

Guardians of truth: how to ensure the accuracy of ESG information

Law Working Paper N° 862/2025

July 2025

Takuma Kumashiro

Kobe University

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Abstract

As mandatory ESG disclosure proliferates, jurisdictions often adapt financial enforcement devices to complex ESG information, creating regulatory gaps and excesses. Japan relies on resourceconstrained public sanctions, leading to under-enforcement; the US employs investor litigation, which chills disclosure; and the EU mandates costly, narrow third-party assurance. To resolve this dilemma, this article proposes a hybrid model. The analysis begins with a comparative 2×2 matrix (ex-ante/expost × public/private) that maps the enforcement measures of Japan, the US, and the EU, revealing distinct trade-offs among cost, coverage, and deterrence. An empirical study of Japanese enforcement reveals systemic under-enforcement and SESC's capacity deficits. Findings demonstrate that neither singular reliance on private-led mechanisms (such as third-party assurance or investor litigation) nor resource-constrained public enforcement alone can reliably secure ESG information without distorting incentives. The proposed hybrid strategically allocates tools to their comparative advantage: (i) reserving ex-ante assurance for high-impact, readily verifiable metrics; (ii) enlarging public audit resources for broader disclosures; and (iii) tying private liability thresholds to contextspecific materiality reflecting ESG's qualitative character. Such an integrated framework can achieve a more balanced alignment between investor protection, stakeholder transparency, and compliance costs, thereby reinforcing market trust and avoiding the twin perils of greenwashing and disclosure chill.

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GUARDIANS OF TRUTH: HOW TO ENSURE THE ACCURACY OF ESG INFORMATION*

TAKUMA KUMASHIRO†

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I. INTRODUCTION

ESG disclosure¹ has a significant impact on investment and voting decisions, encouraging listed or influential companies to consider the environmental and social impacts of their business activities.² However, ensuring the accuracy of ESG information³ remains a substantial challenge because existing enforcement mechanisms, primarily designed for financial information, struggle to adapt to the complex, qualitative, and discretionary nature of ESG information.⁴ While international efforts are underway to standardise ESG disclosure frameworks,⁵ considerable jurisdictional differences persist in how the accuracy of such information is enforced.

The existing scholarship focuses mainly on single jurisdictions or general discussions on disclosure quality. This paper adds a fresh perspective by providing a comparative analysis of ESG disclosure enforcement mechanisms in Japan, the United States (US), and the European Union (EU). This study addresses the central research question: How can public and private enforcement mechanisms, and *ex-ante* and *ex-post* approaches, be effectively structured to ensure the accuracy of ESG disclosures while striking an appropriate balance between the interests of investors, stakeholders, and society? The analysis adopts a structured comparative methodology, evaluating each jurisdiction based on three key criteria: (i) the balance between public and private enforcement mechanisms, (ii) the effectiveness of *ex-ante* and *ex-post* enforcement strategies, and (iii) the capacity and expertise of enforcement bodies to detect and address misstatements.

Japan relies heavily on *ex-post* and public enforcement mechanisms, primarily administrative fines and criminal sanctions, which are enforced by the Financial Services Agency (FSA),⁶ the Securities and Exchange Surveillance Commission (SESC),⁷ and prosecutors. This approach has resulted in systemic under-enforcement, primarily due to limited regulatory resources, a narrow focus on traditional corporate governance information, and a lack of robust private enforcement tools such

¹ Generally, ‘ESG’ is employed as an acronym for Environmental, Social, and Governance, a term known for its polysemous nature (Elizabeth Pollman, ‘The Making and Meaning of ESG’ (2024) 14 *Harvard Business Law Review* 403, 424–33, Amanda M Rose, ‘A Hard Look at Portfolio-Focused Stewardship’ (2024) 2024 *Columbia Business Law Review* 313, 315(n2)). While acknowledging criticisms regarding the polysemy and broad scope of ESG, this paper utilises it simply as an environmental, social, and governance acronym. Furthermore, ‘ESG disclosure’ in this paper is used interchangeably with Non-Financial Information (NFI) disclosure, despite varied interpretations of NFI in existing literature (Lara Tarquinio and Stefania Carolina Posadas, ‘Exploring the Term “Non-Financial Information”: An Academics’ View’ (2020) 28 *Meditari Accountancy Research* 727, 742 – 743; Mark Ortega, ‘Environmental, Social, and Governance (ESG) Reporting from an Environmentalist’s (Not Investor’s) Lens’ (2023) 47 *UC Davis Law Review* 52, 56, 76).

² See part III.A.

³ Greenwashing, which refers to the practice of making sustainability-related statements, declarations, actions, or communications that do not clearly and fairly reflect the underlying sustainability profile of an entity, financial product, or financial service (European Securities and Markets Authority, *Progress Report on Greenwashing* (2023) ESMA30-1668416927-2498 [11]), is one form of inaccurate ESG disclosure and may mislead consumers, investors, or other market participants. However, this paper does not limit its discussion to greenwashing alone.

⁴ Ortega (n 1) 79 – 86; ESMA (n 3) [48] – [62].

⁵ See part III.B.

⁶ FSA, formally known as *Kinyūchō* (金融庁) in Japan, is the Japanese governmental agency responsible for regulating the nation’s financial markets.

⁷ SESC, formally known as *Shōken Torihiki-tō Kanshi Iinkai* (証券取引等監視委員会), is the Japanese governmental agency responsible for overseeing and enforcing compliance with securities laws and regulations.

as third-party assurance or investor-led litigation.⁸ In contrast, the US largely depends on *ex-post* and private enforcement, mainly through securities fraud litigation initiated by investors. While this model provides strong deterrence against misrepresentation, it faces challenges such as the risk of frivolous lawsuits and difficulties in proving materiality and reliance in ESG-related cases.⁹ Meanwhile, the EU adopts a more proactive stance, employing mandatory third-party assurance under the Corporate Sustainability Reporting Directive (CSRD)¹⁰ to ensure the accuracy of ESG information before disclosure. However, this approach has limitations: the scope of eligible information and the level of assurance are inherently restricted, qualified providers are scarce, and assurance is costly.¹¹

This comparative analysis reveals substantial trade-offs within each system. Japan's reliance on *ex-post* and public enforcement highlights the strengths and limitations of government-led oversight. While public authorities may be well-placed to enforce such disclosures, resource constraints and difficulties in detecting complex ESG misstatements hinder their effectiveness. Although the US model provides vigorous private enforcement, it struggles with consistency and accessibility, particularly given the high costs and risks associated with litigation. The EU's proactive *ex-ante* approach offers comprehensive safeguards but depends heavily on the quality and independence of third-party assurance providers.

This study makes three contributions. First, it highlights the global need for more balanced and integrated enforcement frameworks that combine public oversight with private enforcement mechanisms. Jurisdictions should leverage the strengths of both approaches by integrating proactive third-party assurance and investor-driven enforcement with robust public monitoring. Second, this study highlights the inherent role and limitations of public enforcement under the double materiality framework.¹² While public regulators may play a limited role in enforcing disclosures critical to investors, they are essential for ensuring the accuracy of information that is significant for other stakeholders, particularly in addressing broader societal and environmental concerns. Third, it proposes a hybrid enforcement model that balances *ex-ante* and *ex-post* approaches, combines public and private enforcement, and enhances regulatory bodies' capacity to ensure the accuracy of ESG disclosures. Such a model would strengthen corporate accountability and transparency and foster global sustainable and responsible investment practices.

The structure of this paper is as follows. Part II reviews the international expansion of ESG disclosure and the status of ESG disclosure systems in Japan, organising the approximately 50-year history of ESG disclosure expansion and its adoption in Japan. Part III provides an overview of the purposes of ensuring the accuracy of ESG information and the legal measures that can be taken to

⁸ See part IV.B, C.

⁹ See part III.B.1.

¹⁰ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322/15 ('CSRD').

¹¹ See part III.B.2.

¹² The concept of double materiality refers to corporate disclosure approach from two perspectives: one is financial materiality, which considers how ESG matters affect the company's value and then for investors' interest (the 'outside-in' perspective), and the other is environmental and social materiality, which considers the external impact of company's activities on environment and social and then for interest to citizens, consumers, employees, business, partners, communities, and civil society organisations ('inside-out' perspective). See *European Commission, Guidelines on Reporting Climate-related Information* (2019) <https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf>; CSRD art 1(4).

achieve this. Here, the accuracy assurance methods are divided into *ex-ante/ex-post* and public/private enforcement, and the characteristics of typical methods are analysed. Part IV analyses the legal measures for ensuring the accuracy of ESG information in Japan. Since the accuracy assurance measures differ depending on the disclosure document in Japan, these measures are organised by disclosure document. Then, the status of *ex-post* enforcement for the Annual Securities Report, a representative disclosure document, is summarised, and the characteristics of Japan's legal means for ensuring ESG information accuracy are extracted. Part V presents an analytical framework for ESG information accuracy assurance methods, building upon the preceding analysis. Part VI concisely presents the conclusions of this paper and outlines avenues for future research.

II. THE EXPANSION OF ESG DISCLOSURE

A. Global Trends: History and Evolution of ESG Disclosure

Previous research divides the historical development of ESG disclosure into three distinct phases.¹³ The first wave, spanning from the mid-1970s to the late 1970s, witnessed the emergence of ESG disclosure, primarily driven by governmental efforts at the international level. The second wave, from the 1990s to the mid-2000s, saw individual companies and specific non-governmental organisations voluntarily disclosing ESG information on their own initiative. The third wave, beginning in the late 2000s, particularly following the global financial crisis, marks a period in which various jurisdictions began to mandate or actively promote ESG disclosure through regulatory frameworks.

The first wave of ESG disclosure can be traced back to the OECD Guidelines for Multinational Enterprises established in 1976.¹⁴ The Guidelines were adopted and published against the backdrop of the rise of multinational corporations and the growing importance of international investment.¹⁵ Although the original 1976 version did not prominently feature ESG in its chapter structure, it already contained provisions that anticipated later concerns. For instance, among its eight chapters,¹⁶ the 'Disclosure of Information' section recommended reporting the average number of employees by geographical area.¹⁷ Over time, through successive revisions, the Guidelines have evolved into a more ESG-oriented framework. The current version includes dedicated chapters on Human Rights,

¹³ David Monciardini, Jukka Tapio Mähönen and Georgina Tsagas, 'Rethinking Non-Financial Reporting: A Blueprint for Structural Regulatory Changes' (2020) 10 *Accounting, Economics and Law: A Convivium* 1, 8 – 17; Ortega (n 2) 69 – 70; Nick G Schwake, 'What Is Material?: Creating a Conducive Environment for Climate-Related Information Disclosure in the Oil and Gas Industry' (2023) 108 *Iowa Law Review* 1959, 1963-1965.

¹⁴ Previous researches identify the OECD Guidelines as the starting point of the first wave of ESG disclosure (Monciardini et al (n 13) 8, 13 and Ortega (n 1) 69). The OECD Guidelines have disclosure provisions, but in the 1976 original version, disclosures such as (i) enterprise structure, (ii) geographical operations, (iii) operating results and sales, (iv) significant new capital investment, (v) funds flow, (vi) the average number of employees in each geographical area, (vii) research and development, (viii) intra-group pricing, (ix) accounting policies, and ESG aspects did not feature prominently (ESG matters were reflected only in (vi)).

¹⁵ OECD, *Declaration on International Investment and Multinational Enterprises* (21 June 1976) preamble.

¹⁶ Eight chapters of the original 1976 version were General Policies, Disclosure of Information, Competition, Financing, Taxation, Employment and Industrial Relations, Science and Technology, and Implementation and Follow-up.

¹⁷ OECD, *Guidelines for Multinational Enterprises* (n 15) ch 2 (f).

Environment, Combating Bribery and Other Forms of Corruption, and Consumer Interests, reflecting the growing global emphasis on responsible business conduct in these areas.¹⁸

The year 1976 was significant not only as the starting point for international ESG disclosure initiatives but also for broader perspectives on corporate governance and ESG. It marked a pivotal moment in the emergence of debates that remain central to contemporary ESG issues, such as the tension between shareholder primacy and multi-stakeholder approaches, as well as the fundamental question of the corporation's purpose. Influentially, Jensen and Meckling, in their 1976 paper, conceptualised the firm as a nexus of contracts. They posited that shareholders are principals and managers are agents, thereby laying the theoretical foundation for the subsequent development of agency theory.¹⁹ While they did not explicitly advocate shareholder primacy, they assumed that the interests of other stakeholders, such as creditors, employees, and trading partners, could be protected through the design of appropriate incentive structures and contractual constraints.²⁰ Eisenberg, in his 1976 monograph, analysed the legal structure of the corporation and explicitly referred to the corporation's public interests and the potential involvement of other stakeholders in decision-making processes.²¹ He thus suggested the possibility of a conflict between shareholder interests and those of other stakeholders or broader societal goals.²² Nader, Green, and Seligman, in their 1976 book, criticised the negative externalities caused by the activities of mega corporations in the US. They advocated for regulation through 'federal chartering', which would involve strengthening board independence and enhancing disclosure requirements, with a strong emphasis on corporate social responsibility (CSR).²³

The second wave of ESG disclosure, which emerged in the 1990s and continued until the early 2000s, saw ESG disclosure progress primarily through voluntary initiatives by companies. This followed the conclusion of discussions within international regulatory organisations during the 1980s, which brought an end to the first wave. To support this voluntary disclosure, various guidelines and frameworks, such as the Global Reporting Initiative, were introduced.²⁴ These frameworks shared several characteristics: filling regulatory gaps, supporting voluntary disclosure, encouraging reputation-focused disclosure, and highlighting the growing importance of climate and environmental issues.²⁵

The third wave of ESG disclosure began in the late 2000s, particularly following the global financial crisis in 2007, which brought the second wave to an end. In its aftermath, jurisdictions worldwide began to introduce and strengthen mandatory ESG disclosure requirements as part of broader efforts to enhance corporate transparency and accountability. For example, in the US, the Dodd-Frank Act was enacted in 2010,²⁶ which expanded disclosure requirements regarding executive

¹⁸ OECD, *Guidelines for Multinational Enterprises* (2023) ch 1-11.

¹⁹ Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.

²⁰ See Jensen and Meckling (n 19) 308-311, 337-339.

²¹ Melvin A Eisenberg, *The Structure of the Corporation: A Legal Analysis* (Beard Books, 1976).

²² Eisenberg (n 21).

²³ Ralph Nader, Mark Green and Joel Seligman, *Taming the Giant Corporation* (Alfred A Knopf, 1976).

²⁴ European Union, *Eco-Management and Audit Scheme* (EMAS) (1993); Global Reporting Initiative (1996); United Nations, *UN Global Compact* (2000); Carbon Disclosure Project, *CDP Questionnaire* (2000).

²⁵ Monciardini et al (n 13) 13-14.

²⁶ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No 111-203, 124 Stat 1376 (2010)) and the Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos 33-9106; 34-61469 (8

compensation and conflict minerals.²⁷ It also strengthened and introduced whistleblower protection schemes to encourage the disclosure of corporate misconduct.²⁸ Furthermore, in 2024, the SEC adopted rules mandating climate-related disclosures for listed companies.²⁹ In the UK, the 2013 amendment to the Companies Act introduced the Strategic Report, requiring listed companies to include non-financial information necessary for understanding their development, performance, and position, such as environmental, employee, and social matters, respect for human rights, and anti-corruption and anti-bribery measures, in addition to their strategy and business model.³⁰ The Modern Slavery Act was enacted in 2015, obliging certain companies to disclose measures taken to prevent modern slavery and human trafficking in their own operations and supply chains.³¹ Additionally, in 2019, the Streamlined Energy and Carbon Reporting (SECR) framework was introduced, mandating the inclusion of greenhouse gas emissions and energy consumption in annual reports.³² Beyond these, various other jurisdictions, such as Australia³³ and some Asia countries,³⁴ are strengthening mandatory or promoting ESG disclosures.

The 2010s saw these reforms extended beyond domestic regulations, with international initiatives also gaining momentum, including revisions to existing disclosure standards and the development of new global frameworks and guidelines.³⁵ As previously discussed, while international frameworks for ESG disclosure existed during the first and second waves, their primary focus was on whether to disclose ESG information. In contrast, the third wave is characterised by a shift in focus towards how to disclose such information.³⁶ This emphasis likely stems from the introduction of mandatory disclosure and disclosure promotion at the jurisdictional level during this period.

Thus, the third wave has seen a strengthening of ESG disclosure at both the jurisdictional and international framework levels. One key factor behind these developments is the increasing expectation for institutional investors to act as responsible investors, engaging in long-term investment,

February 2010). See Schwake (n 13) 1980–1981.

²⁷ *Dodd-Frank Act* ss 951, 953(a), 1502, codified at Securities Exchange Act of 1934 ss 14A, 14(i), 13(p).

²⁸ *Dodd-Frank Act* s 922, codified at Securities Exchange Act of 1934 s 21F.

²⁹ Securities and Exchange Commission (US), *The Enhancement and Standardisation of Climate-Related Disclosures for Investors*, Release Nos 33-11275, 34-99678, 17 CFR pts 210, 229, 230, 232, 239, 249 (6 March 2024). See Kimberly Houser and Lindsay Jones, ‘Investor Driven Climate Accountability’ (2024) 57 *UC Davis Law Review* 2627, 2637–2642; Jerry W Markham, ‘US Securities and Exchange Commission and the “Deep Administrative State”: A Case Study of Its ESG Rules’ (2024) 14 *American University Business Law Review* 151, 214–218, 228–234.

³⁰ *Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013* (UK) SI 2013/1970.

³¹ *Modern Slavery Act 2015* (UK) c 30. (see Wangwei Lin, ‘Corporate Non-Financial Reporting in the UK: Diversions from the EU Sustainability Reporting Framework’ (2022) 14 *Sustainability: Science, Practice and Policy* 9134).

³² *The Companies (Directors’ Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018* (UK).

³³ *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (Cth).

³⁴ See Rachel Phang and Yaru Chia, ‘Sustainability and the Sunlight of Disclosure: ESG Disclosure in Three Asian Financial Centres’ (2024) 33 *Review of European, Comparative and International Environmental Law* 209.

³⁵ For example, International Integrated Reporting Council, *International Integrated Reporting Framework* (Framework, 2014); United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Resolution, adopted 25 September 2015); Financial Stability Board, *Recommendations of the Task Force on Climate-related Financial Disclosures* (Recommendation, 2017); ISSB, *IFRS S1: General Requirements for Disclosure of Sustainability-related Financial Information* (Standard, 2023); and ISSB, *IFRS S2: Climate-related Disclosures* (Standard, 2023).

³⁶ Monciardini et al (n 13) 15.

proxy voting, and constructive dialogue with investee companies.³⁷ This shift is evident in the enactment of stewardship code-like soft law in various jurisdictions following the Principles for Responsible Investment (PRI) in 2006, and subsequently, the Non-Financial Reporting Directive (NFRD) in 2014.³⁸ Furthermore, unlike the first and second waves, where social matters (first wave) and climate and environmental matters (second wave) largely diverged from investment decisions, the third wave positions ESG disclosure as a means to counter investor short-termism.³⁹

Now I will examine how these expanding trends in ESG disclosure have influenced Japan and how ESG information is disclosed within the country.

B. Catching up with Global Trends: Japan's Delayed Response

1. Legal Basis of ESG Disclosure in Japan

Japan's disclosure system differs from those of other advanced economies, such as the US and the UK. It is shaped by three distinct legal and regulatory frameworks: the Companies Act 2005, the Financial Instruments and Exchange Act 1948, and the Tokyo Stock Exchange (TSE) Listing Rules. Each of these frameworks governs a separate disclosure document, namely, the Business Report,⁴⁰ the Annual Securities Report,⁴¹ and the Corporate Governance Report. Japanese listed companies⁴² are thus required to disclose ESG information across all three reports, making Japan unique in its mandate for multi-document ESG disclosure.⁴³

The Business Report, as required under the Companies Act 2005, is distributed before the Annual General Meeting (AGM) to provide shareholders with the necessary information for exercising their voting rights.⁴⁴ It requires disclosure of the company's current status, covering its business activities, operational progress, workforce details, significant corporate actions such as financing and

³⁷ Thomas Bowley and Jennifer Hill, 'The Global ESG Stewardship Ecosystem' (2024) 25 *European Business Organization Law Review* 229, 232-237.

³⁸ Directive 2014/95/EU of the European Parliament and the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1, Recital 3: 'disclosure of non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection'.

³⁹ Ortega (n 1) 70; Schwake (n13) 1965 – 1966 (illustrating the connection between shareholder engagement and ESG).

⁴⁰ The Business Report, formally known as *Jigyō Hōkoku* (事業報告) in Japan, serves as a mandated disclosure document under the *Companies Act 2005* (Japan), disclosing ESG information, mainly governance information.

⁴¹ The Annual Securities Report, formally known as *Yūkaishōken Hōkokusho* (有価証券報告書) in Japan, serves as a mandated disclosure document under the Financial Instruments and Exchange Act 1948, disclosing both financial and ESG information.

⁴² Non-listed but public companies are required to prepare only the Business Report, not the Annual Securities Report or Corporate Governance Report, and therefore disclose ESG information solely through the Business Report, as mandated by the Companies Act 2005. However, closely held companies (that is, private companies), where the transfer of all issued shares is subject to approval by the general meeting of shareholders or the board of directors (*Companies Act 2005* (Japan) ss 2(v) (*a contrario*), 136-145) are subject to fewer statutory disclosure requirements, particularly concerning ESG information, compared to public companies (*Ordinance for Enforcement of the Companies Act* (Ministry of Justice Order No. 12 of 2006) (Japan) s 118).

⁴³ In addition to the mandatory disclosure documents discussed in the main text, many listed companies in Japan voluntarily prepare Integrated Reports and Sustainability Reports, which provide more detailed ESG information.

⁴⁴ *Companies Act 2005* (Japan) ss 299(1), 437.

investments, and key challenges to be addressed.⁴⁵ It also mandates detailed information regarding directors and *Kansayaku*,⁴⁶ including their names and positions, compensation structure, and details of any liability limitation agreements or D&O insurance contracts.⁴⁷

The Annual Securities Report, mandated by the Financial Instruments and Exchange Act of 1948, is intended mainly for investors. It provides integrated disclosure of financial and ESG information and is typically made available after the AGM.⁴⁸ Every year, listed companies are required to prepare and submit their Annual Securities Reports to the FSA via EDINET (Electronic Disclosure for Investors' NETwork).⁴⁹ The Local Finance Bureaus,⁵⁰ which are administrative bodies authorised by the Commissioner of the FSA, conduct formal reviews to ensure that the submitted reports comply with statutory requirements.⁵¹ This document provides comprehensive ESG information, including details on business activities, management policy, key challenges, and significant business risks. It also contains Management's Discussion and Analysis (MD&A), information on the corporate group and workforce, and a detailed section on corporate governance practices.⁵² Reflecting recent mandatory changes, as discussed below,⁵³ it now features a dedicated section on sustainability-related policies and initiatives, covering topics such as climate change and human capital.

The Corporate Governance Report is a document disclosed to investors whenever there are changes to the required disclosure items under the listing rules.⁵⁴ It primarily contains information on the company's corporate governance practices, such as details on its compliance with the Corporate Governance Code,⁵⁵ measures to eliminate anti-social forces,⁵⁶ its governance structure, internal

⁴⁵ *Ordinance for Enforcement of the Companies Act (Ministry of Justice Order No. 12 of 2006)* (Japan) s 120

⁴⁶ The system of *Kansayaku* and *Kansayaku-kai* (the board of *Kansayaku*) in Japan is a unique corporate governance institution with no direct foreign equivalents apart from a few Asian jurisdictions. *Kansayaku* is often translated as 'company auditor' or 'internal auditor', but these translations do not adequately capture the full range of functions performed by *Kansayaku*. The *Kansayaku* and *Kansayaku-kai* do not merely 'audit' based on the legality of managerial acts, but also supervise the activities of management, working in collaboration with the board of directors (*Companies Act 2005* (Japan) ss 381, 383). See, The Japan Audit & Supervisory Board Members Association, 'Announcement – New Recommended English Translation of “*Kansayaku*” and “*Kansayaku-kai*”' <<https://www.kansa.or.jp/wp-content/uploads/en/announcement.pdf>>).

⁴⁷ *Ordinance for Enforcement of the Companies Act (Ministry of Justice Order No. 12 of 2006)* (Japan) ss 121, 121-2.

⁴⁸ *Financial Instrumental and Exchange Act 1948* (Japan) s 24(1)(i). Listed companies in Japan are required to submit an Annual Securities Report within three months after the end of each fiscal year. In Japan, AGM are typically held between eight and eleven weeks after the end of the fiscal year. As a result, most listed companies submit their Annual Securities Reports after the conclusion of the AGM.

⁴⁹ *Financial Instrumental and Exchange Act 1948* (Japan) ss 27-30-2 – 27-30-11.

⁵⁰ The Local Finance Bureaus, formally known as *Zaimukyoku* (財務局), are regional administrative bodies in Japan.

⁵¹ *Financial Instrumental and Exchange Act 1948* (Japan) ss 9, 24, 194-7(1), (6), (8).

⁵² *Cabinet Office Ordinance on Disclosure of Corporate Affairs, etc.* (Japan) Ordinance of the Ministry of Finance No. 5 of 1973, Form 3.

⁵³ See part II.B.2.

⁵⁴ *Tokyo Stock Exchange Listing Rules* (Japan) ss 204(12)(i), 419(1).

⁵⁵ Japan's Corporate Governance Code (CGC), which is attached to the Listing Rules of the TSE, operates on a 'comply or explain' basis. This requires listed companies to disclose in their Corporate Governance Report their compliance with each principle of the Code or to explain the reasons for any non-compliance (*Tokyo Stock Exchange Listing Rules* (Japan) s 445-3). See (n 66) and its accompanying text.

⁵⁶ Anti-social forces refer to organised crime groups or individuals/entities that threaten public order and safety through violence, fraud, or coercion, such as the *Yakuza* (Japanese organised crime syndicates).

control systems, and specifics regarding directors, *Kansayaku*, and their compensation.⁵⁷

Differences among these mandatory disclosure documents extend beyond the timing and content of disclosures to encompass the mechanisms used to ensure their accuracy and reliability. These differences in enforcement mechanisms arise because each disclosure document is subject to different legislation or listing rules, and each of the frameworks prescribes its procedures for ensuring accuracy.⁵⁸ The following section will discuss recent developments in ESG disclosure in Japan, as well as the background factors driving these changes.

2. Government Policies and Regulatory Developments

In Japan, the expansion of ESG disclosure has followed recent global trends, albeit with a notable delay. Although Japanese companies have long been required to disclose certain ‘Social’ elements, such as details on their workforce, including the number of employees and labour union status,⁵⁹ this information was historically presented in a fragmented manner and was not part of a broader ESG framework. It was not until the mid-2010s that a truly systematic and substantive approach to ESG disclosure began to emerge.

While the international push for ESG disclosure has primarily been driven by the need to address investors’ short-termism,⁶⁰ in Japan, ESG disclosure has been positioned as part of the country’s broader growth strategy.⁶¹ Since the 1990s, Japan has experienced a prolonged period of low economic growth, often referred to as the ‘lost three decades’, during which improving corporate profitability became a key policy objective.⁶² At the same time, the proportion of foreign institutional investors continued to increase steadily. Until the 1990s, the shares of Japanese listed companies were often held by Japanese banks that had extended loans to the companies and other domestic listed companies. However, from the 2000s onward, these cross-shareholdings were gradually unwound, and shares increasingly came to be held by both domestic and foreign institutional investors.⁶³ In particular, there was growing pressure to establish corporate governance frameworks and enhance disclosure practices that would be favourably received by foreign institutional investors.⁶⁴

During the mid-2010s, a foundation for encouraging ESG disclosure was established for listed companies in Japan. Between 2014 and 2015, FSA and TSE introduced Japan’s Stewardship Code and

⁵⁷ Tokyo Stock Exchange, *Preparation Guidelines for Corporate Governance Reports* (Revised Version as of April 2024).

⁵⁸ This point will be discussed in detail in part IV.A.

⁵⁹ In the Annual Securities Reports, disclosure of labour conditions and employee benefits, specifically, the number of employees, salary status, labour union status, and welfare facilities, has been mandatory since relatively early on (Securities and Exchange Commission Regulation No 10, ‘Regulation Partially Amending the Regulation on the Filing of Registration Statements for Public Offering or Sale of Securities’ (Japan, promulgated 25 May 1950) Form No 3 [in Japanese]).

⁶⁰ See part II.A.

⁶¹ See Gen Goto, ‘Recent Boardroom Reforms in Japan and the Roles of Outside/Independent Directors’ in Hiroshi Oda (ed), *Comparative Corporate Governance: The Case of Japan*, Journal of Japanese Law, Special Issue 12 (2018).

⁶² See Hideaki Miyajima and Takuji Saito, ‘Corporate Governance Reforms under the Abenomics: The Economic Consequences of Two Codes’ (2019) <<https://papers.ssrn.com/abstract=3684372>>.

⁶³ Julian Franks et al, *Managing Ownership by Management* (Research Institute of Economy, Trade and Industry, March 2023) Discussion Paper 23-E-022, 5 – 8.

⁶⁴ Miyajima and Saito (n 62) 16 – 17.

Japan's Corporate Governance Code. Japan's Stewardship Code sets forth principles to ensure institutional investors fulfil their stewardship responsibilities by engaging in constructive dialogue with investee companies to enhance corporate value and sustainable growth.⁶⁵ To facilitate such engagement, ESG information became increasingly necessary for institutional investors. Japan's Corporate Governance Code requires listed companies to disclose information proactively, ensuring transparency and accountability to shareholders, including ESG information.⁶⁶ In addition, in 2016, the Government Pension Investment Fund (GPIF)⁶⁷ launched a public call for proposals for ESG indices covering domestic equities, and in 2017, announced the adoption of three ESG indices,⁶⁸ marking the formal beginning of large-scale ESG investments in Japan.⁶⁹ These domestic developments align with the broader trends of the 'global ESG stewardship ecosystem', where transnational networks of institutional investors and international agencies actively develop and disseminate norms of ESG stewardship, thereby influencing national markets.⁷⁰

From the late 2010s onward, efforts to enhance ESG disclosure have increasingly been pursued through amendments to Japan's Corporate Governance Code and statutory regulations. These efforts can be broadly categorised into three key developments outlined below.

Japan's Corporate Governance Code has increasingly encouraged the disclosure of ESG information with each revision. In the Notes to Principle 3,⁷¹ which addresses information disclosure,

⁶⁵ Financial Service Agency, *Principles for Responsible Institutional Investors (Japan's Stewardship Code): To promote sustainable growth of companies through investment and dialogue* (2014), principle 1.1: 'Institutional investors should aim to enhance the medium- to long-term return on investments for their clients and beneficiaries by improving and fostering investee companies' corporate value and sustainable growth through constructive engagement, or purposeful dialogue, based on in-depth knowledge of the companies and their business environment'.

⁶⁶ Tokyo Stock Exchange, *Japan's Corporate Governance Code: Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid-to Long-Term Principle* (2015), principle 3.1: 'In addition to making information disclosure in compliance with relevant laws and regulations, companies should disclose and proactively provide the information listed below (along with the disclosures specified by the principles of the Code) in order to enhance transparency and fairness in decision-making and ensure effective corporate governance: i) Company objectives (e.g., business principles), business strategies and business plans; ii) Basic views and guidelines on corporate governance based on each of the principles of the Code; iii) Board policies and procedures in determining the remuneration of the senior management and directors; iv) Board policies and procedures in the appointment of the senior management and the nomination of directors and *Kansayaku* candidates; and v) Explanations with respect to the individual appointments and nominations based on iv).'

⁶⁷ GPIF is Japan's largest public investment fund and is key in stabilising the national pension scheme (Government Pension Investment Fund, *Annual Report Fiscal Year 2023* (2024) 1 <https://www.gpif.go.jp/en/performance/annual_report_fiscal_year_2023.pdf>). GPIF signed the Principles for Responsible Investment (PRI) in 2015 and fully complied with Japan's Stewardship Code (*Ibid* at 17). Additionally, GPIF has actively focused on ESG investment to enhance long-term investment returns.

⁶⁸ Government Pension Investment Fund, *Selection of ESG Indices* (3 July 2017) <https://www.gpif.go.jp/investment/esg/pdf/esg_selection.pdf> [in Japanese].

⁶⁹ The GPIF has been expanding its ESG investments year by year, with both the number of adopted indices and the investment amount increasing. As of the end of March 2024, the proportion of ESG investments within the total portfolio has risen to around 8%, with the investment amount reaching JPY 19.4 trillion at that time (GPIF, *2023 ESG Report* (27 Sep. 2024) <https://www.gpif.go.jp/en/investment/GPIF_ESGReport_FY2023_E_02_02.pdf>).

⁷⁰ Bowley & Hill (n 37) 237-241.

⁷¹ Japan's CGC is structured around five fundamental principles ((1) securing the rights of shareholders and ensuring their equality, (2) appropriate collaboration with stakeholders other than shareholders, (3) ensuring appropriate information disclosure and transparency, (4) responsibilities of the board of directors, etc., and (5) dialogue with shareholders), which are further elaborated by 31 detailed principles and 42 supplementary principles; the Code also

the 2018 revision explicitly pointed out the insufficiency of ESG disclosures.⁷² Subsequently, the Notes in the 2021 revision were further updated to emphasise that sustainability issues, including ESG factors, are critical management challenges for enhancing medium- to long-term corporate value.⁷³ Against this backdrop, Japanese companies were encouraged to address sustainability challenges proactively.

The scope of information required in Annual Securities Reports was expanded, enhancing ESG disclosure in 2019 and 2023. The 2019 amendment aimed to expand disclosures related to management policies and strategies, business risks, executive compensation, and cross-shareholdings.⁷⁴ The 2023 amendment introduced a dedicated section for sustainability information, mandating the disclosure of governance arrangements for sustainability-related risks and opportunities, human capital (including policies for human resource development and internal environmental improvements), information used to evaluate and manage sustainability-related risks and opportunities, and processes used to identify, assess, and manage such risks and opportunities. Additionally, companies are now required to disclose information on employee status, specifically the ratio of female managers, the rate of male employees taking childcare leave, and gender pay gaps.⁷⁵

The formulation of ESG information disclosure standards has been completed, and discussions are also underway regarding the mandatory requirement of third-party assurance for ESG information. To this end, in 2025, the Sustainability Standards Board of Japan (SSBJ) formulated disclosure standards (SSBJ Standards) based on the ISSB Standard, an international framework for ESG disclosure grounded in the concept of single materiality.⁷⁶ Concurrently, the Working Group on Sustainability Disclosure and Assurance, established by the FSA, is currently examining potential frameworks to ensure the accuracy of ESG information through assurance mechanisms.⁷⁷

includes ‘Notes’ under each General Principle to explain their background and context.

⁷² Tokyo Stock Exchange, *Japan’s Corporate Governance Code: Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid-to Long-Term Principle* (2018), note of general principle 3: ‘Non-financial information, including matters related to the company’s financial condition, management strategies, risks, governance, and social and environmental issues (so-called ESG factors), often consisted of boilerplate statements or lacked specificity, providing little added value.’

⁷³ Tokyo Stock Exchange, *Japan’s Corporate Governance Code: Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid-to Long-Term Principle* (2021), note of general principle 3: ‘The revised Notes highlighted that awareness of sustainability had been growing globally, as evidenced by the adoption of the Sustainable Development Goals (SDGs) at the UN Summit and the increasing number of organizations endorsing the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD)’.

⁷⁴ Cabinet Office Ordinance on Disclosure of Corporate Affairs, etc., Cabinet Office Ordinance No. 13 of 2019 (Extra Edition, 21 June 2019) (Japan).

⁷⁵ Cabinet Office Ordinance on Disclosure of Corporate Affairs, etc., Cabinet Office Ordinance No. 11 of 2023 (Extra Edition, 31 January 2023) (Japan).

⁷⁶ SSBJ, *Schedule of Differences between ISSB Standards and SSBJ Standards* (31 Mar. 2025) <https://www.ssb-j.jp/en/wp-content/uploads/sites/7/ssbj_20250331_01_e.pdf>, SSBJ, *Table of Concordance between ISSB Standards and SSBJ Standards* (31 Mar. 2025) <https://www.ssb-j.jp/en/wp-content/uploads/sites/7/ssbj_20250331_02_e.pdf>.

⁷⁷ For details regarding the status of meetings of the Working Group, please refer to the Financial Services Agency’s website (FSA, The Working Group on Disclosure and Assurance of Sustainability-related Financial Information (of the Financial System Council) <https://www.fsa.go.jp/en/refer/councils/sustainability_disclose_wg/index.html>).

III. OVERVIEW OF MECHANISMS FOR ENSURING THE ACCURACY OF ESG INFORMATION

A. The Rationale for Accuracy Assurance in ESG Disclosure

There is a broad consensus that the inaccurate disclosure of ESG information is undesirable. However, the precise reasons for preventing it are often understood abstractly. For example, ESMA (European Securities and Markets Authority) notes that greenwashing, one form of inaccurate ESG disclosure, ‘may undermine trust in sustainable finance markets and policies.’⁷⁸ ESMA’s explanation emphasises the importance of preserving trust in markets and regulatory policies. While such concerns are undoubtedly valid, this type of explanation does not offer a comprehensive or sufficiently concrete explanation of why ensuring the accuracy of ESG information is essential, particularly in the context of mandatory ESG disclosure frameworks. An examination of the characteristics of mechanisms for ensuring the accuracy of ESG information must, therefore, be preceded by clarifying why ensuring such accuracy is necessary. In this regard, linking the justifications for ensuring the accuracy of ESG information to the broader rationales underlying the mandatory disclosure of ESG information itself is helpful. By doing so, the basis for ensuring accuracy can be understood more concretely and systematically. These rationales can be broadly classified into three categories.

The first rationale for mandating ESG disclosure can be referred to as the investment decisions theory, which highlights the importance of ESG information in enhancing the quality of investment decisions.⁷⁹ Under the traditional framework of securities law, mandatory disclosure aims to reduce information asymmetry between investors and investee companies⁸⁰ by ensuring access to reliable information, it protects investors from securities fraud and facilitating more efficient capital allocation by enabling capital to flow to more profitable projects at lower capital costs.⁸¹ From the perspective of corporate finance theory, institutional investors, through portfolio diversification, can mitigate firm-specific risks or idiosyncratic risks but they remain exposed to broader systematic risks that cannot be eliminated through diversification.⁸² Climate change and pandemic risks are prime examples of such systematic risks.⁸³ Institutional investors are increasingly relying on ESG information disclosed by

⁷⁸ ESMA (n 4) [14].

⁷⁹ Roshan Wasim, ‘Corporate (Non)Disclosure of Climate Change Information’ (2019) 119 *Columbia Law Review* 1311, 1316–22; Aisha I Saad and Diane Strauss, ‘The New “Reasonable Investor” and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation’ (2020) 17 *Berkeley Business Law Journal* 391, 399–401, 407–412; John C Coffee, ‘The Future of Disclosure ESG, Common Ownership, and Systematic Risk’ (2021) 2021 *Columbia Business Law Review* 602; Nick G Schwake, ‘What Is Material?: Creating a Conducive Environment for Climate-Related Information Disclosure in the Oil and Gas Industry’ (2023) 108 *Iowa Law Review* 1959, 1961, 1975–76, 1985–1991; George S Georgiev, ‘The Market-Essential Role of Corporate Climate Disclosure’ (2023) 56 *UC Davis Law Review* 2105, 2116–2119, 2127–2130; Dalit Gafni et al, ‘ESG Regulation and Financial Reporting Quality: Friends or Foes?’ (2024) 61 *Finance Research Letters* 105017; Rose (n 1) 318–321.

⁸⁰ Ann M Lipton, ‘Not Everything Is about Investors: The Case for Mandatory Stakeholder Disclosure’ (2020) 37 *Yale Journal on Regulation* 499, 509.

⁸¹ See John C Coffee, ‘Market Failure and the Economic Case for a Mandatory Disclosure System’ (1984) 70 *Virginia Law Review* 717, 734–737, Zohar Goshen and Gideon Parchomovsky, ‘The Essential Role of Securities Regulation’ (2006) 55 *Duke Law Journal* 711, 713–716.

⁸² Richard A Brealey et al, *Principles of Corporate Finance* (14th ed, 2023) 184–210.

⁸³ Coffee (n 79) 618–619.

companies to assess and manage these risks, enabling them to evaluate the extent to which these risks may impact their portfolios and take appropriate action where necessary.⁸⁴ As ESG factors have become increasingly relevant to corporate performance and long-term value creation, ESG information is now considered essential for sound investment decisions. ESG disclosure, therefore, serves to complement the traditional disclosure framework by providing investors with a clearer understanding of how environmental and social risks and governance practices affect corporate value and financial stability.⁸⁵

However, with the rise of diversified institutional investors and index funds, a more nuanced understanding of ‘investor protection’ has emerged. The portfolio primacy theory posits that financially motivated diversified investors aim to maximise the risk-adjusted value of their entire portfolio, leading them to seek internalisation of costs their activities impose on other portfolio firms through ESG disclosures and stewardship.⁸⁶ Yet, the practical efficacy of such portfolio-focused stewardship in increasing overall portfolio value remains contested due to various real-world frictions, including managerial and intermediary agency costs, imperfect information, and market dynamism.⁸⁷

The second justification can be referred to as the corporate governance theory, which posits that ESG disclosure enhances corporate accountability concerning ESG-related issues.⁸⁸ Under the principal-agent model, which defines shareholders as principals and directors as agents, corporate disclosure plays a crucial role in reducing shareholders’ monitoring costs by helping deter directors’ mismanagement and self-interested behaviour.⁸⁹ Mandatory disclosure systems provide directors with strong incentives. They are encouraged to gather information on matters subject to disclosure proactively and to develop robust internal control systems to support the effective collection and management of information.⁹⁰ While ESG information is essential for assessing systematic risks and pursuing economic returns, it also plays a critical role in enabling investors to fulfil their responsibilities as responsible investors. This role has been increasingly expected since the mid-2000s, as discussed.⁹¹ ESG information provides the foundation for informed and responsible investment decisions, as well as meaningful engagement with investee companies.⁹² The increasing expectation for institutional investors to act as ‘responsible investors’ and to engage in ‘stewardship’ with investee companies, as discussed in the context of corporate governance, further highlights the role of ESG disclosure.⁹³ While such stewardship aims to enhance corporate accountability, its effectiveness in achieving broader portfolio-level financial gains through direct influence remains a subject of critical academic inquiry, particularly given the inherent agency problems and other frictions within the asset management industry.⁹⁴

⁸⁴ Lipton (n 80) 507-511.

⁸⁵ Coffee (n 79) 615-621; Rose (n 1) 326-330.

⁸⁶ Rose (n 1) 319-321.

⁸⁷ Rose (n 1) 331-373.

⁸⁸ Saad & Strauss (n 80) 401-403; Ortega (n 1) 87; Lipton (n 80) 509-511; Francesco E Mezzanotte, ‘Examining the Reasons for Impact Materiality in EU Corporate Sustainability Reporting’ (2024) 35 *European Business Law Review* 925, 935-937.

⁸⁹ See Bengt Holmström, ‘Moral Hazard and Observability’ (1979) 10 *Bell Journal of Economics* 74.

⁹⁰ Lipton (n 80) at 509.

⁹¹ See part II.A.

⁹² See part II.B.

⁹³ Rose (n 1) 326-330.

⁹⁴ Rose (n 1) 333-343.

The third rationale, referred to as private enforcement theory, posits that ESG disclosure serves as a mechanism to motivate companies to address ESG issues proactively.⁹⁵ The EU Corporate Sustainability Reporting Directive (CSRD) is a key component of the EU Green Deal⁹⁶ and builds upon the Global Reporting Initiative (GRI).⁹⁷ Recognising this, ESG disclosure under the CSRD can be understood as part of a broader policy framework. This framework aims to align business activities with sustainable development, primarily by enabling external stakeholders, including consumers, business partners, local communities, and NGOs, to exert pressure on companies and influence their operations towards sustainability.⁹⁸ This emphasis is further underpinned by the emergence of a ‘global ESG stewardship ecosystem’, a transnational network of diverse non-state actors, including international agencies, investor networks, service providers, and advocacy organisations. These actors collaboratively develop and disseminate norms for ESG stewardship, actively encouraging and coordinating investor engagement across global markets.⁹⁹

It is worth noting that the second and third categories are interdependent. By enhancing corporate accountability, ESG disclosure increases external pressure from shareholders and other stakeholders, such as consumers and NGOs. This external pressure, in turn, is a key mechanism to motivate companies to engage more actively with ESG issues. In this way, enhanced corporate accountability (the second category) and external incentives for ESG action (the third category) mutually reinforce one another. However, the second justification focuses on encouraging companies to address ESG issues primarily through shareholder engagement within the corporate governance framework. In contrast, the third justification differs in that it also encompasses non-shareholder stakeholders who have access to ESG information. These stakeholders include business partners, employees, local communities, and NGOs dedicated to environmental protection, all of whom can exert pressure on companies to consider ESG considerations.¹⁰⁰

As outlined above, the justifications for requiring companies to disclose ESG information can be summarised into three key points: improving the quality of investors’ decision-making (the investment decisions theory), enhancing corporate accountability concerning ESG issues (the corporate governance theory), and encouraging companies to address ESG challenges actively (the private enforcement theory). Based on these justifications, the need to ensure the accuracy of ESG information can be understood as serving three primary purposes: preventing harm to investors¹⁰¹, other stakeholders, and society as a whole.¹⁰²

⁹⁵ Mezzanotte (n 88) 933-934; Lipton (n 80) 511-519.

⁹⁶ European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal*, COM (2019) 640 final.

⁹⁷ Global Reporting Initiative, *GRI 1: Foundation 2021* (2021) ss 2.2, 2.4; Carol Adams et al, *The Double-Materiality Concept: Application and Issues* (2021) < <https://www.globalreporting.org/media/jrbntbyv/griwhitepaper-publications.pdf>>.

⁹⁸ Mezzanotte (n 88) 933-934; Hans B Christensen, Luzi Hail and Christian Leuz, ‘Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review’ (2021) 26 *Review of Accounting Studies* 1176, 1193-1194, 1205-1208; Ortega (n 1) 93-96.

⁹⁹ Bowley & Hill (n 37) 230-231, 237-241, 249-250.

¹⁰⁰ Rose (n 1) 324, 368-371, 382-383.

¹⁰¹ Classical explanation written in George A Akerlof, ‘The Market for “Lemons”: Quality Uncertainty and the Market Mechanism’ (1970) 84 *The Quarterly Journal of Economics* 488, 495.

¹⁰² Miriam A Cherry, ‘The Law and Economics of Corporate Social Responsibility and Greenwashing’ (2014) 14 *UC Davis Business Law Journal* 281, 301; Ortega (n 1) 87.

B. Key Mechanisms

Many mechanisms designed to ensure the accuracy of ESG information are modelled on those developed initially to ensure the accuracy of financial information. However, ESG information has distinctive characteristics, often including qualitative, forward-looking, and narrative elements.¹⁰³ Consequently, the effectiveness of such transplanting mechanisms designed for financial information remains subject to considerable scrutiny.

Mechanisms for ensuring the accuracy of ESG information can be categorised along two dimensions. The first dimension distinguishes between *ex-ante* and *ex-post* approaches.¹⁰⁴ *Ex-ante* mechanisms focus on ensuring accuracy before the information reaches the public (i.e. before disclosure), for example, through internal corporate governance processes, third-party assurance, or regulatory pre-clearance. In contrast, *ex-post* mechanisms operate after disclosure has occurred and misrepresentation or omission of ESG information has been identified, including administrative sanctions, criminal liability, and litigation initiated by shareholders or investors, such as securities fraud litigation.

The second dimension concerns the distinction between public enforcement and private enforcement.¹⁰⁵ Public enforcement relies on regulatory authorities and enforcement agencies to monitor and ensure the accuracy of ESG information through inspections, investigations, and administrative sanctions. On the other hand, private enforcement relies on actions initiated by private parties, such as investors or other stakeholders, including shareholder derivative actions, securities litigation, or third-party assurance and audit processes.

Table 1 summarises the mechanisms for ensuring the accuracy of ESG information, classified along the two dimensions of *ex-ante/ex-post* approaches and public/private enforcement. This classification highlights the wide range of tools available to ensure the reliability of ESG disclosures, while also illustrating the different roles played by public authorities and private actors. The following part will examine some key mechanisms for the accuracy of ESG information that are commonly used or widely debated internationally. Specifically, two mechanisms will be considered: third-party assurance, which represents an *ex-ante* and private-led mechanism, and civil liability claims brought by investors against companies and their directors, which constitute *ex-post* and private-led enforcement.

¹⁰³ Ortega (n 1) at 79–86; ESMA (n 4) [48] – [62].

¹⁰⁴ See Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, Oxford University Press, 2017) 37-38 (a summary of the essential features of *ex-ante* and *ex-post* enforcement).

¹⁰⁵ Howell E Jackson and Jeffery Y Zhang, ‘Private and Public Enforcement of Securities Regulation’ in Jeffrey N Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press, 2018) 928; Jenifer Varzaly, ‘The Dynamics of Shareholder Dispersion and Control in Australia’ (University of Cambridge Faculty of Law Research Paper, No 5/2021, 2021) <<https://papers.ssrn.com/abstract=3768856>> (Varzaly advocates for the establishment of an effective collaborative framework between private enforcement and public enforcement in Australia’s securities regulation); Alan K Koh, ‘Enforcing Corporate Purpose: Comparative Approaches’ (2024) 45 *University of Pennsylvania Journal of International Law* 833, 850, 861 (a summary of the essential features of private and public enforcement).

Table 1: Mechanisms for ensuring ESG information accuracy, divided by timing and entities

	Public	Private
<i>ex-ante</i>	- Orders to amend or suspend disclosure	- Board approval - Third-party assurance
<i>ex-post</i>	- Administrative fines or surcharges - Criminal liability	- Civil liability - Revocation of shareholder meeting resolution - Measures against listed companies by stock exchange (delisting, designation as a security on alert)

1. *Ex-ante* & Private-led Enforcement: Third-Party Assurance

Third-party assurance refers to the process by which independent experts, such as accountants or other certified professionals,¹⁰⁶ assess whether a company's ESG disclosures accurately reflect reality and, at a minimum, comply with established standards or reporting frameworks.¹⁰⁷ Mechanisms incorporating third-party assurance have been formally adopted under the EU Corporate Sustainability Reporting Directive (CSRD) and are increasingly being introduced in jurisdictions globally.¹⁰⁸ It is relatively common for companies to voluntarily obtain third-party assurance, with around half of companies choosing to do so without a legal requirement.¹⁰⁹ This approach offers several strengths, as independent assurance conducted before disclosure helps prevent false or misleading information from reaching the market and the public, thereby safeguarding investors from distorted decision-making based on inaccurate information and fostering broader public trust in both corporate disclosures and companies' ESG initiatives.

However, its effectiveness is often constrained by fundamental challenges to the reputational mechanisms that typically discipline such gatekeepers. As previous research argued, assurance providers usually face weaker reputational constraints than their traditional financial counterparts, increasing the likelihood of inaccurate certifications being issued. These challenges stem from inherent limitations in users' incentives and abilities to discern accurate certifications.¹¹⁰ The 'warm glow' effect, where users derive utility simply from believing a product or company is sustainable, can diminish their incentive to verify certifications rigorously, exacerbating the problem of inadequate

¹⁰⁶ For example, in France, independent third-party bodies, in addition to statutory auditors, are expected to provide assurance services for ESG disclosures. See (n 116).

¹⁰⁷ The depth of such assurance varies, typically ranging from limited assurance, which provides a lower confidence level, to reasonable assurance, which requires a more in-depth examination.

¹⁰⁸ *Ordinance No. 2023-11425 of 6 December 2023* (France); Securities and Exchange Commission (US), *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 17 CFR § 210, Release Nos 33-11275, 34-99678 (2024); *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (Cth)*.

¹⁰⁹ International Federation of Accountants, *The State of Play beyond the G20: Sustainability Disclosure and Assurance in 20 More Jurisdictions* (2023) <<https://www.ifac.org/knowledge-gateway/audit-assurance/publications/state-play-beyond-g20>>.

¹¹⁰ Luca Enriques, Alessandro Romano and Andrew F Tuch, 'Green Gatekeepers' (2024) 109 *Minnesota Law Review* 609, 637-640.

private supply.¹¹¹

In addition, there are several notable limitations arise. First, the scope of ESG information subject to third-party assurance remains relatively narrow. While ESG information is predominantly qualitative, forward-looking, and subject to managerial discretion,¹¹² third-party assurance is best suited to objectively quantifiable metrics, such as greenhouse gas (GHG) emissions.¹¹³ Other ESG factors, particularly social and governance-related disclosures, are generally only subject to verification in terms of their compliance with established reporting frameworks rather than the substantive accuracy of the information itself. Consequently, the ability of third-party assurance to prevent misrepresentation or fraudulent disclosures remains inherently limited.

Second, the availability of qualified third-party assurance providers is limited. This poses potential bottlenecks as demand for assurance services continues to rise. ESG disclosure has primarily developed through voluntary reporting mechanisms,¹¹⁴ resulting in a situation where consulting firms affiliated with audit groups, such as the Big Four, offer advisory services related to ESG disclosures. This has raised concerns over potential conflicts of interest, particularly when the same accounting firms offer both ESG assurance and consulting services. To mitigate such risks, many jurisdictions have introduced independence requirements for assurance providers, restricting firms that offer ESG consulting from also conducting ESG assurance.¹¹⁵ However, this further limits the pool of available assurance providers. Some jurisdictions have sought to address this issue by allowing non-audit entities to provide ESG assurance,¹¹⁶ but this creates challenges in integrating ESG assurance with financial audits.¹¹⁷

Finally, cost considerations present a significant challenge. Mandating third-party assurance for all companies meeting a specific threshold, such as all listed companies, imposes compliance costs on firms regardless of whether they have engaged in misrepresentation or inaccurate disclosure. Additionally, the limited number of assurance providers may drive up costs, increasing the regulatory burden. As a result, balancing the need for assurance with cost-efficiency remains a key challenge in ESG disclosure regulation. The company itself bears the costs of third-party assurance and ultimately passes them on to shareholders. However, if the ESG information subject to mandatory disclosure is not solely intended to enhance investment decision-making, but also serves other functions, such as improving corporate governance or promoting ESG activities through the presence and pressure of different stakeholders, as discussed,¹¹⁸ then questions arise as to why shareholders alone should bear these costs. The verification of many green gatekeepers' certifications often has a public-good nature,

¹¹¹ Enriques et al (n 110) 642, 660.

¹¹² Ortega (n 1) 79–86.

¹¹³ At present, the primary focus of ESG assurance is on GHG emissions, particularly Scope 1 emissions (direct emissions from a company's own operations) and Scope 2 emissions (indirect emissions from the consumption of purchased electricity, heat, or steam). In some cases, assurance is also provided for Scope 3 emissions (other indirect emissions across the value chain), although its coverage remains limited in practice.

¹¹⁴ See part II.A.

¹¹⁵ See *Code de commerce* (France) arts L822-6–L822-13.

¹¹⁶ See *Code de commerce* (France) arts L822-1, 822-3, 822-4.

¹¹⁷ See Directive (EU) 2022/2464 recital 61 ('The assurance of sustainability reporting by the statutory auditors or audit firms would help to ensure the connectivity between, and consistency of, financial and sustainability information, which is particularly important for users of sustainability information. However, there is a risk of further concentration of the audit market, which could risk the independence of auditors and increase audit fees or fees relating to the assurance of sustainability reporting').

¹¹⁸ See part III.A.

leading to an undersupply by private markets.

2. *Ex-post* & Private-led Enforcement: Investor-Driven Suits

In some jurisdictions, investors bring lawsuits against a company and/or its directors for misrepresenting or omitting ESG information in violation of securities laws.¹¹⁹ The most prominent jurisdiction is the US, where such actions are primarily brought under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, which prohibit making any untrue statement of material fact or omitting a material fact that makes statements misleading to investors.¹²⁰ This *ex-post* and private-led enforcement mechanism offers specific strengths, as the risk of litigation acts as a powerful deterrent against misrepresentation or omission, prompting companies and their directors to ensure the accuracy of ESG disclosures to avoid both legal liability and reputational damage.

However, this approach also has several limitations. One crucial issue concerns who initiates such lawsuits. Investors are often rationally apathetic, given that the potential costs and complexity of litigation discourage individual shareholders from commencing lawsuits against companies or their directors. In practice, many ESG-related lawsuits are pursued as class actions, which depend heavily on legal professionals to organise and finance the proceedings. There are also practical questions regarding who ultimately bears the costs of litigation, including legal fees and third-party litigation funding. Furthermore, the initial identification of ESG misrepresentations poses a significant challenge, as such information often comes to light through shareholder inspection rights,¹²¹ whistleblower reports, or investigative journalism, rather than through direct monitoring by individual investors.

Another significant challenge is whether misstatements in ESG disclosures can satisfy the substantive requirements for securities fraud claims. In addition to fulfilling heightened pleading standard of the PSLRA (Private Securities Litigation Reform Act of 1995), a plaintiff bringing a fraud suit under the federal Section 10(b) and Rule 10b-5 bears the burden of proving six elements: (i) a material misrepresentation or omission; (ii) scienter on the part of the defendant; (iii) a connection between the misrepresentation or omission and the purchase or sale of a security; (iv) the plaintiff's reliance upon the misrepresentation or omission; (v) economic loss for the plaintiff; and (vi) a causal connection between the plaintiff's reliance and economic loss.¹²² In securities fraud litigation, plaintiffs face significant hurdles in seeking remedies for misstatements or omissions in ESG disclosures, particularly in proving key elements, such as (i) materiality, (ii) scienter,¹²³ and (iv) reliance.¹²⁴

¹¹⁹ Wasim (n 79) 1326 – 1332; James J Park, 'ESG Securities Fraud' (2023) 58 *Wake Forest Law Review* 1149; Houser and Jones (n 29) 2656 – 2668.

¹²⁰ *Securities Exchange Act* of 1934, 15 USC § 78j(b); *Code of Federal Regulations*, 17 CFR § 240.10b-5.

¹²¹ In the US, before filing a securities fraud lawsuit, investors often exercise their inspection rights under state corporate law (e.g., *Delaware General Corporation Law*, 8 Del C § 220) to obtain detailed internal company information.

¹²² See *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014).

¹²³ See Park (n 119) 1175 – 1178.

¹²⁴ See Kevin S Haeberle, 'Fraud-on-the-Market Liability in the ESG Era' (2023) 98 *Tulane Law Review* 641; Houser and Jones (n 29) 2666; Aneil Kovvali, 'ESG and Securities Litigation: A Basic Contradiction' (2023) 73 *Duke Law Journal* 1229, 1277-1282.

For instance, in the US, regarding (i) materiality,¹²⁵ ‘materiality requirement is satisfied when there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available’,¹²⁶ and ‘the issue of materiality may be characterised as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts’.¹²⁷ This framework of materiality is based on the concern that ‘the Court was careful not to set too low a standard of materiality; it was concerned that a minimal standard might bring an overabundance of information within its reach, and lead management ‘simply to bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decision making’.¹²⁸ Under this framework, certain types of information are classified as ‘puffery’, meaning that ‘they are too general to cause a reasonable investor to rely upon them’.¹²⁹ They are therefore dismissed at the pleading stage as legally immaterial without proceeding to trial. As a result, many ESG-related statements fail to meet the materiality threshold, making it particularly challenging for plaintiffs to establish materiality in ESG-related claims.¹³⁰

A final point to consider, separate from the issue of encouraging lawsuits while preventing frivolous claims, is that ESG information disclosed primarily for the benefit of stakeholders other than investors may fall outside the scope of securities fraud enforcement. This is because securities laws require that misstatements or omissions cause actual loss to investors and meet the materiality standard, which is typically assessed based on its significance to investors’ investment decisions. Suppose ESG disclosures are made to serve broader societal or environmental objectives, rather than directly influencing investment decisions. In that case, they may fail to satisfy these legal requirements and thus cannot be enforced through private securities litigation. This issue becomes particularly significant in jurisdictions where double materiality is adopted in disclosure standards or where mandatory disclosure rules require companies to disclose broader ESG information than investors demand. In such a case, these disclosures may not be enforceable through investor lawsuits. Consequently, the scope of *ex-post* and private enforcement mechanisms remains inherently limited when ESG disclosure obligations are not solely designed to protect investors.

¹²⁵ See Park (n 119) 1178 – 84; Saad (n 79) 413 – 423.

¹²⁶ *Matrixx Initiatives Inc v. Siracusano*, 563 U.S. 27, 38 (2011) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231–2 (1988)) (‘*Basic*’).

¹²⁷ *TSC Industries Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1970).

¹²⁸ *Basic* (n 126) 485 U.S. 232.

¹²⁹ *Singh v. Cigna Corp.*, 918 F.3d 57, 63 (2d Cir. 2019).

¹³⁰ *In re Vale S.A. Sec. Litig.*, 2017 WL 1102666 (S.D.N.Y. Mar. 23, 2017); *Retail Wholesale & Dep’t Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275–1276 (9th Cir. 2017). In contrast, *In re BHP Billiton Ltd. Securities Litigation*, 276 F. Supp. 3d 65 (S.D.N.Y. 2017) negated puffery in a case involving disclosures similar to those in the *Vale* case. See John Armour, Luca Enriques and Thom Wetzer, ‘Green Pills: Making Corporate Climate Commitments Credible’ (2023) 65 *Arizona Law Review* 285, 312–313.

IV. MECHANISMS FOR ENSURING ESG INFORMATION ACCURACY IN JAPAN

A. Overview of Japan's Mechanisms for Ensuring ESG Information Accuracy

This section provides an overview of the mechanisms for ensuring the accuracy of mandatory disclosure documents for ESG information in Japan. As previously mentioned, Japan has three mandatory disclosure documents for ESG information: the Business Report, the Annual Securities Report, and the Corporate Governance Report.¹³¹ Table 2 categorises enforcement measures in Japan based on their timing (before or after non-financial information is disclosed to the public) and the enforcement entity (government or other entities, such as private parties or exchanges). Most of the measures listed here are similar to those in other countries, as shown in Table 1. The following discussion is structured in order of 'ex-ante and public', 'ex-ante and private-led', 'ex-post and public', and 'ex-post and private-led' mechanisms.

Table 2: Mechanisms for ensuring ESG information accuracy, divided by timing and entities in

Japan		
	Public	Private
<i>ex-ante</i>	- Orders to amend or suspend disclosure	- Board approval - <i>Kansayaku-kai</i> ¹³² approval - Third-party assurance
<i>ex-post</i>	- Administrative fines or surcharges - Criminal liability	- Civil liability - Revocation of shareholder meeting resolution - Measures against listed companies by TSE (delisting, designation as a security on alert)

1. *Ex-ante* & Public Mechanism

In Japan, the only mandatory document disclosing ESG information subject to *ex-ante* public enforcement is the Annual Securities Report; neither the Business Report nor the Corporate Governance Report falls within the scope of such enforcement. The Local Finance Bureaus, operating under the FSA, receive and review the submitted Annual Securities Reports by listed companies.¹³³ If deficiencies, material misstatements, or omissions are identified, the FSA may order the company to file a correction and may also suspend or postpone the effectiveness of the original report.¹³⁴ However,

¹³¹ See part II.B.1.

¹³² See (n 46).

¹³³ See part II.B.1.

¹³⁴ *Financial Instruments and Exchange Act* 1948 (Japan) ss 24-2, 24-3, 24-5(5).

given that there are approximately 4,000 listed companies in Japan,¹³⁵ around a significant portion of which, approximately 2,700 companies, have a financial year ending in March, the submission of Annual Securities Reports tends to be concentrated within a short period. This practical reality severely limits the extent to which meaningful review by the Local Finance Bureaus can be expected.¹³⁶

2. Ex-ante & Private-led Mechanism

(1) Internal oversight¹³⁷: Board approval & *Kansayaku-kai* approval

In Japan, only the Business Report is subject to oversight by the board of directors and *Kansayaku-kai*; neither the Annual Securities Report nor the Corporate Governance Report undergoes such scrutiny. Japanese law places particular emphasis on documents requiring board approval. Under the Companies Act 2005, directors are subject to liability for any misrepresentation or omission in a document they approve, unless they can prove they were not negligent in its approval. This statutory requirement thus serves as a critical incentive for directors to diligently review the accuracy of disclosures, thereby establishing a defence against future claims of negligence.¹³⁸ Among the mandatory disclosure documents, however, only the Business Report, required under the Companies Act 2005, must be approved by the board of directors.¹³⁹ In contrast, the Annual Securities Report and Corporate Governance Report do not require board approval.¹⁴⁰

The *Kansayaku-kai*, a distinctive feature of Japan's corporate governance framework,¹⁴¹ also plays a key role in ensuring the accuracy of ESG disclosures. Although the *Kansayaku* attends board meetings and has the right to express opinions, they do not have voting rights regarding the board's resolutions.¹⁴² As part of their statutory duties, the *Kansayaku-kai* must audit the Business Report and prepare an Audit Report, which confirms whether the Business Report accurately reflects the company's situation and complies with applicable laws and the articles of association.¹⁴³ However,

¹³⁵ Japan Exchange Group, *Number of Listed Companies/Shares* < <https://www.jpx.co.jp/english/listing/co/index.html> >.

¹³⁶ Etsuro Kuronuma, *Financial Instruments and Exchange Law* (2nd ed, Yūhikaku, 2020) 197 [in Japanese].

¹³⁷ See Nooraisah Katmon and Omar Al Farooque, 'Exploring the Impact of Internal Corporate Governance on the Relation between Disclosure Quality and Earnings Management in the UK Listed Companies' (2017) 142 *Journal of Business Ethics* 345 (empirical analysis of ESG disclosure and earnings management in the UK and finding that monitoring functions of corporate governance enhanced transparency of disclosure).

¹³⁸ *Companies Act 2005* (Japan) s 429(2). See part IV.A.4.

¹³⁹ *Companies Act 2005* (Japan) s 436(3).

¹⁴⁰ Approximately 80% of listed companies voluntarily present Annual Securities Report to the board of directors, either for resolution or for just reporting purposes (*Japan Audit & Supervisory Board Members Association (Nihon-Kansayaku-Kyōkai)*, *Results of 22nd Online Questionnaire on Changes in the Composition of the Board of Directors etc.: For Companies with Audit & Supervisory Board Members* (18 May 2022) <https://www.kansa.or.jp/wp-content/uploads/2022/05/enquet22_220518-1-1.pdf>). In addition, listed companies must submit Certification Letter attesting that the contents of their Annual Securities Reports comply with relevant laws and regulations (*Financial Instruments and Exchange Act 1948* (Japan) s24-4-2). This letter requires the signatures of both the representative director and the chief financial officer (*Cabinet Office Ordinance on Disclosure of Corporate Affairs, etc.* (Japan) s 17-10, Form4-2).

¹⁴¹ See (n 46).

¹⁴² *Companies Act 2005* (Japan) s 383(1).

¹⁴³ *Companies Act 2005* (Japan) s 436(1), (2), *Ordinance for Enforcement of the Companies Act 2006* (Japan) ss 129(1), 130-2, 131(1).

the *Kansayaku*'s auditing responsibilities do not extend to the Annual Securities Report or the Corporate Governance Report, both of which fall outside their scope of review.

(2) External audit: Third-party assurance

The Business Report and the Corporate Governance Report do not require a third-party audit or assurance for their ESG information.

The Annual Securities Report integrates financial and ESG information into a single document, requiring sections such as the balance sheet, profit and loss statement, and other financial accounting statements to be audited by certified public accountants or audit firms¹⁴⁴ with no particular interest in the company.¹⁴⁵ Under auditing standards, accountants and audit firms are required to read other information section,¹⁴⁶ including the ESG section, and identify any material discrepancies based on their knowledge of financial statements and the audit process¹⁴⁷; however, they are not obligated to assure the accuracy of ESG information.¹⁴⁸

The Japanese government is currently considering introducing mandatory third-party assurance for ESG disclosures as part of its efforts to enhance the functioning of Japan's capital markets. The discussion focuses on ensuring that investors have access to reliable information necessary for assessing long-term corporate value and engaging in constructive dialogue, while also examining the appropriate framework for ESG disclosure and assurance to maintain its credibility.¹⁴⁹ As of the time of writing this paper, discussions are still ongoing, the content remains undetermined, and the measures have naturally not yet been implemented.

3. *Ex-post* & Public Mechanism

The Business Report and the Annual Securities Report are subject to *ex-post* and public enforcement, whereas the Corporate Governance Report is not. Suppose the Business Report includes false statements or omissions material information, directors may be subject to a sanction fee,¹⁵⁰

¹⁴⁴ Certified public accountants, or *Kōnin-kaikeishi* in Japan, are professionals specialised in auditing and accounting, whose duties include conducting audits and providing assurance on financial statements and other financial information in an independent capacity (*Certified Public Accountants Act* 1948 (Japan) ss 1,3(1)). Audit firms, referred to as *Kansa-Hōjin* in Japan, are corporate entities established for the purpose of performing such audits and assurance services in an organised and systematic manner (*Certified Public Accountants Act* 1948 (Japan) ss 1-3(3), 3).

¹⁴⁵ *Financial Instruments and Exchange Act* 1948 (Japan) s 193-2, *Cabinet Office Ordinance on Audit Certification of Financial Statements* (Japan, Ordinance of the Ministry of Finance No 12 of 1957) s 1 (It should be explicitly stated that only the financial statements are subject to audits).

¹⁴⁶ Japanese Institute of Certified Public Accountants, *Auditing Standards Committee Statement No 720: Auditor's Responsibilities Relating to Other Information*, paras 13(1), A25 – 29 [in Japanese] ('ASCS 720').

¹⁴⁷ ASCS 720 (n 146) paras 13(2), 14, A24, A37, A38.

¹⁴⁸ ASCS 720 (n 146) paras 8, A28.

¹⁴⁹ Financial Services Agency (Japan), Consultation Document (2024) <https://www.fsa.go.jp/singi/singi_kinyu/sustainability_disclose_wg/shiryō/20240326/01.pdf>.

¹⁵⁰ Sanction fee, formally known as *Karyō* (過料) in Japan, is a type of monetary penalty imposed not as a criminal punishment, such as a fine or petty fine, but rather as a sanction for violations of civil or administrative obligations. It is typically assessed in a predetermined amount (for example 1 million JPY under the *Companies Act 2005* s 976 (Japan)) for sanctioning purposes (Kazuyuki Takahashi et al (eds), *The Dictionary of the Law* (Hōritsugaku Shōjiten) (5th ed, Yūhikaku, 2016) 153 [in Japanese]).

which constitutes a form of non-criminal monetary sanction under Japanese law.¹⁵¹

If a company submits an Annual Securities Report or other relevant filings that contain material misrepresentations or omissions, it may be subject to administrative fines,¹⁵² criminal liability, and regulatory orders. The Local Finance Bureaus and the SESC, acting under the delegation of the FSA, review Annual Securities Reports and other disclosures submitted by listed companies. When the SESC identifies a material misrepresentation or omission and subsequently recommends that the FSA impose an administrative fine, the FSA will levy that fine in accordance with the SESC's recommendations.¹⁵³ In instances where a company submits an Annual Securities Report containing factual misrepresentations, administrative fines may be imposed on the company itself, and its directors and related entities, such as accounting firms, may also face criminal liability.¹⁵⁴

4. *Ex-post* & Private-led Mechanism

(1) Civil liability

A company and its directors may be held liable for damages resulting from misrepresentations or omissions in ESG disclosures. However, the requirements for establishing liability, including the burden of proof for such claims, vary in Japan depending on the specific disclosure statement in question.

In all types of mandatory disclosure documents, companies and their directors are subject to general tort liability for damages suffered by investors and shareholders due to false statements or omissions in these documents.¹⁵⁵ When pursuing a claim under general tort liability, investors and shareholders must establish the misrepresentation or omission, materiality, the defendant's culpability (intent or negligence), reliance, causation, and damages.¹⁵⁶

However, in the case of Business Reports and Annual Securities Reports, the Companies Act 2005 and the Financial Instruments and Exchange Act 1948 provide for a relaxation of the plaintiff's burden of proof when bringing a tort-based claim. Where a material misrepresentation or omission is found in a Business Report or an Annual Securities Report, directors are presumed liable for damages unless they can establish a lack of negligence.¹⁵⁷ Therefore, a plaintiff seeking to hold directors liable under these laws must demonstrate the existence of a material misrepresentation or omission, the resulting damage, reliance, and causation, but does not need to prove the directors' intent or negligence.

¹⁵¹ *Companies Act 2005* (Japan) s 976(vii). However, there is no established mechanism under corporate law for public authorities to detect misstatements in disclosure documents that are subject to regulation.

¹⁵² Administrative fine, formally known as *Kachōkin* (課徴金) in Japan, refers to a non-tax monetary penalty imposed by the government under its administrative or judicial authority. In this context, it is an administrative measure whereby FSA, delegated by the Prime Minister, may, following prescribed procedures under the Financial Instruments and Exchange Act, order an individual or entity that has committed certain procedural violations to pay a specified amount into the national treasury (Takahashi et al eds (n 151) 128-129). It serves both as a deterrent against opportunistic conduct and as a mechanism to disgorge unlawful gains, with the amount determined on a case-by-case basis depending on the nature and severity of the violation.

¹⁵³ *Financial Instruments and Exchange Act 1948* (Japan) s 172-4(1).

¹⁵⁴ *Financial Instruments and Exchange Act 1948* (Japan) s 197(1)(i).

¹⁵⁵ *Civil Code 1896* (Japan) s 709.

¹⁵⁶ *Id.*

¹⁵⁷ *Companies Act 2005* (Japan) s 429(2), *Financial Instruments and Exchange Act 1948* (Japan) ss 24-2, 22.

(2) Other mechanisms

The Business Report is distributed to shareholders before the AGM, where directors provide an update on its contents. If the Business Report contains any misrepresentations or omissions, shareholders may, under certain conditions, seek to rescind any resolution related to the issues.¹⁵⁸

Suppose a listed company submits an Annual Securities Report or Corporate Governance Report containing misrepresentations or omissions. In that case, the TSE may designate the company as an issuer of particular caution and require it to submit an improvement report¹⁵⁹ or adopt delisting measures.¹⁶⁰

5. Summary of Mechanisms for Ensuring the Accuracy of ESG Information in Japan

Table 3: Japan's mechanisms for ensuring ESG information accuracy in each mandatory document

	Bus Rpt	Ann Sec Rpt	CG Rpt
Orders to amend or suspend disclosure	X	✓	X
<i>ex-ante</i> Board approval	✓	X	X
<i>ante</i> Kansayaku approval	✓	X	X
Third-party assurance	X	X	X
Administrative fines or surcharges	✓	✓	X
Criminal liability	X	✓	X
<i>ex-post</i> Civil liability	✓	✓	✓
<i>post</i> Revocation of the shareholder meeting resolution	✓	X	X
Measures against listed companies by TSE	X	✓	✓

Table 3 organises the presence (indicated by ✓) or absence (indicated by X¹⁶¹) of ESG information accuracy assurance mechanisms in Japan for each mandatory disclosure document. As previously observed, the variation in enforcement mechanisms depending on the type of disclosure document is unique to Japan. This distinction arises from a path-dependent regulatory framework, where accuracy assurance mechanisms are prescribed separately under different laws and regulations

¹⁵⁸ *Companies Act 2005* (Japan) s 831(1)(i). This provision allows for the rescission of a shareholders' meeting resolution when the procedures for convening the meeting, or the method of resolution violate laws or the articles of incorporation or are otherwise grossly unfair. If the Business Report, which is provided to shareholders as part of the shareholders' meeting reference materials, contains misstatements or omissions, and if such inaccuracies are relevant to the resolution's content, the resolution may be subject to rescission.

¹⁵⁹ *Tokyo Stock Exchange Listing Rules* (Japan) s 504.

¹⁶⁰ *Tokyo Stock Exchange Listing Rules* (Japan) s 601(1)(viii).

¹⁶¹ Table 3 indicates 'X' for 'Third-party assurance' under 'Annual Securities Report'. However, as per (n 77) and its corresponding text, the mandating of third-party assurance for ESG disclosures is currently under consideration as of the time of writing this paper.

rather than based on a rationally justified approach.

The Companies Act 2005 mandates the approval of the board of directors, oversight by *Kansayaku* or *Kansayaku-kai*,¹⁶² and the rescission of shareholder meeting resolutions,¹⁶³ which apply exclusively to the Business Reports, disclosure documents under the Companies Act 2005. When shareholders seek to hold a director liable in civil court for misstatements or omissions in the Business Report, the burden of proof regarding the directors' intent or gross negligence is shifted to the director, making it easier to establish liability than in ordinary tort claims.¹⁶⁴ Additionally, directors may be subject to a sanction fee if the Business Report contains misstatements or omissions.¹⁶⁵

Annual Securities Reports, governed by the Financial Instruments and Exchange Act 1948, are subject to scrutiny by the FSA and the Local Finance Bureau, which is subordinated to the FSA.¹⁶⁶ Since the Annual Securities Reports disclose both financial and ESG information in a single document, certified accountants and auditing firms audit the financial information and review ESG information in conjunction with the financial data to detect any material inconsistencies.¹⁶⁷ However, the power of accountants and audit firms, as stipulated by the Companies Act 2005, is limited to financial information and does not extend to ESG information.¹⁶⁸ Consequently, the powers of certified public accountants under the Companies Act 2005 do not fully align with their expected roles under the auditing standards, especially ASCS 720.¹⁶⁹ Implementation of third-party assurance on a mandatory basis, which would address this gap, is currently being discussed.¹⁷⁰ In pursuing civil liability claims against a company or its directors based on misstatements in the Annual Securities Reports, the burden of proof on the plaintiff is similar to that in actions based on the Business Report.¹⁷¹ Additionally, administrative fines and criminal penalties may be imposed.¹⁷² In a later section, these *ex-post* enforcement mechanisms for the Annual Securities Report will be examined in detail.¹⁷³

The Corporate Governance Report, a disclosure document required by the TSE Listing Rules, is not subject to effective enforcement measures, apart from sanctions such as trading suspension or delisting imposed by the exchange.¹⁷⁴ When investors seek damages for misstatements in the Corporate Governance Report, the plaintiff bears a heavier burden of proof, in contrast to claims based on misstatements in Business Reports or Annual Securities Reports, where the burden of proving the directors' intent or negligence shifts from the plaintiff to the defendant. For Corporate Governance Reports, however, the burden of proving that the directors acted with intent or negligence remains with the plaintiff investors.¹⁷⁵

¹⁶² See (nn 138-140) and their accompanying text.

¹⁶³ See (n 158) and its accompanying text.

¹⁶⁴ See (n 157) and its accompanying text.

¹⁶⁵ See (n 151) and its accompanying text.

¹⁶⁶ See (nn 134-136) and their accompanying text.

¹⁶⁷ See (nn 144-149) and their accompanying text.

¹⁶⁸ *Companies Act 2005* (Japan) s 396.

¹⁶⁹ See (nn 146-148) and their accompanying text.

¹⁷⁰ See (n 77) and its accompanying text.

¹⁷¹ See (n 157) and its accompanying text.

¹⁷² See (nn 152-154) and their accompanying text.

¹⁷³ See part IV.B.

¹⁷⁴ See (nn 159 and 160) and their accompanying text.

¹⁷⁵ Compare (n155) and its accompanying text with (n 157) and its accompanying text.

B. Key Mechanisms in Japan: Ex-post Enforcement on Annual Securities Reports

1. Overview of Ex-post Enforcement on Annual Securities Reports

As we have seen, Japan has established various mechanisms to ensure the accuracy of ESG disclosures. However, from the perspective of *ex-ante* and *ex-post* enforcement, *ex-ante* and public mechanisms are limited to certain disclosure documents, and even in those cases, it is unrealistic to expect substantive review of ESG information.¹⁷⁶ Regarding *ex-ante* and private mechanisms, third-party audits and assurance services could play a role; however, such assurance is not currently mandated for all disclosure documents. Although certified public accountants and audit firms are required under auditing standards to review the Annual Securities Report, which integrates financial and ESG information, and identify any material inconsistencies, their statutory authority under the Companies Act 2005 does not extend to ensuring the accuracy of ESG disclosures.¹⁷⁷ Thus, at present, Japan lacks effective *ex-ante* enforcement tools for ensuring ESG disclosure accuracy, or such tools remain underdeveloped.

This section, therefore, focuses on *ex-post* mechanisms for ensuring the accuracy of ESG disclosures in Annual Securities Reports. In practice, Annual Securities Reports are the most critical disclosure documents in Japan, and several cases involved misrepresenting or omitting ESG information. These cases will provide us with insight into ensuring the accuracy of ESG information through *ex-post* measures, such as civil liability, administrative fines, and criminal prosecution.

A distinctive feature of Japan's enforcement landscape is that the government is the primary actor responsible for *ex-post* enforcement. As we have seen, in the US, securities fraud litigation by private individuals plays a more substantial role.

In Japan, there have been eight cases¹⁷⁸ where the misrepresentation or omission of ESG information was at issue, as shown in Table 4. Of these eight cases, six resulted in administrative fines;¹⁷⁹ one led to both administrative fines and civil liability for the issuer company and its directors;¹⁸⁰ and one involved criminal liability for the issuer company's officers.¹⁸¹ Misrepresented

¹⁷⁶ See part IV.A.1.

¹⁷⁷ See part IV.A.2.

¹⁷⁸ (i) Judgment of Supreme Court (Japan), 13 September 2011, 65(5) *Minshū* 2511 ('Seibu Railway case'); (ii) Administrative Order of Financial Services Agency (Japan), 3 February 2017 ('Optrom case'); (iii) Administrative Order of Financial Services Agency (Japan), 31 January 2020 ('Nihon Form Service case'); (iv) Administrative Order of Financial Services Agency (Japan), 28 February 2020; Judgment of Tokyo District Court (Japan), 3 March 2022, 458 *Shiryoban-Shojihomu* 123 ('Nissan Motor case'); (v) Administrative Order of Financial Services Agency (Japan), 11 June 2020 ('Tela case'); (vi) Administrative Order of Financial Services Agency (Japan), 10 September 2020 ('Freesia Macross case'); (vii) Administrative Order of Financial Services Agency (Japan), 8 February 2023 ('DSS case'); (viii) Administrative Order of Financial Services Agency (Japan), 17 June 2024 ('Ardepro case'). All judgments and administrative orders are written in Japanese.

¹⁷⁹ (ii) *Optrom* case, (iii) *Nihon Form Service* case, (iv) *Nissan Motor* case, (v) *Tela* case, (vi) *Freesia Macross* case, (vii) *DSS* case, and (viii) *Ardepro* case.

¹⁸⁰ (i) *Seibu Railway* case.

¹⁸¹ (iv) *Nissan Motor* case.

or omitted information included information on related party transactions in three cases,¹⁸² corporate governance information in two cases,¹⁸³ information on the status of major shareholders (e.g., actual ownership structure), and stock option allottees in two instances,¹⁸⁴ and Management's Discussion and Analysis (MD&A) in one case.¹⁸⁵ There was also a misstatement of financial information in four of these eight cases.¹⁸⁶

Table 4: Cases about *ex-post* enforcement for misrepresentation or omission of ESG information on Annual Securities Report in Japan

	Enforcing body	Information	w/finance
(i) <i>Seibu Railway</i> Supreme Court, 13 Sep 2011	Investors	Shareholding of the controlling shareholder	
(ii) <i>Optrom</i> FSA, 3 Feb 2017	FSA	Stock option allottees (anti-social forces ¹⁸⁷)	✓
(iii) <i>Nihon Form Service</i> FSA, 31 Jan 2020	FSA	Corporate governance information (the board of directors, <i>Kansayaku</i>)	✓
(iv) <i>Nissan Motor</i> FSA, 28 Feb 2020 Tokyo District C, 3 Mar 2022 Tokyo High C, 4 Feb 2025	FSA & prosecutor	Corporate governance information (the amount of executive compensation)	
(v) <i>Tela</i> FSA, 11 June 2020	FSA	Related party transaction	
(vi) <i>Freesia Macross</i> FSA, 10 Sep 2020	FSA	Related party transaction	
(vii) <i>DSS</i> FSA, 8 Feb 2023	FSA	Management's Discussion and Analysis	✓
(viii) <i>Ardepro</i> FSA, 17 June 2024	FSA	Related party transaction	✓

2. Findings and Implications

Several characteristics of Japan's *ex-post* enforcement mechanisms for ensuring the accuracy of ESG disclosures can be gleaned from the above eight cases.

(1) Focus on Governance Information

Misrepresented or omitted ESG information in Japan has been primarily related to governance

¹⁸² (v) *Tela* case, (vi) *Freesia Macross* case, and (viii) *Ardepro* case.

¹⁸³ (iii) *Nihon Form Service* case and (iv) *Nissan Motor* case.

¹⁸⁴ (i) *Seibu Railway* case and (ii) *Optrom* case.

¹⁸⁵ (vii) *DSS* case.

¹⁸⁶ (ii) *Optrom* case, (iii) *Nihon Form Service* case, (vii) *DSS* case, and (viii) *Ardepro* case.

¹⁸⁷ See (n 57).

(G) information rather than environmental (E) or social (S) information. Notably, there has been only one case involving misstatements in the MD&A section, a frequent issue in the US.¹⁸⁸ Moreover, there have been no known cases in Japan where E&S (Environmental & Social) information,¹⁸⁹ often the focus of international discussions, has been the subject of enforcement action.

(2) Heavy Reliance on Public Enforcement

Public authorities, such as the FSA and prosecutors, conduct *ex-post* enforcement for misrepresenting or omitting ESG information in Annual Securities Reports. Except for one case,¹⁹⁰ no private individuals have reported filing claims for damages against issuer companies or their directors for the misrepresentation or omission of ESG information. The exact reasons for the limited number of private enforcement cases, specifically civil liability claims against companies and their directors, are unclear.

However, several factors may be contributing to this trend. These include the absence of a class action system, the low utilisation of shareholder inspection rights, and the highly restricted access to company information available to shareholders.¹⁹¹ Additionally, there are few mechanisms to reduce or finance litigation costs and legal fees for investor plaintiffs,¹⁹² further discouraging such lawsuits.¹⁹³

(3) Potential Under-Enforcement

Although some *ex-post* enforcement actions have been taken, there remains a strong possibility of underenforcement. Whether in the form of civil or criminal liability, the number of cases that have resulted in court judgments is minimal. Even when including administrative actions such as an administrative fine imposed by the FSA, there have been only eight cases in total. While this may suggest that Japanese listed companies have not engaged in materially false or misleading ESG disclosures, there are compelling reasons to believe that such misconduct may either go undetected or, even if detected, remain unenforced.

The ability of regulatory authorities such as the FSA and SESC to detect false ESG disclosures

¹⁸⁸ See *Macquarie Infrastructure Corp. v. Moab Partners, L. P.*, 601 U.S. 257, 144 S. Ct. 885, 218 L. Ed. 2d 214 (2024).

¹⁸⁹ (ii) *Optrom* case, in which stock options were allocated to anti-social forces, could potentially be classified as a case of misrepresentation of social (S) information. However, it differs significantly from typical S-related disclosures, such as human rights policies and other standard social responsibility disclosures.

¹⁹⁰ (i) *Seibu Railway* case.

¹⁹¹ Under Japan's corporate law, shareholders have inspection rights, but these are limited to accounting books and board or committee meeting minutes (*Companies Act 2005* (Japan) ss 371(2), 394(2), 399-11(2), 413(3), 433), making it difficult to gather sufficient materials to support litigation. See generally Alan K Koh and Eiji Takahashi, 'Of Activist Mayors and Nuclear Reactors: The Ōsaka v Kansai Electric Saga and Japan's Curious Regime Governing Shareholder Access to Minutes of Board Meetings' (2015) 40 *Journal of Japanese Law* 99. In contrast, shareholders in Delaware are granted access to 'books and records', which cover a significantly broader range of internal documents, including emails (e.g. *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch., 2016)).

¹⁹² For a description of the fee regimes applicable to shareholder lawsuits in English, see e.g. Alan K Koh, 'Direct Suits and Derivative Actions: Rethinking Shareholder Protection in Comparative Corporate Law' (2022) 21 *Washington University Global Studies Law Review* 391, 400, 403.

¹⁹³ In shareholder derivative lawsuits, measures exist to reduce litigation costs. In Japan, the filing fee for a shareholder derivative lawsuit is fixed at 13,000 yen, regardless of the amount of damages claimed (*Companies Act 2005* (Japan) s874-4(1), *Act on Costs of Civil Procedure* (Japan) Act No 40 of 1971, s 4(2)). Additionally, the plaintiff can seek reimbursement from the company for reasonable attorney's fees incurred during the litigation (*Companies Act 2005* (Japan) s 852 (1)).

is significantly constrained by understaffing and limited information-gathering capabilities, potentially leading to under-enforcement.¹⁹⁴ This constraint is starkly illustrated by staffing levels relative to the approximately 4,000 listed companies in Japan.¹⁹⁵ The SESC has fewer than 400 personnel overall,¹⁹⁶ with only an estimated few dozen to 100 staff members assigned to the Disclosure Inspection Division (DID), the unit responsible for inspecting disclosure documents.¹⁹⁷ The Local Finance Bureaus' monitoring departments add only about 300 officials to this effort.¹⁹⁸

Given these resource limitations, it is naturally impossible to conduct comprehensive accuracy checks on every company. As a result, regulators conduct selective, risk-based reviews, which inevitably entail gaps and depend heavily on preliminary leads, often from internal whistleblowers. The limited output of this system is evident, with the SESC issuing fewer than ten recommendations annually for all types of disclosure violations, not just those related to ESG.¹⁹⁹ Furthermore, this limited enforcement capacity is compounded by a misaligned focus; even when inspections occur, they tend to prioritise financial rather than ESG information.²⁰⁰

Indeed, several social phenomena raise doubts about the veracity of ESG information disclosed by listed Japanese companies. One case concerns disclosure related to safety by Tokyo Electric Power Company ('TEPCO'), a power utility that experienced a nuclear accident. On 11 March 2011, the Great East Japan Earthquake triggered a tsunami that caused a complete loss of electric power at the Fukushima Daiichi Nuclear Power Plant, which was owned and operated by TEPCO. This incident resulted in severe environmental and societal consequences. In its Annual Securities Report, disclosed in June 2010, TEPCO had described its progress in taking measures against earthquakes and disasters at its nuclear power plants.²⁰¹ However, in subsequent litigation concerning the breach of directors'

¹⁹⁴ For context, the FSA imposes administrative fines on companies that misrepresent or omit financial or ESG information based on recommendations from the Securities and Exchange Surveillance Commission (SESC). The SESC, to which the FSA's authority to collect reports and documents and conduct inspections has been delegated (*Financial Instruments and Exchange Act* 1948 (Japan) ss 26–27), is responsible for disclosure inspections (*Financial Instruments and Exchange Act* 1948 (Japan) s 194-7(3)).

¹⁹⁵ As of recent data, approximately 3,900 companies are listed on the TSE (Tokyo Stock Exchange, *Number of Listed Companies/Shares* <<https://www.jpx.co.jp/english/listing/co/index.html>>). In addition to these, around 100 companies are listed exclusively on Japan's regional stock exchanges, including the Sapporo Securities Exchange, the Nagoya Stock Exchange, and the Fukuoka Stock Exchange. This brings the total number of listed companies in Japan to roughly 4,000.

¹⁹⁶ Securities and Exchange Surveillance Commission (Japan), Organizational Structure and Personnel for Fiscal Year 2024 (2024) <<https://www.fsa.go.jp/sec/aboutsec/pdf/teiin.pdf>>; Securities and Exchange Surveillance Commission (Japan), Changes in Personnel Numbers of the SESC (2024) <https://www.fsa.go.jp/sec/aboutsec/pdf/teiin_suii.pdf> [both in Japanese].

¹⁹⁷ SESC comprises six departments, including the Disclosure Inspection Division, the General Affairs Division, the Market Analysis and Inspection Division, the Securities Inspection Division, the Trading Surveillance Division, and the Special Investigation Division. See generally Naohiko Matsuo, *Financial Instruments and Exchange Act* (7th ed, Shōji-Hōmu, 2023) 35 [in Japanese].

¹⁹⁸ Matsuo (n 197) 34 [in Japanese].

¹⁹⁹ The number of recommendations for monetary surcharge payment orders related to violations of disclosure regulations, including Annual Securities Reports, Large Shareholding Reports, and other disclosure filings, remains fewer than ten per year. Securities and Exchange Surveillance Commission, *Disclosure Inspection* <<https://www.fsa.go.jp/sec/actions/kaiji.html>> [in Japanese].

²⁰⁰ Of the seven cases in which the FSA imposed monetary surcharges, four cases involved misstatements in financial information. This suggests that misstatements in ESG information may have been detected incidentally during the investigation of financial misstatements.

²⁰¹ Tokyo Electric Power Company (TEPCO), *Annual Securities Report AY-2009 (from 1 April 2009 to 31 March 2010)*

duty of care, it was established that TEPCO's directors had prior knowledge of the flood risk at Fukushima Daiichi.²⁰² This factual finding suggests that TEPCO may have misrepresented or omitted material environmental and risk-related information regarding flood risks and countermeasures at the plant in its Annual Securities Report. While this information might be more strongly aligned with business risk information rather than purely ESG information, it can also be positioned as information concerning negative environmental externalities, given its impact on the global environment and local communities.

Another case involves disclosures related to employee protection by Fuji Media Holdings, Inc. ('Fuji TV'), a company operating one of Japan's major television stations. In the company's Annual Securities Report, disclosed in June 2024, under the section titled 'Promotion of Sustainability/ESG,' it stated its commitment to ensuring trust with business partners, collaborators, and on-screen talent, and to establishing an environment where employees and staff can work with peace of mind, to provide high-quality content. This commitment was reinforced by the establishment of the 'Group Human Rights Policy' in November 2023, which detailed efforts to actively engage in human rights due diligence.²⁰³ However, it was later revealed that a prominent Japanese performer appearing in content aired by the company had perpetrated sexual assault against the company's employees and that the company had attempted to handle the matter covertly.²⁰⁴ This can be characterised as a misrepresentation or omission of social information related to human rights and employee protection.

Yet no public or private enforcement action was taken against the company for these potential misstatements.²⁰⁵ These cases highlight the possible inadequacy of enforcement mechanisms in ensuring the accuracy of ESG disclosures, particularly those concerning environmental and social aspects that could significantly impact public safety and corporate accountability. The information at issue in these instances, while sometimes aligned with broader business risk disclosures (as seen in the TEPCO case), nonetheless concerns negative environmental and social externalities. Given these

(2010) 17 ('we are steadily advancing equipment inspections, evaluations, and seismic reinforcement work to ensure the full restoration of all reactors. Similarly, at the Fukushima Daiichi and Fukushima Daini Nuclear Power Plants, we are diligently implementing seismic reinforcement measures based on insights gained from the Kashiwazaki-Kariwa facility, with the collective efforts of our entire group focused on constructing disaster-resilient nuclear power plants.') [in Japanese].

²⁰² Judgment of Tokyo District Court, 13 August 2022, 2580=2581 *Hanrei-Jihō* 5 [in Japanese]. However, in the appellate judgment of the aforementioned case, the directors were found to have no foreseeability regarding the flood risk (Judgment of Tokyo High Court, 6 June 2025, *Reiwa 4 (Ne) No 4601* [in Japanese]).

²⁰³ Fuji Media Holdings, *Annual Securities Report AY 2023 (from 1 April 2023 to 31 March 2024)* (2024) 13 ('To deliver high-quality program content, services, and products to our customers across all business sectors, we are committed to maintaining strong relationships with our partners, collaborators, and on-screen talent, while fostering a safe and supportive environment where our employees and staff can thrive. In November 2023, we established the 'Group Human Rights Policy' to further clarify our commitment to respecting human rights in all business activities. Under this policy, we actively engage in human rights due diligence through dialogue with stakeholders and strive to enhance awareness of human rights throughout the organisation.')

²⁰⁴ Independent Committee for the Board of Directors of Fuji Media Holdings and Fuji Television, *Investigation Report (Public Version)* (Report, 31 March 2025) [in Japanese].

²⁰⁵ Regarding the misrepresentation related to employee protection by Fuji TV, an analysis of stock price movements suggests that investors may not have incurred damages. Fuji TV's stock price trended downwards between 19 December 2024, when other media (tabloids) reported on the issue, and 16 January 2025, the day before Fuji TV's management held a press conference, declining by approximately 17% compared to the closing price on 19 December 2024. However, subsequently, up to the time of writing (27 June), the stock price has generally been on an upward trend, increasing by 65% compared to the closing price on 20 December 2024.

factors, ESG disclosures are not systematically reviewed, and the overall framework for enforcing ESG accuracy remains weak and underdeveloped.

C. The distinct characteristics of Japan's approach to ESG disclosure assurance

This section analyses the distinct characteristics of Japan's approach to ESG disclosure assurance, drawing on the overview and analysis provided in the preceding sections. It organises the similarities and differences between Japan's enforcement tools and international practices and debates and extracts key implications from the Japanese legal framework.

First, the enforcement mechanisms for mandatory disclosure documents in Japan differ depending on the type of report, with no unified approach to ensuring the accuracy of ESG disclosures.²⁰⁶ This variation is path-dependent and lacks strong rational justification. In particular, Corporate Governance Reports have limited assurance mechanisms for accuracy, which contrasts with Business Reports and Annual Securities Reports, which are subject to more structured enforcement.²⁰⁷ This fragmented approach stems from Japan's parallel system of multiple disclosure documents, with each subject to different legal and regulatory frameworks.²⁰⁸ Since each law or listing rule independently defines its accuracy assurance mechanisms, there is no oversight or coordination among them. This highlights the need for a more integrated approach.

Second, Japan's ESG misrepresentation cases differ significantly from those observed in the US and other international contexts. In the US and Europe, misstatements or omissions in environmental (E) and social (S) information have become a significant concern.²⁰⁹ However, in Japan, most cases have involved corporate governance (G) issues or, at most, risk-related disclosures, with E&S information misstatements remaining largely unaddressed.²¹⁰ This does not necessarily mean that Japanese companies are exempt from misstatements or omissions in their environmental or social disclosures. Instead, it suggests that ESG disclosure enforcement in Japan is underdeveloped and that inaccuracies in E&S information may go undetected due to weak regulatory mechanisms.²¹¹

Third, Japan's ESG disclosure enforcement framework heavily depends on *ex-post* and public enforcement, primarily carried out by the FSA and the SESC.²¹² In contrast, *ex-ante* and private enforcement mechanisms, such as third-party assurance, remain under discussion and have not yet been widely implemented.²¹³ Private litigation related to ESG disclosure is also rare, even in cases where financial misstatements occur. Several factors contribute to this lack of private enforcement. Japan's public enforcement of ESG disclosure violations has also been reactive and ad hoc, rather than proactive or systematic.

Fourth, Japan's current mechanisms for ensuring the accuracy of ESG disclosures imply that it

²⁰⁶ See part IV.A.5.

²⁰⁷ See part IV.A.5.

²⁰⁸ See part II.B.1.

²⁰⁹ See part II.A.

²¹⁰ See part IV.B.2 (1).

²¹¹ See part IV.B.2 (3).

²¹² See part IV.B.2 (2).

²¹³ See part II.B.2, IV.A.2 (2).

requires an appropriate balance between public and private enforcement mechanisms.²¹⁴ Both *ex-ante* private and enforcement, such as third-party assurance, and *ex-post* and private enforcement, such as securities fraud litigation, present structural challenges. Third-party assurance carries the risk of over-regulation and faces difficulties securing sufficient qualified assurance providers.²¹⁵ On the other hand, securities fraud litigation must strike a balance between encouraging investor-led lawsuits and preventing frivolous claims. Furthermore, private litigation is inherently limited in its scope, as investors cannot bring claims for misstatements or omissions that do not cause direct financial harm, such as ESG disclosures primarily intended to serve broader societal interests.²¹⁶ While public enforcement mechanisms can address some of these limitations, Japan's system is constrained by limited regulatory resources and challenges in gathering sufficient information to detect misstatements effectively.²¹⁷

Another critical issue in ESG disclosure accuracy mechanisms is cost allocation, the issue of who should bear the financial burden of ensuring accurate ESG disclosures. In the case of third-party assurance, the costs are borne by the company itself, ultimately by its shareholders and internal stakeholders. Securities fraud litigation imposes costs on investors who initiate lawsuits, making private enforcement a financially burdensome option for plaintiffs. Public enforcement, by contrast, is funded through government resources, meaning that taxpayers collectively bear the costs of enforcement. Suppose ESG disclosure is not solely aimed at improving investment decision-making but also serves broader functions, such as enhancing corporate accountability and promoting responsible business practices.²¹⁸ In that case, its benefits extend beyond investors to society as a whole. Public enforcement mechanisms may be justified in this context, as they align the financial burden with the broader public interest in ensuring reliable ESG disclosures.²¹⁹

V. ANALYTICAL FRAMEWORK FOR THE ASSURANCE OF ESG DISCLOSURE ACCURACY

Drawing upon the preceding analysis, this part presents a comprehensive framework for analysing the enforcement mechanisms aimed at ensuring the accuracy of ESG information disclosed by companies. This framework is designed not merely as a descriptive tool, but as an analytical lens to understand how various enforcement mechanisms interact. It reveals how their strengths and weaknesses concerning specific regulatory objectives, actor incentives, cost implications, and information characteristics necessitate a tailored, hybrid approach. This framework thus serves as a foundation for evaluating existing systems across different jurisdictions and for constructing more effective hybrid models.

²¹⁴ See Jackson and Zhang (n 105); Varzaly (n 105).

²¹⁵ See part III.B.1.

²¹⁶ See part III.B.2.

²¹⁷ See part IV.B.2 (3).

²¹⁸ See part III.A.

²¹⁹ However, even in the case of public enforcement, as long as it is based on existing securities laws, the issue of whether ESG information can be deemed material remains a challenge, even if demonstrating actual investor harm is not a necessary requirement.

A. Purposes of Ensuring Accuracy in ESG Disclosure

As previously discussed, the purposes of ensuring the accuracy of ESG information can be classified into three main theoretical approaches.²²⁰ These objectives provide the theoretical basis for selecting enforcement mechanisms in each jurisdiction.

According to the Investment Decisions Theory, ensuring the accuracy of ESG information enables investors to make more informed investment decisions based on reliable information. This serves to resolve or mitigate information asymmetry between companies and investors, protect investors from securities fraud, and promote more efficient capital allocation.²²¹ Under the Corporate Governance Theory, ensuring the accuracy of ESG information encourages companies to fulfil their accountability regarding ESG-related issues. By obligating or encouraging companies to disclose accurate ESG information, directors are incentivised to actively collect information pertinent to their company's operations and related ESG issues, and to establish robust internal control systems.²²² The Private Enforcement Theory adopts a more proactive stance, suggesting that ensuring the accuracy of ESG information serves as a mechanism to motivate companies to address ESG challenges by mandating or encouraging their proactive disclosure. This is achieved through external pressure from not only shareholders but also non-financial stakeholders such as business partners, employees, local communities, and NGOs.²²³

These theories, while overlapping, are adopted and emphasised differently across jurisdictions. For instance, in the US, there appears to be a general consensus, albeit to varying degrees, on the first theory (investor protection), but opinions diverge regarding the second and third theories, particularly concerning the promotion of addressing ESG issues.²²⁴ In contrast, in the EU, given that the European Commission has positioned ESG disclosure as an integral part of the EU Green Deal, there is relatively stronger support for the second and third theories.²²⁵ Japan's stance is not outwardly clear. While the 2023 amendment to the Annual Securities Report expanded ESG disclosure to include not only sustainability information but also items such as gender pay gaps, the ratio of female managers, and the rate of male employees taking childcare leave,²²⁶ these requirements appear to serve purposes beyond merely enhancing investors' investment decisions, seemingly aligning with improving corporate governance and encouraging influential companies to tackle ESG matters. On the other hand, SSBJ has formulated disclosure standards (SSBJ Standards) based on the ISSB Standard, an international framework grounded in materiality for investors, which appears to primarily consider investor protection.²²⁷ This ambiguity in Japan's approach mirrors the broader academic debate on what constitutes 'investor protection' in the context of ESG, particularly concerning the contested benefits and practical limitations of portfolio-focused stewardship.²²⁸

²²⁰ See part III.A.

²²¹ See (nn 79-85) and their accompanying text.

²²² See (nn 88-92) and their accompanying text.

²²³ See (nn 95-98) and their accompanying text.

²²⁴ See (nn 79-85) and their accompanying text.

²²⁵ Mezzanotte (n 88) 933-940.

²²⁶ See (n 75) and its accompanying text.

²²⁷ See (n 76) and its accompanying text.

²²⁸ See Rose (n 1) 318-321, 331-332.

B. Dimensions of Enforcement Mechanism Analysis

This section extracts several key elements for an analytical framework, drawing on the distinctions and commonalities of ESG information accuracy assurance mechanisms discussed in this part, that is, securities fraud litigation (*ex-post* and private-led enforcement measures), third-party assurance (*ex-ante* and private-led enforcement measures), and administrative or criminal sanctions (*ex-post* and public enforcement measures). These include enforcement actors and their incentives, the scope of enforceable information and the detectability of inaccuracies, and cost bearers.

1. Actors and Incentives in Enforcement

The primary enforcement actors involved in ensuring the accuracy of ESG information disclosure, as examined in this paper, along with their respective incentives, are as follows.

Securities fraud litigation: It is investors and the lawyers representing them who seek damages for misrepresentations or omissions in ESG disclosures through securities fraud litigation. Their primary incentive for initiating such lawsuits is the recovery of economic losses incurred due to misrepresentation or omission of material facts.

Third-party assurance: It is independent third-party assurance bodies, such as accountants or other certified professionals, who verify disclosure documents prepared by companies before their release and issue an assurance statement. Their incentive would lie in enhancing the reliability of disclosures through the provision of expert evaluation and, consequently, establishing their market position and their reputation.²²⁹ However, the risk of reputational damage is unlikely to materialise due to the limited harm suffered by users as a result of misrepresentation.²³⁰

Administrative or criminal sanctions: It is public authorities or enforcement bodies who conduct investigations and impose sanctions. Currently, these include financial regulatory authorities such as the FSA and the SESC in Japan and the SEC in the US. Their incentives would be to maintain market fairness and transparency, protect investors, prevent greenwashing, and sometimes achieve broader social and environmental goals.²³¹

2. Enforceable Information Scope and Detectability of Inaccuracies

Securities fraud litigation: The scope of enforceable ESG information is primarily limited to information deemed ‘material’ to investors and that causes economic loss.²³² Regarding detectability, direct detection by individual investors is challenging, primarily relying on information that surfaces through shareholder inspection rights, whistleblower reports, investigative journalism, or disclosures

²²⁹ Enriques et al (n 110) 619-623.

²³⁰ Enriques et al (n 110) 643-652.

²³¹ For instance, there are diverging views regarding the active involvement of the SEC, as a securities regulator, in ESG disclosure. Some scholars support this involvement (Thomas L Hazen, ‘Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose’ (2021) 62 *Boston College Law Review* 851, 900-904; Georgiev (n 79) 2127-2132), while others present critiques (Markham (n 29) 181-185, 262-263; Rose (n 1) 387-390).

²³² See (nn 122-130) and their accompanying text.

prompted by other enforcement actors, that is, government enforcement.

Third-party assurance: This measure is most suitable for objectively verifiable quantitative metrics, for instance, greenhouse gas emissions. Substantive assurance for qualitative, forward-looking, or discretionary ESG information is currently limited. As a proactive verification process conducted by independent experts, the detectability of inaccurate information is high when appropriate authority and resources are provided. However, the comprehensiveness of the information supplied and the independence of the assurance body are key. ESG attributes often possess a ‘credence’ quality, meaning their accuracy is inherently difficult to verify even by sophisticated users or gatekeepers, due to the complexity of the underlying methodologies.²³³ In some jurisdictions, the investigatory powers of accountants are primarily defined with financial information in mind²³⁴; thus, legal amendments may be required to expand these powers to enable effective assurance of ESG information.

Administrative or criminal sanctions: In theory, all ESG information mandated for disclosure by law is subject to enforcement. Government agencies, depending on the jurisdiction, are granted broader investigatory powers compared to accountants.²³⁵ However, in practice, it is constrained by limitations in human resources, difficulties in interpreting complex ESG information, and the limits of detectability. Japanese cases tend to focus on the enforcement of governance information. Regarding detectability, it relies on limited information sources such as reviews of submitted corporate reports, information provision, and whistleblower reports. Large-scale investigations require significant resources, posing a risk of under-enforcement. In reality, a risk-based approach is the only option, and the detection of inaccurate ESG information relies on fortuitous elements such as information obtained through whistleblowing or discoveries made during investigations into financial misstatements.

3. Cost Bearers

Costs and cost bearers vary depending on the specific enforcement mechanism employed.

Securities fraud litigation and third-party assurance: The initiating investors and their legal firms bear the costs of litigation and attorneys’ fees in securities fraud cases. For third-party assurance, the company engaging in the assurance contract with audit firms or similar bodies incurs the assurance fees, which are ultimately borne by the residual claimants, namely the shareholders. While these private-led enforcement mechanisms align the cost-bearers with the beneficiaries when the purpose of ESG disclosure is to protect investors or enhance corporate accountability, a misalignment arises when the objective extends beyond these, also seeking to promote companies’ engagement in resolving ESG issues.

Administrative or criminal sanctions: Public enforcement, conducted by government agencies, is funded by national budgets, which are derived from tax revenues; thus, the costs are borne by all citizens. This is justified when ESG disclosure serves not only investor protection but also broader societal interests.

²³³ Enriques et al (n 110) 611, 627.

²³⁴ See (n 168) and its accompanying text.

²³⁵ See (nn 153 and 154) and their accompanying text.

C. Seeking an Appropriate Balance

From the perspectives outlined above, each jurisdiction must seek an appropriate combination of enforcement mechanisms tailored to its specific characteristics, considering the trade-offs among cost, coverage, and deterrence. Building on the analytical framework presented in this part, I now examine how various combinations of enforcement mechanisms can most effectively achieve specific regulatory objectives for ESG disclosure. The optimal hybrid model depends critically on the primary purpose assigned to ESG information accuracy.

1. For the Sole Purpose of Investor Protection

When the primary purpose is only investor protection, it generally suffices to ensure the accuracy only of ESG information that influences investors' investment decisions and causes them financial harm. From this perspective, *ex-post* and private-led enforcement, such as securities fraud litigation, is useful. In this scenario, the cost-bearers (investor plaintiffs) and the beneficiaries of accurate disclosure are aligned, motivated by their incentive to recover economic losses caused by misrepresentation. However, *ex-post* and private-led enforcement may fall outside the scope for certain information. This includes, for instance, information that influences the investment decisions of certain investors (such as those who specifically focus on an investee company's ESG factors) but is not deemed legally material under current judgment frameworks²³⁶; or, information that influences investors' investment decisions but results in no economic impact or only a minor economic impact that does not exceed the break-even point for litigation.²³⁷

For such information, *ex-ante* and private-led enforcement can serve as a crucial complement to enhance investor protection more thoroughly. The company bears the costs of third-party assurance, which are ultimately borne by its shareholders, leading to a misalignment between the beneficiaries and the cost-bearers of assurance. Furthermore, the scope of information suitable for third-party assurance remains limited to objectively verifiable data, making it less amenable to the qualitative and discretionary nature of much ESG information.

Consequently, for information that is crucial for some investors' decision-making or has a limited price impact, yet simultaneously lacks sufficient *ex-ante* objective verifiability, private enforcement proves ineffective.²³⁸ This is because such information either falls outside its scope or is unsuitable for *ex-ante* verification. Therefore, if the accuracy of such information is to be ensured, *ex-post* and public enforcement becomes necessary. Furthermore, private enforcement relies on various preconditions; in their absence, *ex-post* and public enforcement may need to serve as a backup. For instance, for *ex-post* and private enforcement to function, private parties must somehow become aware of misstatements or omissions in ESG information.²³⁹ In jurisdictions where shareholders' inspection

²³⁶ See (n 130) and its accompanying text.

²³⁷ (nn 203-205) and their accompanying text indicate misrepresentations or omissions of ESG information that influence investment decisions but have no negative impact on price, or whose negative impact on price is extremely short-lived. See also Enriques et al (n 110) 650-652.

²³⁸ Enriques et al (n 110) 674-681 (proposing legal regulation for green gatekeepers based on the significance of user private costs from inaccurate certifications and *ex-post* verifiability by policymakers and courts).

²³⁹ See (n 121) and its accompanying text.

rights, which are a prerequisite for this awareness, are not sufficiently robust,²⁴⁰ discovery through public enforcement may be the only viable option.

2. For Enhancing Corporate Accountability and Promoting ESG Issue Resolution

When the purposes of ESG disclosure extend beyond mere investor protection to encompass enhancing corporate accountability and promoting proactive engagement with ESG issues, the current regulatory mechanisms, rooted in traditional securities regulation, prove largely ineffective in achieving these ambitious goals. Information relevant to these broader purposes frequently falls outside the narrow scope covered by *ex-post* and private-led enforcement, such as securities fraud litigation, as it often does not result in direct financial harm to investors.²⁴¹ Similarly, *ex-ante* and private-led enforcement, such as third-party assurance, cannot address the entirety of information necessary for comprehensive accountability or driving ESG action across diverse stakeholder interests.²⁴² While *ex-post* and public enforcement might seemingly fill these gaps, regulatory authorities, despite being governmental bodies, are primarily incentivised towards securities market regulation and may find it challenging to act from the perspective of promoting broad stakeholder interests.²⁴³ Consequently, current rules, which are fundamentally based on financial impact, are insufficient to achieve these more expansive ESG disclosure objectives fully.

The validity of pursuing such broad objectives requires critical examination; furthermore, even if deemed legitimate, their pursuit through disclosure mechanisms demands constant scrutiny.²⁴⁴ However, where the pursuit of such broad objectives is indeed affirmed and ESG disclosure is to play a role in that endeavour, substantial systemic reform becomes necessary. From a cost-minimisation perspective, *ex-post* and private-led enforcement is primarily justified. Should this approach be favoured, it would necessitate measures that do not require proof of investor or shareholder harm, such as approaches enhancing the effectiveness of remedies for false statements in shareholder meeting resolutions or proxies.²⁴⁵ Nevertheless, these measures also require initiative from a limited set of stakeholders, namely investors and shareholders. In cases where the beneficiaries of ESG disclosure are the public as a whole, this might necessitate the establishment of *ex-post* and private-led enforcement mechanisms initiated by other private actors, including consumers and local communities. Yet, for the full realisation of such goals, *ex-post* and public enforcement then become essential to complement the inherent gaps of private-led mechanisms. While public enforcement is not a panacea, it offers the potential for broader coverage and systematic oversight that private mechanisms, with their inherent focus on pecuniary harm or verifiable data, cannot fully provide. It can enforce disclosure requirements related to a broader array of ESG issues, thereby contributing to increased corporate accountability and fostering a wider societal impact, even in the face of resource constraints

²⁴⁰ See (n 191) and its accompanying text.

²⁴¹ As (nn 122 and 154-156) and their accompanying text showed, economic damages for the plaintiff are required under securities litigation fraud.

²⁴² Ortega (n 1) 79-86; ESMA (n 3) [48]-[62].

²⁴³ See (n 231).

²⁴⁴ See Armour et al (n 130) 321-335 (argument posits for 'green pills' to lend credibility to climate change commitments, internalising incentives for companies to achieve emissions reduction targets under contract law, thereby mitigating the risk of greenwashing).

²⁴⁵ See Kovvali (n 124) 1290-1292 (discussing proposals to address unlawful proxy solicitation under state corporate law and federal securities law, especially Rule 14a-9); also (n 158) and its accompanying text.

and detectability challenges.

VI. CONCLUSION

As ESG disclosure proliferates globally, ensuring the accuracy of complex and qualitative ESG information presents a pressing challenge, as traditional enforcement mechanisms often struggle to adapt to its distinctive characteristics. This paper's findings demonstrate that neither purely *ex-ante* private-led enforcement (such as third-party assurance) nor purely *ex-post* private-led enforcement (such as securities litigation) models alone can reliably secure ESG information without distorting disclosure incentives. To resolve this dilemma, this paper proposes a hybrid enforcement model that strategically allocates tools based on their comparative advantages. This approach advocates reserving *ex-ante* assurance for high-impact, readily verifiable metrics; enlarging public audit resources for broader disclosures; and tying civil liability thresholds to context-specific materiality reflecting ESG's qualitative character. Such an integrated framework can achieve a more balanced alignment between investor protection, stakeholder transparency, and compliance costs, thereby reinforcing market trust and avoiding the twin perils of greenwashing and disclosure chill.

This paper leaves many issues for further consideration, and its examination is admittedly incomplete in certain aspects. It has not fully clarified the theoretical justification for incurring the substantial costs required to ensure the accuracy of ESG information disclosed by companies. While this paper has attempted to provide some answers by aligning with the purposes of ESG disclosure, its limitations are acknowledged. Specifically, from the perspective of the third objective, that is using disclosure to encourage companies to address ESG issues, where substantial costs are required for accuracy assurance, the validity of this third objective itself needs to be further scrutinised.²⁴⁶ If the aim is to prompt companies to tackle ESG issues, alternative approaches, such as mandating or prohibiting specific actions, imposing fiduciary duties, or establishing other mechanisms, could be considered. Therefore, further investigation is required to ascertain what advantages information disclosure holds as a regulatory instrument within this context. Additionally, while this paper presents a hybrid model, it has not provided specific, tailor-made designs for each jurisdiction. These remain crucial outstanding challenges.

²⁴⁶ Though disclosure regulation may be more flexible and present less risk of distortion than regulatory commands (George Loewenstein, Cass R Sunstein and Russell Golman, 'Disclosure: Psychology Changes Everything' (2014) 6 *Annual Review of Economics* 391, 392; Rose (n 1) 368), the cost of its implementation and maintenance can be substantial, and disclosure regulation alone may not internalize negative externalities (Rose (n 1) 369-371).

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