 20197, S. D. NY, 31 July 1989].

¹⁶⁷ Feller, *supra* note 135, at 249.

¹⁶⁸ *Id.* at 250.

¹⁶⁹ See *supra* note 11.

as promising as they are, might meet the same fate as other environmental disclosure initiatives that failed to fully take off, such as the ECOWATCH program.

The ECOWATCH program initially showed promise of curbing industrial pollution because similar models were successfully implemented outside the Philippines. However, an observed misfit in the overall national policy design¹⁷⁰ led to relatively unsatisfactory results. A policy analysis on the ECOWATCH program noted that information flows in the program were severely limited, if not nonexistent: “No information flow about the performance ratings was reaching the public sphere because there were no publication or dissemination through any mass or social media. This meant that consumers, investors, communities or any of the business stakeholders do not have information by which they can act upon.”¹⁷¹ Thus, information flow remained one-way from industrial businesses to the DENR, with no feedback from stakeholders or, at times, even from the DENR itself.¹⁷² Under this implementation scheme, while information was being collected by the DENR, it appeared to serve no further significant purpose due to the ineffective dissemination channels.

Learning from the ECOWATCH program, it is recommended that the SEC take a proactive role in disseminating sustainability reports to government bodies and the general public. The proactive role of the State in disseminating information was deliberated upon by the Constitutional framers. Constitutional Commissioner Atty. Napoleon Rama emphasized the proactive role the State must play in ensuring that it has a policy, even without being demanded, to disclose information and transactions.¹⁷³

Currently, corporate information may be obtained online from the SEC through the SEC i-View at a minimal cost, or upon personal request in the SEC office.¹⁷⁴ The SEC has also released a People’s Right to Information Manual, which provides the procedure to request for information, including the reports submitted to the SEC.¹⁷⁵ The procedure requires approval from

¹⁷⁰ Lambino, *supra* note 31, executive summary.

¹⁷¹ *Id.* at 75.

¹⁷² *Id.* at 75-76.

¹⁷³ *Akbayan*, 558 SCRA 468, 640 (Puno, *C.J.*, *dissenting*), *citing* V RECORD CONST. COMM’N. 26 (Sept. 24, 1986).

¹⁷⁴ SEC, *SEC i-View*, SEC WEBSITE, *available at* <http://www.sec.gov.ph/online-services/sec-i-view/>.

¹⁷⁵ SEC PEOPLE’S RIGHT TO INFORMATION MANUAL (2018), § 4.

the FOI Decision Maker, who is given 15 working days from receipt of the request to grant or deny the request for information.¹⁷⁶

The UNEP takes the position that with more environmental information freely made available in the public sphere, there would be a decreased need for specific information requests. The UNEP calls for states to adopt “a proactive environmental information policy that regularly compiles and disseminates information in a user friendly way [that] may reduce administrative burdens and make it easier for public authorities to carry out their responsibilities.”¹⁷⁷ The UNEP recommends making information available electronically as such could vastly increase the capacity to disseminate information.¹⁷⁸

For widespread dissemination of the sustainability reports, it is suggested that the SEC establish an online database that makes sustainability reports easily and freely accessible. It has been business practice for some corporations to publish their sustainability reports on their company websites, such as that of Metro Pacific Investments,¹⁷⁹ GT Capital Holdings,¹⁸⁰ and Manila Water,¹⁸¹ to name a few. While sustainability reports are freely and publicly accessible on some company websites, it is suggested that the SEC consolidate all submitted sustainability reports in an online database. This would allow a clear and direct information flow from the SEC to other government entities and the general public.

More importantly, this would allow stakeholders and the general public to better measure and monitor the contribution of PLCs to the SDGs. The GRI recommends the tracking of the contribution of PLCs to the SDGs as part of the strategies to use corporate reporting to strengthen the SDGs:

As is the case in the public sector, keeping track of contribution by private companies is essential to ensure progress and implementation of the Goals. The data businesses disclose through their sustainability reporting practices constitutes a good source of information at the national level, which can help policy actors

¹⁷⁶ *Id.*

¹⁷⁷ *See supra* note 11, at 25.

¹⁷⁸ *Id.*

¹⁷⁹ Metro Pacific Investments, *Sustainability*, MPIC WEBSITE, available at <https://www.mpic.com.ph/sustainability/>

¹⁸⁰ GT Capital Holdings Incorporated, *Sustainability Report*, GT CAPITAL WEBSITE, available at <https://www.gtcapital.com.ph/sustainability-report>.

¹⁸¹ Manila Water, *Sustainability Reports*, MANILA WATER WEBSITE, available at <https://www.manilawater.com/corporate/sustainability/sustainability-reports>.

understand the contribution to specific sustainability areas within industries and sectors.¹⁸²

Moreover, the second information flow should be two-way and reciprocal, with the SEC collecting feedback by corresponding directly with stakeholders. This is aligned with the Supreme Court's pronouncement in *Valmonte v. Belmonte*,¹⁸³ wherein it held that it is essential to the right to information to keep open a continuing dialogue or process of communication between the government and the people. "Only when the participants in the discussion are aware of the issues and have access to information relating thereto can such bear fruit."

The SEC should exercise its power under the Securities Regulation Code to enlist the aid and support of enforcement agencies of the government, as well as any private institution or person,¹⁸⁴ and actively engage them for feedback. Feedback on the sustainability reports will help the SEC monitor the success of the policy at its initial implementation stage and evaluate its contribution to the attainment of the SDGs on a national and global scale.

Further, the feedback would enable the SEC to define "materiality" in alignment with and in relation to the attainment of sustainable development.¹⁸⁵ Thus, as more feedback is collected, materiality becomes a shared concept of all stakeholders, considering that disclosures would then align with the direct concerns and demands of stakeholders as articulated in their feedback.

With the collected feedback, the SEC can proceed to the next step of standardizing information requirements, thereby reducing information asymmetry and making the sustainability reports even more reliable and useful.¹⁸⁶ It can also strengthen its enforcement actions by being able to verify the disclosed information and investigate non-compliance.¹⁸⁷

¹⁸² GLOBAL REPORTING INITIATIVE, USING CORPORATE REPORTING TO STRENGTHEN SUSTAINABLE DEVELOPMENT GOALS 3.

¹⁸³ G.R. No. 74930, 170 SCRA 256, 265, Feb. 13, 1989.

¹⁸⁴ Rep. Act No. 8799 (2000), § 5(h).

¹⁸⁵ § 18.

¹⁸⁶ Feller, *supra* note 135, at 248.

¹⁸⁷ *Id.*

D. Third Information Flow: From the Stakeholders to the Publicly-Listed Company – Utilizing Stakeholder Feedback and Collective Action to Improve Sustainability Reporting and the Attainment of the SDGs

The UN Resolution and national policies to attain the SDGs recognize the vital role of the private sector in the attainment of sustainable development.¹⁸⁸ Sustainable development should be coupled with collective action because the environment and natural resources are trust resources, and the public is regarded as the beneficial owner thereof.¹⁸⁹

To implement the SDGs, the Philippines has employed a whole-of-government and whole-of-society approach, wherein stakeholders are informed and engaged in public discourse,¹⁹⁰ which is the objective of the third information flow. The UNEP advocates that “[t]he public engagement objective builds capacities, empowers citizens, legitimizes the authority’s role and the role of stakeholders, and develops confidence and trust.”¹⁹¹

The Constitutional framers have recognized how information provides power leverage to the public. Constitutional Commissioner Dr. Florangel Rosario-Braid explained: “Communication and information provide the leverage for power. They enable the people to act, to make decisions, to share consciousness in the mobilization of the nation.”¹⁹² Aligned with this thought, the Supreme Court has emphasized that the right to information is essential in democratic participation.¹⁹³ It was held in *Chavez v. Public Estates Authority*¹⁹⁴ that, “An informed citizenry is essential to the existence and proper functioning of any democracy.”

With the second flow of information from the SEC to stakeholders,¹⁹⁵ the general public is empowered to mobilize collective action for sustainable

¹⁸⁸ See *supra* note 12, at 10, ¶ 39.

¹⁸⁹ *Maynilad*, G.R. No. 202897.

¹⁹⁰ United Nations, *Sustainable Development Goals Knowledge Platform: Philippines*, SUSTAINABLE DEVELOPMENT GOALS: KNOWLEDGE PLATFORM, available at <https://sustainabledevelopment.un.org/memberstates/philippines>

¹⁹¹ See *supra* note 11, at 12.

¹⁹² *Akbayan*, 558 SCRA 468, 640 (Puno, C.J., dissenting), citing V RECORD CONST. COMM’N. 26 (Sept. 24, 1986).

¹⁹³ *Legaspi*, 150 SCRA 530, 540; *Chavez*, 384 SCRA at 184.

¹⁹⁴ *Chavez*, 384 SCRA 152, 184.

¹⁹⁵ See *supra* note 24.

development. An informed citizenry can mobilize action by exacting accountability from the government and major actors such as PLCs. The UNEP has recognized that public participation improves the likelihood that decisions will be implemented with public support and participation.¹⁹⁶ Thus, since information enables citizens to take part in the public discourse, the public interest in sustainable development bears greater weight in government policy-making and implementation,¹⁹⁷ and pressures corporate responsibility in sustainable development practices.¹⁹⁸

1. Government Action

In the Philippine Development Plan, NEDA noted that there have been slight improvements in environmental quality but monitoring of environmental compliance remains weak.¹⁹⁹ With the information flow to the government, the government can utilize the sustainability reports to monitor compliance of PLCs with environmental laws and their impact on the attainment of the SDGs, and in the process, diagnose environmental problems and develop alternative solutions.²⁰⁰ Upon review of the disclosed information, the government can better identify the contribution of companies to sustainability areas²⁰¹ and respond to the same with policy or enforcement action. This process is similar to the EIA system, wherein the reports submitted by the project proponent undergo a review process for the government to assess the environmental impact of the project and enact measures to address the same.²⁰²

NEDA reported that the potential of the private sector to contribute to ENR management is largely untapped due to a lack of clear government policy. With the information obtained in the second information flow through the sustainability reports, it is envisioned that the government can develop a clear mechanism to guide the private sector in complementing government efforts in ENR management.²⁰³

In addition, the third information flow from the government to the PLCs can result in regulatory activity to improve sustainability reporting, which in turn may help accelerate progress towards attainment of the

¹⁹⁶ See *supra* note 11, at 12.

¹⁹⁷ *Chavez*, 384 SCRA 152, 185.

¹⁹⁸ Huang & Huang, *supra* note 62.

¹⁹⁹ PHILIPPINE DEVELOPMENT PLAN 2017-2022 318.

²⁰⁰ See *supra* note 11, at 12.

²⁰¹ See *supra* note 182.

²⁰² *Paje v. Casiño* [hereinafter “Paje”], G.R. No. 207257, Feb. 3, 2015.

²⁰³ PHILIPPINE DEVELOPMENT PLAN 2017-2022 at 320.

SDGs.²⁰⁴ Through a review of the sustainability reports, the government can develop guidelines on sustainability reporting and provide tools to assist companies with monitoring, measuring, and reporting sustainability-related matters, such as what is being employed in countries such as Australia, China, India, and the U.S.²⁰⁵

In *MMDA*,²⁰⁶ the Supreme Court emphasized the “extreme necessity” for government agencies to immediately act and discharge their duties and obligations to prevent the worsening of the environmental degradation on Manila Bay. The Supreme Court held that even in the absence of a categorical legal provision for the duty to clean up Manila Bay, government agencies cannot escape their obligation to future generations to protect the environment.²⁰⁷

This work identifies below the role of the DENR and local government units (“LGUs”) in the third information flow, with the objective of attaining sustainable development through government action, undertaken in response to sustainability reports.

i. Department of Environment and Natural Resources

The DENR is “the primary government agency responsible for the conservation, management, development, and proper use of the country’s environment and natural resources[.]”²⁰⁸ The DENR is given quasi-legislative powers that may be exercised to achieve its mandate concerning the country’s environment and natural resources. Among its powers and functions is to “[p]romote proper and mutual consultation with the private sector involving natural resources development, use and conservation[.]”²⁰⁹

Through the information obtained in the sustainability reports, the DENR can more effectively fulfill its mandate of conservation and protection of the country’s ENR. The law itself recognizes that information obtained from consultation with the private sector can assist the DENR in crafting policies on the development, use, and conservation of ENR.

²⁰⁴ GLOBAL REPORTING INITIATIVE, FREQUENTLY ASKED QUESTIONS ON CORPORATE SUSTAINABILITY REPORTING 15 (2013).

²⁰⁵ *Id.*

²⁰⁶ *MMDA*, 574 SCRA 661, 692-97.

²⁰⁷ *Id.* at 692.

²⁰⁸ Exec. Order No. 192 (1987), § 4.

²⁰⁹ § 5(f).

ii. Local Government Units

The Local Government Code provides for the duty of national government agencies and government-owned and controlled corporations to engage in mandatory consultation with LGUs in the planning and implementation of any project or program that may impact the ENR within their jurisdiction. LGUs are empowered by the Local Government Code to formulate and implement policies and measures on local autonomy, guided by several operative principles, including the participation of the private sector in local governance: “(1) The participation of the private sector in local governance, particularly in the delivery of basic services, shall be encouraged to ensure the viability of local autonomy as an alternative strategy for sustainable development[.]”²¹⁰

Moreover, the Local Government Code provides for the powers of a local Environment and Natural Resources Officer. Among the Officer’s powers are the power to coordinate with government agencies and non-governmental organizations in the implementation of measures to prevent and control pollution, and the power to recommend to the *sanggunian* and advise the local chief executive “on all matters relative to the protection, conservation, maximum utilization, application of appropriate technology and other matters related to the environment and natural resources.”²¹¹

It is recommended that the LGUs utilize the sustainability reports in light of its principle of private sector participation in local governance. Guided by the information reported in sustainability reports, LGUs can more knowledgeably and effectively conduct mandatory consultation on projects that may impact the ENR. Moreover, LGUs, through the initiative of the local Environment and Natural Resources Officers, can implement measures relative to the protection and conservation of the ENR.

2. *Private Action*

The shareholders of PLCs are major stakeholders with a significant role in the third information flow. Shareholders can encourage good business practice and demand companies to be more accountable and transparent.²¹² With more information on environmental matters obtained from sustainability reports, shareholders have a better perspective of corporate

²¹⁰ Rep. Act No. 7160 (1991), § 3(*h*).

²¹¹ § 484(*b*)(5)

²¹² See *supra* note 204.

sustainability issues,²¹³ allowing them to participate in corporate decision-making in sustainability areas.²¹⁴

Public disclosure has caused sufficient reputational losses that have pressured many companies to voluntarily make public commitments to improve their environmental performance.²¹⁵ In South and Southeast Asia, disclosure programs have influenced industrial polluters to reduce emissions.²¹⁶ In Indonesia, the public pressure to work on environmental impact extended to banks, which led them to consider environmental information in evaluating environmental risks.²¹⁷ In the U.S., public disclosure of the U.S. EPA's Toxics Release Inventory induced businesses to take action to reduce their toxic chemical release.²¹⁸

The GRI has identified the key roles shareholders can play in advancing sustainability reporting, which includes the following: providing PLCs with feedback on sustainability reports, considering sustainability matters in investment decisions, and requesting disclosures on sustainability issues.²¹⁹

With improved sustainability reporting practices, a measuring and monitoring tool can eventually be introduced to track the contributions of PLCs to the SDGs. The GRI notes that keeping track of these contributions is essential for the progress and implementation of the SDGs.²²⁰ With a tracking system in place, shareholders can exact accountability from companies that fall behind in positive contributions to the SDGs.

Aside from shareholders, the GRI recommends corporate engagement with other affected stakeholders and expert stakeholders. PLCs should engage with stakeholders who are negatively affected by their activities in order to understand the actual and potential environmental impact linked to their operations, and improve upon the same.²²¹ These companies should

²¹³ *Legaspi*, 150 SCRA 530.

²¹⁴ See *supra* note 11.

²¹⁵ Repetto, MacSkimming & Isunza, *supra* note 164, at 4.

²¹⁶ COMMISSION FOR ENVIRONMENTAL COOPERATION, ENVIRONMENTAL DISCLOSURE IN FINANCIAL REPORTING: UPDATE AND RECOMMENDATIONS 3, available at <http://www3.cec.org/islandora/fr/item/1956-environmental-disclosure-in-financial-reporting-en.pdf>

²¹⁷ Lambino, *supra* note 31 at 20.

²¹⁸ Repetto, MacSkimming & Isunza, *supra* note 164 at 4.

²¹⁹ See *supra* note 204, at 29.

²²⁰ See *supra* note 182, at 3.

²²¹ GLOBAL REPORTING INITIATIVE & UNITED NATIONS GLOBAL COMPACT, INTEGRATING THE SDGS INTO CORPORATE REPORTING: A PRACTICAL GUIDE 7, 11 (2018).

also engage with expert stakeholders who understand the industry and have insight into sustainable development practices, so that these expert stakeholders can review company plans, add suggestions, or identify gaps for improvement.²²²

The above discussion has emphasized the importance and potential of a fluid environmental information market. With public engagement comes greater transparency that can mitigate the effects of greenwashing as PLCs become subject to public evaluation and feedback.

The Guidelines can become a more effective tool for the attainment of the SDGs as sustainable development becomes a shared concept that demands collaboration and collective action, with PLCs at the forefront of the challenge to retain their legitimacy through sustainable development practices.

E. Crafting Next Generation Disclosure Rules

For materiality assessments and sustainability reporting to truly work, the Guidelines, as presently devised, should not be the end in itself. Instead, the Guidelines should be used in a manner that casts a wide net, so to speak, in collating company information. Thereafter, the mass of information should be put through extensive, exhaustive, and participative stakeholder engagements as discussed above, with the end view that such information shall be used to craft more industry-specific disclosure rules, with other environmentally-concerned government bodies participating in monitoring and compliance. In this sense, the Guidelines should be utilized as a first-generation disclosure scheme, which will later evolve to more specific disclosure rules that obviate the present issues concerning materiality.

While the SEC's effort to incorporate environmental concerns into PLC reporting is laudable,²²³ there appears to be an incongruence as the SEC's mandate is not specifically geared towards environmental protection. To begin with, the SEC's statutory mandate concerns itself with juridical entities as a general and homogenous class, particularly by exercising "absolute jurisdiction, supervision and control over all corporations, partnerships or associations, who are the grantees of primary franchise and/or a license or permit issued by the government to operate in the Philippines[.]"²²⁴

²²² *Id.*

²²³ SEC Mem. Circ. No. 19 (2016), recommendations 10.1 and 12.4.

²²⁴ Pres. Dec. No. 902-A (1976), § 3. *See also* § 6.

However, as earlier adverted to, material information varies across different firms operating in vastly distinct sectors.²²⁵ Sustainability issues can be more or less important across industries as a function of the pertinent industry's resource use and social impact. Thus, carbon emissions would, for instance, be more note-worthy to electric utility companies than financial companies.²²⁶ Nissan's own view on sustainability emphasizes, among other issues, fuel economy, climate change-induced transition and physical risks, electrification, energy efficiency, and in-cabin air quality.²²⁷ Meanwhile, an educational institution, such as the University of Worcester, would focus on on-campus environmental advocacies and workshops, the crafting of biodiversity-enhancing ecosystems management, or campus residents' food consumption.²²⁸ One environmental consultancy group has even crafted its own Ecological Footprint calculator and Carbon Accounting method, tailor-fit for certain companies' materiality assessments.²²⁹

To address these concerns, the Guidelines need to sprout more industry-specific disclosure rules akin to those adopted by the U.S. SEC for oil, mining, and gas.²³⁰ These rules require the submission of a "technical report summary,"²³¹ which concerns very detailed, specific, and comprehensive information regarding mining operations, so as to eliminate subjectivity of material information.

The technical report summary requires disclosures on the concerned property;²³² accessibility, climate, local resources, infrastructure, and

²²⁵ Wu, Shao & Chen, *supra* note 87, at 2.

²²⁶ Ioannou & Serafeim, *supra* note 72, at 12.

²²⁷ Nissan Motor Corp., *Environmental Policies and Philosophy*, NISSAN MOTOR CORP. WEBSITE, available at <https://www.nissan-global.com/EN/SUSTAINABILITY/REPORT/ENVIRONMENTAL/POLICY/>

²²⁸ See UNIVERSITY OF WORCESTER, CHANGE TODAY PROTECT TOMORROW: CREATING CRITICAL THINKERS AND AGENTS OF CHANGE TO PROTECT OUR COMMON FUTURE, ANNUAL SUSTAINABILITY REPORT 2017-2018.

²²⁹ Ecological Living In Action, *Sustainability Reporting*, ECOLOGICAL LIVING IN ACTION WEBSITE, available at <https://ecolivinginaction.com/consultancy/sustainability-reporting/>.

²³⁰ Standard Instructions for Filing Forms Under Securities Act of 1933, Securities Exchange Act of 1934 and Energy Policy and Conservation Act of 1975, Regulation S-K; and Form and Content of and Requirements for Financial Statements, Securities Act of 1933, Securities Exchange Act of 1934, Public Utility Holding Company Act of 1935, Investment Company Act of 1940, Investment Advisers Act of 1940, and Energy Policy and Conservation Act of 1975.

²³¹ Standard Instructions for Filing Forms Under Securities Act of 1933, Securities Exchange Act of 1934 and Energy Policy and Conservation Act of 1975, Regulation S-K, § 229.601(a)(96).

²³² § 229.601(a)(96)(iii)(b)(3).

physiography;²³³ geological setting, mineralization, and deposit;²³⁴ exploration methods such as sampling and drilling;²³⁵ mineral processing and metallurgical testing;²³⁶ mineral resource estimates;²³⁷ mineral reserve estimates;²³⁸ mining methods, with emphasis on geotechnical and hydrological models, production rates, and equipment used;²³⁹ and processing and recovery methods.²⁴⁰

For oil and gas-producing companies, their financial accounting and reporting rules require them to disclose information regarding properties acquired;²⁴¹ analogous reservoirs, or resources which share similar geological formation, environmental deposition, structure, and drive mechanism to the reservoir of interest;²⁴² deterministic estimates of reserves or resources;²⁴³ development costs;²⁴⁴ development,²⁴⁵ exploratory,²⁴⁶ and extensions wells;²⁴⁷ and production activities, such as search, lifting of resources to the surface, and extraction.²⁴⁸

A review of such rules demonstrates a well-informed understanding of the covered companies' specific activities. Such rules were a product of the "integrated disclosure system," intended to craft disclosure rules that ensured interested parties were "provided with meaningful nonduplicative information[.]"²⁴⁹ More importantly, such rules were a product of the U.S. SEC actively seeking public comment which would later translate to refinements of previous iterations.²⁵⁰

²³³ § 229.601(a)(96)(iii)(b)(4).

²³⁴ § 229.601(a)(96)(iii)(b)(6).

²³⁵ § 229.601(a)(96)(iii)(b)(7).

²³⁶ § 229.601(a)(96)(iii)(b)(10).

²³⁷ § 229.601(a)(96)(iii)(b)(11).

²³⁸ § 229.601(a)(96)(iii)(b)(12).

²³⁹ § 229.601(a)(96)(iii)(b)(13).

²⁴⁰ § 229.601(a)(96)(iii)(b)(14).

²⁴¹ Form and Content of and Requirements for Financial Statements, Securities Act of 1933, Securities Exchange Act of 1934, Public Utility Holding Company Act of 1935, Investment Company Act of 1940, Investment Advisers Act of 1940, and Energy Policy and Conservation Act of 1975, § 210.4-10(a)(1).

²⁴² § 210.4-10(a)(2).

²⁴³ § 210.4-10(a)(5).

²⁴⁴ § 210.4-10(a)(7).

²⁴⁵ § 210.4-10(a)(9).

²⁴⁶ § 210.4-10(a)(13).

²⁴⁷ § 210.4-10(a)(14).

²⁴⁸ § 210.4-10(a)(16).

²⁴⁹ U.S. SEC, REPORT ON REVIEW OF DISCLOSURE REQUIREMENTS IN REGULATION S-K 11 (2013).

²⁵⁰ See U.S. SEC, *Modernization of Oil and Gas Reporting* (2008), U.S. SEC WEBSITE, available at <https://www.sec.gov/rules/final/2008/33-8995.pdf>.

The foregoing experiences underscore the necessity of clearly identifying the end-users of sustainability reports, as well as the efficacy of a dialogue mechanism whereby stakeholders are given an opportunity to craft and shape disclosure rules. Moreover, these chronicle the evolutionary path that disclosure rules may take when subjected to more exacting standards.

Thus, the current Guidelines must be properly utilized as a wide capturing net, seeking to gain as much information as possible regarding the environmental issues posed by disclosing companies. However, as earlier suggested, such collated information must be disseminated to interest groups such as non-governmental organizations, advocacy groups, the academe, as well as government agencies with environmental protection mandates.²⁵¹ Thereafter, avenues for genuine dialogue must be opened in order that stakeholders may chisel down the general, vague, and subjective of materiality into more specific disclosure items. Thus, depending on their assessments of particular PLCs, stakeholders can demand that amorphous terms like “social impact” be further articulated into information such as “carbon emissions” or “industrial effluents.”

The participation of pertinent government agencies should not cease there. They ought to be given a seat in the fine-tuning of the second generation disclosure rules, perhaps through participative and inclusive technical working groups. From there, the Guidelines could break away from being purely an SEC initiative, and progress into disclosure rules and regulations adopted and implemented by environmentally-concerned agencies such as the DENR, Energy Regulatory Commission, or the Department of Energy. There could even be room for inter-agency coordination through joint rules.²⁵² At least, in this way, monitoring, evaluation, and compliance with environmentally-specific disclosure rules would be “closer to home,” so to speak.

The foregoing measures represent decisive steps toward the standardization of disclosure rules for specific industries. Foregoing which, the Philippines’ environmental-disclosure regime might regress to the inefficacious state it had been prior to the Guidelines. One local study assessed the 2006 annual reports and financial statements of 10 publicly-listed mining companies in order to characterize their environmental disclosures.²⁵³

²⁵¹ See *supra* 24.

²⁵² See *Tano v. Socrates*, G.R. No. 110249, 278 SCRA 154, Aug. 21, 1997; *Southern Cross Cement Corp. v. The Phil. Cement Mfr. Corp.*, G.R. No. 158540, 434 SCRA 65, July 8, 2004; and *Manay v. Cebu Air, Inc.*, G.R. No. 210621, 788 SCRA, 155, Apr. 4, 2016.

²⁵³ *Nimpha Aquino, Environmental Disclosures of Ten Publicly-Listed Mining Companies in the Philippines*, 18 DLSU BUS. & ECON. REV. 55, 56-57 (2009).

It found that these disclosures merely consisted of narratives crafted at the discretion of management;²⁵⁴ environmental information disclosed was neither comprehensive nor detailed, only consisting of claims regarding regulatory compliance²⁵⁵ and, at most, discussing rehabilitation plans for mining areas.²⁵⁶ The study recommended the adoption of an overarching environmental disclosure “theme”²⁵⁷ which the Guidelines at least already embody; that financial reporting must incorporate environmental concerns,²⁵⁸ although the Guidelines focus more on non-financial disclosures; and the need for standard-setting bodies²⁵⁹ which, in the meantime, is only the SEC, but must soon expand to involve other agencies with an environmental mandate.

On a related note, the DENR has been implementing the EIS disclosure system.²⁶⁰ Such is “a systems-oriented and integrated approach to the EIS system to ensure a rational balance between socio-economic development and environmental protection for the benefit of present and future generations[.]”²⁶¹ It aids “in assessing the environmental impact of the project and the adequacy of the corresponding environmental management plan or program to address such environmental impact.”²⁶² Akin to the Guidelines, the EIS requires certain disclosures pertinent to environmental impact. However, it is limited only to specific projects which “significantly affect the quality of the environment[.]”²⁶³

The envisioned second-generation disclosure rules should therefore strive to be a refinement of the EIS, as the former would encompass all company activities and not only specific projects, and with an emphasis on material information and not only those which “significantly affect” the environment.

The foregoing proposals, therefore, address the interpretation, operationalization, and application issues of materiality. By placing information gathered by the current Guidelines at the disposal of relevant stakeholders, materiality assessments would now have a clear application.

²⁵⁴ *Id.* at 55.

²⁵⁵ *Id.* at 59.

²⁵⁶ *Id.* at 60.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 61.

²⁶⁰ Pres. Dec. No. 1151 (1977); Pres. Dec. No. 1586 (1978).

²⁶¹ DENR Adm. Order No. 30 (2003), art. I, § 1.

²⁶² *Paje*, G.R. No. 207257.

²⁶³ Pres. Dec. No. 1151 (1977), § 4.

After stakeholders have studied such disclosures, the pertinent government bodies should provide feedback mechanisms for stakeholders to shed light on certain company practices that might have been omitted in the reports, point out deficiencies in the initial disclosures, and lobby for the specific inclusion of certain matters. All in all, the interpretation of materiality is expected to improve from ambiguity towards clear-cut requirements.

V. CONCLUSION: ENVIRONMENTAL DISCLOSURES FOR A MORE EQUITABLE SOCIETY

This work has thus far underscored that sustainability reporting transcends mere corporate concerns. At its core, really, is the idea of a more participative, inclusive, socially conscious, and environmentally-sensitive society. Sustainability reporting is all about leveling the playing field and leveraging political consequence through access to information.

No less than Section 1, Article XIII of the Constitution provides that: “The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, *reduce social, economic, and political inequalities*, and remove cultural inequities by *equitably diffusing wealth and political power for the common good*.”²⁶⁴

While *Social Weather Stations, Inc. v. COMELEC* was concerned primarily with free speech and political decision-making, the Court’s pronouncements therein are no less consequential in the matter of environmental disclosure and exacting corporate accountability:

Proponents of the political theory on “deliberative democracy” submit that “substantial, open, [and] ethical dialogue is a critical, and indeed defining, feature of a good polity.” This theory may be considered broad, but it definitely “includes [a] collective decision making with the participation of all who will be affected by the decision.” It anchors on the principle that the cornerstone of every democracy is that sovereignty resides in the people. To ensure order in running the state’s affairs, sovereign powers were delegated and individuals would be elected or nominated in key government positions to represent the people. On this note, the theory on deliberative democracy may evolve to the right of the people to make government accountable. Necessarily, this includes the right of the people to criticize acts made pursuant to governmental functions.

²⁶⁴ CONST. art. XIII, § 1. (Emphasis supplied.)

Speech that promotes dialogue on public affairs, or airs out grievances and political discontent, should thus be protected and encouraged.²⁶⁵

Through the initiative started by the SEC in its issuance of the Guidelines, it is submitted that the Philippines can take significant steps forward towards attaining sustainable development, in line with the SDGs, Philippine Development Plan, and AmbisyonNatin 2040. This movement towards collective action and public participation is a realization of the UNEP's advocacy that "[e]nvironmental issues are a concern of every human being and the participation of all is more important than ever."²⁶⁶

Thus, as the Guidelines see its first year of implementation, legal practitioners, environmental stakeholders, and the academe should remain scrutinizing. By adopting the above measures that would ensure a more vigorous engagement of the three aforementioned information flows, material information can be more specifically targeted and disclosed in earnest. And as the years of implementation go by, government agencies and interested parties will become more acquainted with the PLCs they seek to monitor, eventually paving the way for more tailor-fit disclosure rules, depending on the company's pertinent industry.

PLCs, after all, have been given a trust; it is only just that they maintain fealty to their social responsibilities.

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²⁶⁵ *Social Weather Stations, Inc. v. COMELEC*, G.R. No. 208062, 755 SCRA 124, 153, Apr. 7, 2015. (Emphasis supplied.)

²⁶⁶ *See supra* note 11, at 12.