

The



# PRACTICAL GUIDANCE

Journal

## RECENT TRENDS AND DEVELOPMENTS IN CORPORATE ENVIRONMENTAL SOCIAL GOVERNANCE

**Infrastructure Greenification  
Opportunities for the US Energy Grid**

**How ESG and Social Movements are  
Affecting Corporate Governance**



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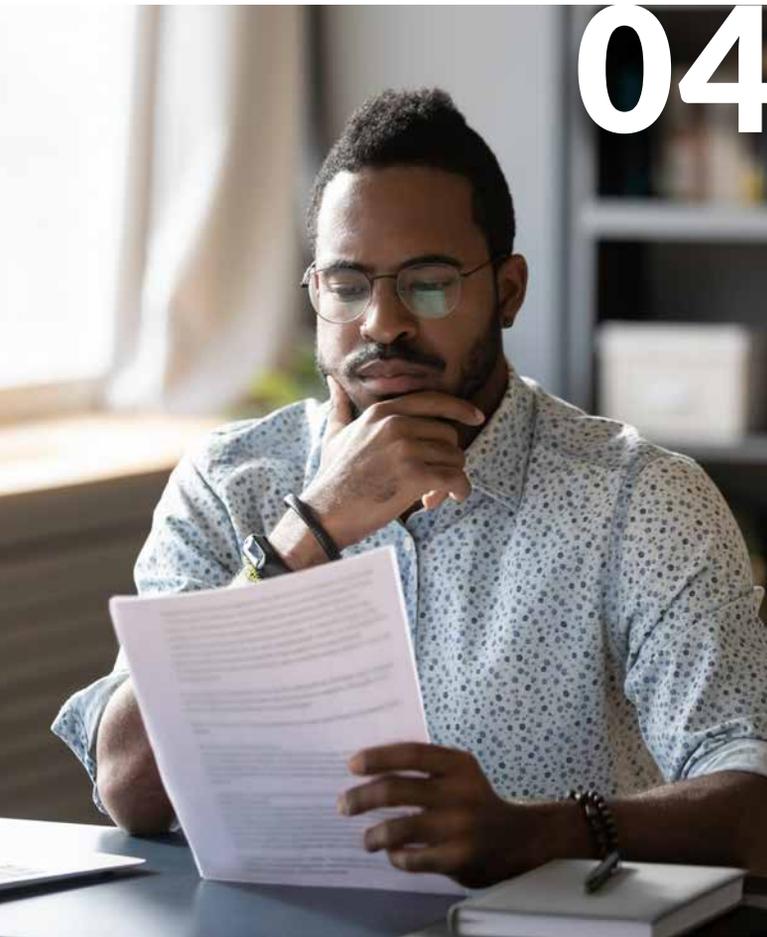
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**IN THIS EDITION OF THE PRACTICAL Guidance Journal**, we will focus on several topics gathering increasing attention and momentum, including Environmental, Social, and Governance (ESG); Infrastructure; and Climate Change.

### How ESG and Social Movements are Affecting Corporate Governance

Businesses of all sizes are working to address racial injustice in a meaningful way. As companies race to publicly denounce racism and implement diversity and inclusion programs, learn more about how increasing focus on ESG, as well as groups such as Black Lives Matter (BLM) and the #MeToo movement (#MeToo) might continue to impact corporate governance and the workplace.

### Trends and Developments in Corporate ESG

Driven by consumer, investor, and other stakeholders' demands, companies are increasingly disclosing information about their ESG programs and performance.

Discover more about this evolving, multi-faceted concept, as well as some pitfalls that companies should avoid when making business-related disclosures.

### Infrastructure Greenification Opportunities for the U.S. Energy Grid

Sparked by incidents raging from severe weather events to real or perceived threats of physical or virtual attacks, concerns over the fragile U.S. power grid have been growing over the last decade or so. Read about how the Biden Administration's focus on clean energy, coupled with various

economic and policy factors, may provide the opportunity to greenify the country's power grid—and some possible benefits and disadvantages this opportunity may present.

### The International Climate Finance Plan

Designed to address climate change, President Biden presented his U.S. International Climate Finance Plan, which proposes a significant increase in climate-related aid to developing countries. Learn more about the Plan's five broad areas of focus and the key items that impact international, private sector development.

This edition also includes a look at Corporate Social Responsibility (CSR) and ways companies can work to ensure that their third-party suppliers act responsibly with respect to human rights, labor rights, and environmental stewardship.

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Sara K. Orr and Sofia Dolores Martos KIRKLAND & ELLIS LLP

# Recent Trends and Developments in Corporate Environmental Social Governance

This article provides an introduction to the concept of corporate environmental social governance (ESG); generally describes the disclosure frameworks adopted by companies in connection with ESG reporting; and addresses recent trends and developments in the United States related to ESG disclosure, including expected regulation of ESG disclosure by the U.S. Securities and Exchange Commission (SEC).

**OVER THE PAST YEAR, INTEREST IN ESG AND CORPORATE** disclosure around ESG issues has skyrocketed. Driven by consumer, investor, and other stakeholders' demands, companies in the United States increasingly disclose information about their ESG performance in a voluntary fashion. The trend generally encourages transparent business practices in the area of environmental protection, social responsibility, and corporate governance. However, voluntary disclosures can also trigger legal and reputational risks. Moreover, the SEC and other U.S. government agencies are keenly focused on ESG disclosures (particularly around climate risks and human capital management), with enforcement priorities announced around ESG statements and proposed rules for corporate ESG disclosure expected in late 2021. Corporate ESG statements will continue to garner regulatory scrutiny and are anticipated to become the target of enhanced regulation. The risk of litigation by investors, regulators, and consumer plaintiffs over voluntary ESG disclosures has also increased in recent years but is beyond the scope of this article.

## What is ESG?

Many names and terms have been used to describe ESG or corporate sustainability. While there is no universally agreed upon definition, market practice has now crystallized around the term ESG. The E stands for environment, which includes myriad ways that a business can impact the natural environment through its consumption of resources or output of waste, or ways that the natural environment can impact a business through the availability of energy or natural resources, climate change, or natural disasters. The S stands for social, which includes social capital issues (e.g., data security, human rights, and customer welfare) and human capital issues (e.g., labor practices, employee health and safety, and diversity, equity, and inclusion (DEI)). The G stands for governance, including business ethics (such as board oversight of ESG, executive compensation, and shareholder rights), supply chain management, and other risk management and compliance issues. This article will use the terms ESG and disclosure to mean a company's communications that are intended to publicly convey information about its behavior, processes, and other aspects of its operations related to its environmental compliance, social performance, and corporate governance.

While ESG issues continue to be governed by a mix of hard and soft laws and practices, there is intense focus on corporate ESG disclosure by a variety of stakeholders. This shift is due, in part, to the COVID-19 pandemic and social justice movements of 2020 following the death of George Floyd. Additionally, since 2018, major institutional investors such as Blackrock and Vanguard have demanded ESG information and have prompted a seismic shift in expectations regarding corporate disclosures.

To meet investor and consumer appetite for information on ESG performance issues, companies have increased their ESG disclosure. For example, a recent study<sup>1</sup> found that 95% of S&P 500 companies now make detailed ESG information publicly available. Many companies post annual ESG reports on their corporate websites to provide their customers, investors, and others with information about their environmental and social performance. Companies also engage in social media campaigns and other marketing to promote their positive environmental and social activities. Given these underlying trends, including evolving investor expectations and litigation risks, it is important for counsel to anticipate potential risks and proactively engage with C-suite and board members on ESG-related issues, including disclosure decisions.

## What Reporting Frameworks and Standards Guide the Disclosure of Corporate ESG Issues?

Approaches to ESG reporting vary and there is a lack of consistency across companies or industries as to what and how ESG information is disclosed. While some countries, states, and regions have made certain categories of ESG reporting mandatory (like the European Union and China), there are currently no broad regulatory mandates in the United States requiring comprehensive ESG disclosure. In the United States, publicly listed companies are required to disclose information about their use of conflict minerals, and, to the extent material, human capital management and climate change risks, but no comprehensive ESG disclosure regulations currently exist. Nevertheless, most companies voluntarily disclose ESG information in their 10-Ks, proxy statements, and graphically enhanced sustainability reports most often posted on their websites.

Accordingly, there are a variety of approaches and frameworks that a company may elect to follow to guide its voluntary ESG disclosure. It is up to each company to select the ESG reporting framework

<sup>1</sup> <https://www.thecaq.org/sp-500-and-esg-reporting/>.



ESG statements should undergo the same rigorous review as other traditional disclosures to avoid potential litigation or liability, as well as the negative public relations or investor relations risks that exist whether or not ESG disclosure is included in a formal SEC filing.

Other substantive disclosure frameworks have risen to prominence in a complementary role to comprehensive ESG reporting guidelines. One example is the Task Force on Climate-related Financial Disclosures (TCFD) recommendations,<sup>5</sup> which have gained prominence as a business-focused tool used in conjunction with other reporting standards to guide the disclosure of climate-related risks. It is possible that the SEC may require U.S.-listed companies to utilize this framework for enhanced, consistent reporting on climate risks, though no such rule has yet been proposed as of the publication date of this article.

Additionally, many companies have adopted other types of voluntary ESG goals and initiatives, including climate commitments (e.g., net zero pledges). One prominent framework is the United Nations 2030 Sustainable Development Goals (SDGs), an ambitious set of goals adopted in 2015 that aims to combat and reverse the world's systemic challenges. The SDGs provide a shared framework for addressing sustainability issues across organizations, industries, and geographies and can help companies establish sustainability priorities and set quantifiable goals. Notably, the United Nations' Principles for Responsible Investment (PRI), to which many of the world's largest fund managers have signed on, are informed by the SDGs. Commitments to climate action, the SDGs, the PRI, or other pledges are often incorporated in, and even shape, ESG disclosures.

ESG disclosures are often made at a much more frequent pace than other types of disclosures. While some companies continue to prepare stand-alone annual ESG reports following one of the above or other guidelines, many also engage in online, real-time ESG disclosure (such as through posts on social media announcing commitments to DEI initiatives, sharing data on board-level diversity, or announcing a commitment to a certain climate target). At the same time, governments are also making use of new technologies and automating the way data is shared with the public regarding companies' environmental, health, and safety compliance (including information about environmental performance provided via searchable, electronic databases). For example, the U.S. Environmental Protection Agency (EPA) and state environmental agencies maintain multiple databases that provide enforcement and

compliance information by facility or company name, such as the EPA's Enforcement and Compliance History Online database. Other environmental-media specific databases like AirData, which provides summaries of pollution data from two EPA databases, and similar databases also provide easily accessible information to the public via online tools.

Without a consensus on the metrics to be used when disclosing ESG information, this drive towards increased transparency also means increased legal and reputational risks. As companies disclose more information more often, these data are increasingly available for plaintiff and regulatory scrutiny. Accordingly, ESG statements should undergo the same rigorous review as other traditional disclosures to avoid potential litigation or liability, as well as the negative public relations or investor relations risks that exist whether or not ESG disclosure is included in a formal SEC filing.

### Recent Corporate ESG Trends

The corporate ESG space is rapidly evolving and, going forward, it will be important for reporting companies and their counsel to respond to company-specific investor concerns and keep apprised of global trends in ESG issues important to the investment and regulatory communities. Two material trends are discussed below. First, while climate change remains a major focus of ESG actions and activism, companies and stakeholders have also turned their attention to a wider range of social and governance issues. Second, the Biden Administration has moved the SEC closer to mandating certain ESG disclosure, and SEC enforcement actions examining ESG disclosures are on the rise.

### Expanded Scope of ESG

Over the course of the last decade, the rise of ESG has been driven largely by attention to climate change and other environmental matters. While climate change remains a core focus of ESG initiatives, companies and their stakeholders have increased their attention to other social and governance aspects of corporate sustainability in recent years, such as diversity and equity.

that best meets its needs, often by benchmarking against peers and competitors and based on its industry sector. Hundreds of reporting frameworks, standards, certifications, and other metrics, including industry-specific guidelines, currently exist. Among these, key standards for voluntary reporting that have been used by companies in recent years include:

- Guidelines issued by the Global Reporting Initiative<sup>2</sup>
- Standards issued by the Sustainability Accounting Standards Board (SASB)<sup>3</sup>
- The framework of the International Integrated Reporting Council<sup>4</sup>

Market confusion over the plethora of reporting frameworks, standards, certifications, and other metrics has led to growing demands for consistent and consolidated ESG frameworks. While there have been a number of recent initiatives aimed at unifying the ESG reporting ecosystem, the International Financial Reporting Standards (IFRS) Foundation's initiative to create an international

Sustainability Standards Board (SSB) is gaining precedence. The IFRS Foundation already oversees the International Accounting Standards Board, which writes accounting rules used in more than 140 countries, and the SSB would be a parallel board. The IFRS Foundation aims to establish the SSB ahead of the COP26 U.N. climate change conference in Glasgow in November 2021. Among those that have responded positively to this initiative are the International Monetary Fund, the United Nations, and global financial regulatory bodies like the International Organization of Securities Commissions and the Financial Stability Board. SEC officials have also signaled support for the IFRS Foundation's efforts to establish the SSB, which may indicate a willingness to explore the adoption of this framework for U.S. corporate ESG reporting. This effort to unify corporate ESG reporting frameworks is promising as it will help narrow the universe of potential frameworks and assist companies and stakeholders with ease of use, comparison, and analysis.

2. <https://www.globalreporting.org/standards/>. 3. <https://www.sasb.org/>. 4. <http://integratedreporting.org/wp-content/uploads/2013/12/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf>.

5. <https://www.fsb-tcfd.org/about/>.

## Climate

An increased focus on climate-related issues dominated 2021, with several groundbreaking developments. President Biden has made climate change a central focus of his administration, as evidenced by his decisions to rejoin the Paris Climate Agreement, host the Leaders Summit on Climate in April 2021, and announce new emissions targets. In addition, President Biden has issued executive orders addressing climate change, such as the Executive Order on Climate-Related Financial Risks issued in May 2021,<sup>6</sup> which directs the federal government to conduct assessments and prepare reports to address climate-related financial risk in their policies and programs, and the Executive Order on Strengthening American Leadership in Clean Cars and Trucks issued in August 2021,<sup>7</sup> which sets a new target to make half of all new vehicles sold in 2030 zero-emissions vehicles. In August 2021, the Intergovernmental Panel on Climate Change issued a report providing a review of the science of climate change, concluding that evidence suggests that human influence has already led to global warming, and issuing warnings regarding future scenarios that are likely unless emissions are drastically cut. The

report was released in the same month that extreme weather events rocked the United States, such as wildfires in California and Hurricane Ida in Louisiana and the Northeast, which may amplify its message.

Shareholder activism related to climate issues and other ESG issues continues to expand. Shareholder proposals related to environmental matters increased in the 2021 proxy season, and a majority of these were climate-related. Among the shareholder proposals that went to a vote, average shareholder support for environmental proposals was higher in 2021 than in 2020. Another major activist development in 2021 related to board seats. Engine No. 1, an activist hedge fund, nominated four independent directors ahead of Exxon's annual shareholder meeting in May, challenging Exxon's slate on the basis of its positions on fossil fuels and climate change. With the support of large pension funds and other institutional investors, Engine No. 1 secured three seats on Exxon's board. The outcome signaled that companies should ensure that they reckon with stakeholder demands regarding climate change.

<sup>6</sup> 86 Fed. Reg. 27,967 (May 25, 2021). <sup>7</sup> 86 Fed. Reg. 43,583 (Aug. 10, 2021).



## Diversity and Equity

Other ESG issues that garnered increasing attention in the last year are diversity and equity. Notably, in 2020, many companies announced widespread support for issues raised by the Black Lives Matter movement in a variety of ways, including by pledging funding for racial justice and developing diversity initiatives. The Biden Administration also signaled that racial equity would be a core focus when, as his first executive order on his first day in office, President Biden issued the Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.<sup>8</sup> Since then, a number of Biden initiatives have emphasized attention to racial equity and diversity. Also in 2021, the SEC approved a Nasdaq proposed rule on diversity, which

includes certain requirements regarding board diversity for Nasdaq-listed companies and also requires such companies to provide standardized disclosures related to board diversity.

With respect to activism related to diversity and equity, momentum in this area has grown in 2021, which witnessed a record number of related shareholder proposals submitted in the United States. Proposals covered topics such as workforce diversity disclosures, such as EEO-1 report disclosures, as well as gender and pay equity. Average shareholder support for such proposals roughly doubled that of 2020, with workforce diversity and EEO-1 reporting proposals garnering an average majority support for the first time.

<sup>8</sup> 86 Fed. Reg. 7,009 (Jan. 25, 2021).

## U.S. ESG Regulatory and Enforcement Developments

As investors have begun to demand more fulsome climate and ESG disclosures, the Biden Administration has indicated that climate change and ESG are at the forefront of federal regulatory agendas. For example, the Commodity Futures Trading Commission and the EPA have announced new climate-related initiatives in recent months, and the Department of Labor and the Office of the Comptroller of the Currency have halted initiatives from the Trump Administration that many understood as an effort to curtail engagement with ESG and sustainable finance.

The SEC has taken a leading role in assessing what ESG-related corporate disclosures may be needed and how such disclosures should be made. In February 2021, then-Acting SEC Chair Allison Herren Lee directed the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings. In March 2021, the SEC requested public input on climate change disclosures in a public statement that did not propose a rule, but instead posed 15 questions for consideration, each with a number of sub-questions. Among the questions asked by the SEC were the following:

- How can the Commission best regulate, monitor, review, and guide climate change disclosures in order to provide more consistent, comparable, and reliable information for investors while also providing greater clarity to registrants as to what is expected of them?
- What are the advantages and disadvantages of rules that incorporate or draw on existing frameworks, such as, for example, those developed by the TCFD, the SASB, and the Climate Disclosure Standards Board?
- What is the best approach for requiring climate-related disclosures?
- Should climate-related requirements be one component of a broader ESG disclosure framework?

The comment period closed in June, and more than 550 unique comment letters were submitted in response. A proposed rule is expected in late 2021.

SEC Chair Gary Gensler has also expressed interest in rulemaking relating to human capital disclosure, including information on workforce turnover, skills and development training, compensation, benefits, workforce demographics (including diversity), and health and safety. These statements are supported by the SEC's June 2021 announcement of its annual regulatory agenda, which specified that the SEC will propose rules related to a number of ESG-related disclosure topics, including climate risk, human capital, including workforce diversity and corporate board diversity, and cybersecurity risk, in 2021.

The SEC has also signaled that it will increase its enforcement scrutiny of ESG disclosures. In March 2021, the SEC announced the creation of a Climate and ESG Enforcement Task Force to focus on identifying material gaps or misstatements in issuers' disclosure of climate risks under existing rules. The task force will also analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies. Additionally, The SEC Division of Examinations' 2021 examination priorities reflect an increased focus on climate-related risks and investment adviser disclosures and practices relating to ESG products and services. In April 2021, the Division also published a risk alert that addressed examination priorities, compliance deficiencies, and effective compliance practices concerning ESG-related investment products, including private funds. With respect to compliance deficiencies, the risk alert highlighted staff observations of instances of potentially misleading statements regarding ESG investing processes and representations regarding the adherence to global ESG frameworks; a lack of policies and procedures related to ESG investing; weak or unclear documentation of ESG-related investment decisions; and compliance programs that did not appear to be reasonably designed to guard against inaccurate ESG-related disclosures or to prevent violations of law, or that were not implemented.



Attention to such issues is evident in the SEC's recent investigation of Deutsche Bank's asset manager, DWS, first reported in August 2021. The investigation followed public accusations by DWS's former head of sustainability that the investment firm overstated how it used sustainable investing criteria to manage investments. Such investigations may become increasingly common under the leadership of Chair Gensler, who has called attention to the wide range of terms used by asset managers to describe ESG and what ESG criteria they use in relation to sustainable investing.

It is possible that additional regulatory attention, including enforcement priorities, may be broadened to encompass other issuers, such as public companies. Accordingly, it is important for lawyers to monitor these developments in order to best advise issuers on liability exposure associated with both SEC filings and any other types of public disclosure.

### Advising Clients on ESG-Related Disclosure

The U.S. government appears to be moving quickly to align itself with ESG market trends, and corporations should expect further regulatory and legislative activity around ESG and climate change, in particular, in the months ahead.

As a practical matter, it is important for companies to manage the exposure and risk associated with increased disclosure of ESG issues, regardless of context or whether the disclosure was voluntary. Teamwork among business managers, ESG experts, and attorneys is critical to proactively address any potential risks. Attorneys can assist companies with the following risk-management strategies:

- Identifying internal and external stakeholders
- Recommending reporting frameworks
- Evaluating the materiality of ESG issues

In light of the SEC focus on how ESG statements are made, it is critical that attorneys advise clients on setting up adequate processes and procedures for maintaining accurate backup data for public ESG statements and internal controls over ESG

### Related Content

For information on ESG disclosures by U.S. reporting companies, see

 [MARKET TRENDS 2019/20: PROXY ENHANCEMENTS](#)

For a collection of resources addressing ESG issues, see

 [ENVIRONMENTAL, SOCIAL, AND GOVERNANCE \(ESG\) RESOURCE KIT](#)

For an analysis of conflict minerals disclosures, see

 [CONFLICT MINERALS RULE COMPLIANCE](#)

For a checklist that presents the initial steps a company should consider in preparing to comply with the Conflict Minerals Rule, see

 [CONFLICT MINERALS RULE COMPLIANCE CHECKLIST](#)

For a list of the disclosure requirements for public companies under the Conflict Minerals Rule, see

 [CONFLICT MINERALS DISCLOSURE CHECKLIST](#)

For an examination of new rules proposed by Nasdaq regarding diversity on boards of directors, see

 [SEC APPROVES NASDAQ BOARD OF DIRECTOR DIVERSITY LISTING STANDARDS: CLIENT ALERT DIGEST](#)

For a sample memorandum addressing shareholder activism related to ESG issues, see

 [SHAREHOLDER ENGAGEMENT STRATEGIES FOR ENVIRONMENTAL, SOCIAL, AND POLITICAL ISSUES BOARD MEMORANDUM](#)



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disclosure. If a company elects to commit to a voluntary initiative or set climate goals, attorneys can also assist with identifying the appropriate frameworks and reporting cadence, as well as advise on standardization of ESG disclosures across company communications.

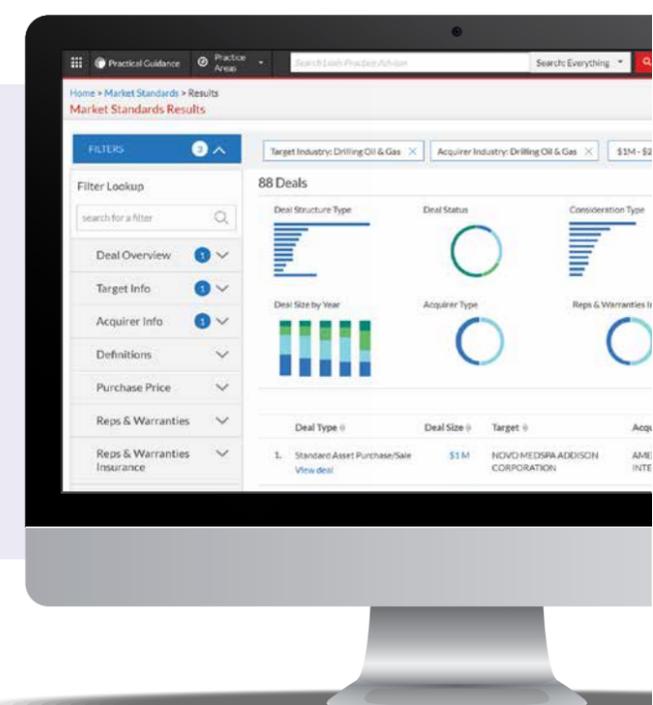
Moreover, attorneys can help counsel the company on handling sensitive ESG issues:

- **Address the issue directly.** If an attorney is aware of potential legal or reputational risks related to an ESG issue, he or she can recommend that its sustainability report or social media postings appropriately address (or refrain from making statements about) the issue.
- **Review drafts of ESG reports and filings.** Consider taking a central role in ensuring the accuracy and consistency of reports and filings with the company's environmental and social performance data. One way to accomplish this is through comparison of environmental regulatory data or diversity data in a sustainability or ESG report with that which is reported to federal and state agencies (often made available to the public via websites or through Freedom of Information Act requests).
- **Help direct the company's shareholder engagement related to ESG issues.** Attorneys can also guide companies as they navigate growing shareholder and NGO activist pressures to increase the volume of ESG disclosure.
- **Keep current with the fast-developing ESG space.** Attorneys can assist with assessment of new regulatory requirements and advise companies on how best to address them (whether through public comment letters, industry initiatives and/or planning for potential mandated disclosure frameworks). 

*Sara K. Orr is a partner in the Chicago office of Kirkland & Ellis LLP. Sara advises clients around the world on ESG issues. She has almost two decades of experience working with private equity, public company, and financial institutional clients on hundreds of complex environmental matters and is a thought leader on sustainability and ESG issues. Her practice specifically focuses on sustainable finance, corporate sustainability programs, ESG reporting and disclosure, ESG due diligence, Equator Principles and IFC Performance Standards on Environmental and Social Sustainability, innovative climate solutions, and other ESG risks and opportunities.*

*Sofia Dolores Martos is a partner in the New York office of Kirkland & Ellis LLP. Sofia builds upon over a decade of experience in U.S. securities law to advise clients on a wide spectrum of ESG matters. She advises public and private companies on recent and emerging ESG regulatory developments, such as anticipated SEC proposed rules related to climate risk, human capital, including workforce diversity and corporate board diversity, and cybersecurity risk. She also counsels clients on ESG disclosures in sustainability reports, proxy statements, and annual reports, which includes advising on regulatory requirements, international disclosure trends, and industry best practices. Sofia focuses largely on social and governance issues. Her governance work involves assessments of ESG programs through benchmarking and gap analysis to identify areas for improvement and ways to mitigate legal and reputational risks, as well as strategies for integrating ESG into clients' business and governance practices through board trainings, company policies, and tabletop exercises.*

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\*As compared to What's Market 07/20



Jed E. Ruccio, MIRRIONE SHAUGHNESSY & UTTI, LLC

# Green Buildings and Sustainable Technology Design and Construction

This article explains the concept of green building, both as a description of a type of building constructed and operated by employing sustainable technology, and as a reference to the design and construction techniques used to construct that building.

**THIS ARTICLE ALSO DESCRIBES HOW YOU MAY OBTAIN** a green building designation upon construction of a new building or retrofitting of an existing building, including qualification for a Leadership in Energy and Environmental Design (LEED) certification and a federal Energy Star designation. With respect to LEED certification, this article explains the significant changes made by LEED Version 4.1 (v4.1) from the previously commonly used LEED Version 4.0 (v4). This article also discusses the American Institute of Architects (AIA) Document E204-2017, Sustainable Projects Exhibit, which was developed for use on a wide variety of sustainable projects.<sup>1</sup>

## Why Green Buildings?

The COVID-19 pandemic and renewed attention on racial justice issues spurred corporations to review their corporate practices and, among other things, focus more on Environmental, Social, and Governance (ESG) issues. According to the World Economic Forum, real estate is responsible for around 40% of global carbon emissions, so it makes sense that companies should look at the carbon footprint of the buildings they inhabit and own. The Global Real Estate Sustainability Benchmark (GRESB) is the ESG benchmark for real assets. It validates, scores, and benchmarks ESG performance data, providing business intelligence and engagement tools to investors and managers.

Investors use GRESB data and analytical tools to monitor ESG opportunities, risks, and impacts, and engage with investment managers. Businesses are now looking for ways to maximize their ESG performance, and green building and healthy building certifications are especially important because they provide validation that an organization has made good on the ESG principles it espouses. More than 120 institutional and financial investors use GRESB data and benchmarks to monitor their investments, engage with their managers, and make decisions that lead to a more sustainable real asset industry. The 2020 real estate benchmark covers more than 120 property companies, real estate investment trusts, funds, and developers. GRESB represents \$5.3 trillion in real asset value.<sup>2</sup>

In addition to achieving a reputation as a socially responsible company, increased productivity, higher retention of employees, and cost savings, tax-advantaged investment opportunities are also factors in the growth of green buildings and tenants seeking green

options. Another incentive for adopting green building practices comes from the federal government's increasing requirements to use green building practices for buildings owned or leased by federal, state, and local government agencies.

## What Are Green Buildings and Green Building Practices?

As commonly understood, a green building is a building designed, constructed, and operated on sustainable principles. The phrase is used both as a description of a building and as a description of the construction process, as in "we used green building practices." The U.S. Environmental Protection Agency (EPA) defines green building as "the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building's life cycle from siting to design, construction, operation, maintenance, renovation and deconstruction." The EPA states that green buildings are designed to reduce the overall impact of the built environment on human health and natural environment by (1) efficiently using energy, water, and other resources; (2) protecting occupant health and improving employee productivity; and (3) reducing waste, pollution, and environmental degradation.<sup>3</sup>

In general, green buildings typically incorporate the following six principles:

- Using the building's site or location to the best advantage, including considering whether to reuse or rehabilitate an existing building
- Using the building's energy as efficiently as possible
- Protecting and conserving the building's water
- Using environmentally friendly products, including recycled materials, during construction
- Enhancing indoor and outdoor air quality
- Operating and maintaining the building in the most efficient manner

While implementing these principles may increase the cost of the building, the goal is to get back these costs over the life of the building through reduced operating costs, whether for electricity, water, sewer, air conditioning, or heat. As energy costs increase, recovery of the costs of energy saving improvements is typically realized faster.

<sup>1</sup> See AIA® Document E204™ – 2017 (Sustainable Projects Exhibit, Sample Form). <sup>2</sup> For more on GRESB, see the GRESB website. <sup>3</sup> For more on green building, see the Definition of Green Building from this archive of EPA resources.



As state, federal, and international regulation of the environment becomes more widespread, the construction of green buildings is likely to increase. Over the past 20 years, construction of green buildings has gone from rare to commonplace, with broad acceptance from owners, architects, construction managers, and tenants.

### Green Building Rating Systems

As previously discussed, green buildings are designed to use land and energy efficiently, conserve water, improve indoor and outdoor air quality, conserve resources, and increase the use of recycled materials. In addition to these environmental benefits, green buildings also have social and economic benefits, including reduced operating costs that enhance these buildings' overall value.

In an attempt to standardize these practices, several building rating systems have been developed. The most widely known and used is LEED, which is described below in more detail. Another rating system is Green Globes from the Green Building Initiative. Green Globes is an online building assessment tool for both residential and

commercial structures and helps with both the new construction of commercial buildings and the maintenance and improvement of existing buildings. There are also several building rating systems that focus on residential buildings. For example, in California, Build It Green is a non-profit membership organization and its mission is to promote healthy, energy- and resource-efficient buildings in the state.

### LEED Designation

#### Background

The LEED designation program is a national program developed and sponsored by the non-profit U.S. Green Building Council (USGBC). The goal of USGBC is to promote and standardize green building methods and to raise the bar for these methods by continually adopting more rigorous green building standards. According to the USGBC, 2.6 million square feet of building space are LEED certified every day, with more than 100,000 commercial projects using LEED across all building types in over 165 countries.

The goal of encouraging green building practices and raising the bar to qualify as a green building has been implemented by the USGBC through a series of standards, commencing with the publication of Standard Version 1.0. USGBC introduced this standard with the explanation that its intention was to create a voluntary, consensus-based national standard for high-performance building that would promote integrated, whole-building design practices.

Standard Version 1.0 was followed by LEED-NC (New Construction) Versions 2.1 and 2.2. In June 2009, the USGBC released LEED Version 3.0, also referred to as 2009 LEED. Version 3.0 was replaced in November 2016 by LEED v4, which the USGBC stated was "designed to up the ante with a more flexible, performance-based approach that calls for measurable results throughout a building's life cycle." More recently, in 2019, the USGBC released LEED v4.1, in which it seeks to advance heightened building standards to address energy efficiency, water conservation, site selection, material selection, day lighting, and waste reduction.<sup>4</sup>

#### LEED Rating Systems

The USGBC offers ratings systems for a wide variety of projects:

- **LEED BD+C (building design and construction).** This rating system applies to buildings that are being newly constructed or going through a major renovation. It includes new construction, core and shell, schools, retail, hospitality, data centers, warehouses and distribution centers, and healthcare.
- **LEED ID+C (interior design and construction).** LEED ID+C applies to projects that are a complete interior fit-out. It includes commercial interiors, retail, and hospitality.
- **LEED O+M (building operations and maintenance).** This rating system applies to buildings that are undergoing improvement work and little or no construction. It includes existing buildings, schools, retail, hospitality, data centers, and warehouses and distribution centers.
- **LEED ND (neighborhood development).** LEED ND applies to new land development projects or redevelopment projects containing residential uses, nonresidential uses, or a mix. Projects can be at any stage of the development process, from conceptual planning to construction.
- **LEED Homes.** This rating system applies to single-family homes, low-rise multi-family (one to three stories), or mid-rise multi-family (four to six stories).
- **Cities and Communities.** This rating system applies to entire cities and sub-sections of a city. LEED for Cities projects can measure and manage their city's water consumption, energy, use, waste, transportation, and human experience.

Choosing which options to pursue involves more than a cost versus points comparison. Design issues, maintenance issues, safety issues (including insurance), and cost of construction/potential of construction delays will also influence the choices.

An applicant for LEED certification must first designate what rating system is appropriate for its project, and then follow the instructions for registration that apply to that rating system. Occasionally projects fall into more than one rating system. If the project is predominantly (60% or more) in one category, that category applies. If the project has close to even categories (between 40%–60%) there is discretion as to which rating system to choose.

#### LEED Rating Levels

Once an applicant has chosen a rating system, projects pursuing LEED certification earn points across several categories, including energy use and air quality. Based on the number of points achieved, the project then earns one of four LEED rating levels:

- Certified: 40–49 points earned
- Silver: 50–59 points earned
- Gold: 60–79 points earned
- Platinum: 80+ points earned

Within each category, an applicant will be provided with a list of available options to be incorporated into the project. The applicant then must pick among the options based on the cost of these options compared to the number of points that each option can earn. This is a form of environmental value engineering that is typically driven by the architect in consultation with the owner and construction manager, often supported by a LEED/sustainability consultant.

Choosing which options to pursue involves more than a cost versus points comparison. Design issues, maintenance issues, safety issues (including insurance), and cost of construction/potential of construction delays will also influence the choices. If you are an owner/developer, you are also well-advised to consult with prospective tenants or a leasing broker to get a sense of what options might be most valued by building occupants.

<sup>4</sup> For more information about LEED v4 and v4.1 visit the [USGBC website](https://www.usgbc.org).

Although LEED v4 has retained the point thresholds for the different ratings previously used in LEED 3.0, it has added two new categories, integrative process and location and transportation, and changed many of the categories' descriptions and components.

### LEED Points Criteria

As described above, the LEED designation process is divided into several broad categories. Each category contains a checklist for pursuing a LEED rating. For illustrative purposes, what follows is a description of the checklist for one of those broad categories, LEED BD+C, used for new construction or major renovation of a commercial building.

There are nine subcategories set forth in LEED v4.1 in which an applicant for a LEED rating for a LEED BD+C project can accumulate points, up to a total maximum of 110 points:

- Integrative process (1 point)
- Location and transportation (16 points)
- Sustainable sites (10 points)
- Water efficiency (11 points)
- Energy and atmosphere (33 points)
- Materials and resources (13 points)
- Indoor environmental quality (16 points)
- Innovation (6 points)
- Regional priority (4 points)

#### *Integrative Process*

The focus of this subcategory, which is assigned one point, is to encourage an integrated development process. There are no descriptive subsections within this subcategory.

#### *Location and Transportation*

The focus of this category is to encourage the siting of developments in suitable locations from a sustainability perspective. There are seven subsections, each assigned a value, totaling a maximum of 16 points:

- Sensitive land protection (1 point)
- High priority site and equitable development (2 points)
- Surrounding density and diverse uses (5 points)
- Access to quality transit (5 points)
- Bicycle facilities (1 point)



- Reduced parking footprint (1 point)
- Electric vehicles (1 point)

#### *Sustainable Sites*

This category deals with minimizing the impact of the development on sensitive resources on or surrounding the development site. There are six subsections, each assigned a value, totaling a maximum of 10 points, as well as one subsection for which compliance is required:

- Construction activity pollution prevention (required)
- Site assessment (1 point)
- Protect or restore habitat (2 points)
- Open space (1 point)
- Rainwater management (3 points)
- Heat island reduction (2 points)
- Light pollution reduction (1 point)

#### *Water Efficiency*

This category deals with the efficient use and reuse of indoor and outdoor water. There are four subsections, each assigned a value, totaling 11 points, as well as three subsections for which compliance is required:

- Outdoor water use reduction (required)
- Indoor water use reduction (required)
- Building-level water metering (required)
- Outdoor water use reduction (2 points)

- Indoor water use reduction (6 points)
- Optimize process water use (2 points)
- Water metering (1 point)

#### *Energy and Atmosphere*

This category is intended to maximize energy efficiency. There are seven subsections, each assigned a value, totaling 33 points, or more than double any other category. There are also four subsections for which compliance is required. This emphasis reinforces that the primary identifier of a sustainable building in the LEED process remains efficient use of energy, preferably from renewable sources. As for the criteria, there is an emphasis on making sure that after you install the proper equipment, it is tested in place (enhanced commissioning—6 points) and operated as intended (optimize energy performance—18 points):

- Fundamental commissioning and verification (required)
- Minimum energy performance (required)
- Building-level energy metering (required)
- Fundamental refrigerant management (required)
- Enhanced commissioning (6 points)
- Optimize energy performance (18 points)
- Advanced energy metering (1 point)
- Grid harmonization (2 points)
- Renewable energy (5 points)
- Enhanced refrigerant management (1 point)



While LEED is the clear rating system of choice with respect to introducing sustainable principles into commercial building construction, the Energy Star program has had a significant impact on the use of energy-efficient electrical fixtures and equipment in commercial buildings.

#### Innovation

This category is intended to encourage new approaches to sustainability issues in the design and construction of commercial buildings. There are two subsections, totaling 6 points:

- Innovation (5 points)
- LEED accredited professional (1 point)

#### Regional Priority

This category is intended to address the reality that different regions may have different priorities. In the Southwest, the conservation of water and the efficient use of air conditioning may be key, while in urban areas air quality and disposal of waste may require special focus. LEED coordinates the selection of regional priorities with their membership in the specific region. This category allows up to four regional credits, each with a value of 1 point:

- Regional priority: Specific credit (1 point)

USGBC has prioritized credits for projects located in the United States, Puerto Rico, the U.S. Virgin Islands, and Guam.

#### Energy Star

While LEED is the clear rating system of choice with respect to introducing sustainable principles into commercial building construction, the Energy Star program has had a significant impact on the use of energy-efficient electrical fixtures and equipment in commercial buildings. The increased use of such products helps the developer/owner reach favorable LEED ratings, while reducing the use of electricity in the building.

Energy Star is a federally-sponsored program administered by the EPA. It is voluntary and helps businesses and individuals save money through superior energy efficiency. According to the EPA, since the inception of the Energy Star program in 1992, Energy Star has saved American families and businesses \$450 billion on their electricity bills and achieved 4 billion metric tons of greenhouse gas reductions.

Sales of fixtures and equipment with strong Energy Star ratings have reached more than \$100 billion.

The Energy Star program has its own EPA-sponsored website, with an online tool, Energy Star Portfolio Manager. According to the EPA, in 2020, the portfolio manager tracked the energy performance of nearly 270,000 commercial buildings, representing approximately 25 billion square feet of commercial floor space in the United States, and for those buildings shown to be energy-efficient, both sales prices and rental rates were higher than those buildings that are less energy-efficient.<sup>5</sup>

#### WaterSense

Another voluntary program sponsored by the EPA is WaterSense. It seeks to help businesses and homeowners improve building water efficiency by upgrading to more efficient products. The EPA has established and built partnerships with manufacturers, retailers and distributors, utilities, state and local governments, nongovernmental organizations, trade associations, irrigation professionals, and professional certifying organizations to promote and encourage water-efficient products. WaterSense-labeled products and services are certified to use at least 20% less water, save energy, and perform as well as or better than regular models.<sup>6</sup>

#### Sustainability Clauses in Architect and Construction Contracts

Most contracts allocating responsibilities among owners, architects, construction managers, and subcontractors in new or major renovation construction projects use the standard forms published by the AIA. These documents have become useful standard forms, but as they tend to be protective of the architect, if you are counsel for owners, construction managers, or subcontractors, you might consider either inline edits to the AIA printed form or providing a rider with override provisions in the printed AIA form. The AIA forms deal with two principal issues:

- What is being built, over what time, and at what cost
- The principal responsibilities and potential liabilities of each project participant

#### Materials and Resources

This category is about waste management, including recyclables, construction and demolition waste, and building products waste. There are five subsections, totaling 13 points, as well as one required subsection:

- Storage and collection of recyclables (required)
- Construction and demolition waste management (2 points)
- Building life cycle impact reduction (5 points)
- Environmental product declarations (2 points)
- Sourcing of raw materials (2 points)
- Building product disclosure and optimization—material ingredients (2 points)

#### Indoor Environmental Quality

This category is about indoor air quality, interior lighting, thermal comfort, and acoustic performance. There are nine subsections, totaling 16 points, as well as two required subsections:

- Minimum indoor air quality performance (required)
- Environmental tobacco smoke control (required)
- Enhanced indoor air quality strategies (2 points)
- Low-emitting materials (3 points)
- Construction indoor air quality management plan (1 point)
- Indoor air quality assessment (2 points)
- Thermal comfort (1 point)
- Interior lighting (2 points)
- Daylight (3 points)
- Quality views (1 point)
- Acoustic performance (1 point)

<sup>5</sup> For more information on the Energy Star program, visit the Energy Star website. <sup>6</sup> For more information on the WaterSense program, visit the WaterSense website.



To review previous editions of the Practical Guidance Journal, follow [this link to the archive](#).

The AIA documents are typically revised on a 10-year cycle, although new documents are added or revised as necessary within the 10-year cycle. The last major revision was in 2007. The documents have again been revised in 2017, although the changes in 2017 have been more modest than the major revisions of 2007.

#### AIA 2007 Documents

In 2007, the movement toward sustainable projects and practices was still in an early stage. As sustainable projects have become more common over the past 10 years, the AIA has tried several approaches to including sustainable project issues in their key contracts. The common theme of these approaches has been to give the architect a key role in designing and implementing sustainable project elements, but stopping short of allocating responsibility to the architect should the project fail to meet its sustainability goals, including a specified level of LEED designation.

Why is the allocation of responsibility for the design and performance of sustainability goals important? Failure to meet

sustainability goals or achieve a certain level of LEED designation can have an impact on:

- Leases with tenants who wish to be in a green building
- Tax credits or other preferential sources of debt and equity
- A project operating pro forma that relied on a favorable level of operating expenses
- Promotional and marketing materials

How you implement the responsibility to achieve performance of project sustainability goals will also be of great interest to design and construction liability insurers.

The 2017 AIA document revisions included a new step in coordinating responsibility and liability for sustainable project goals. Rather than the AIA's prior approach of adding sustainability clauses to key project documents, the AIA chose to develop a sustainability exhibit to be attached to the key project documents, seeking a consistent approach across key project documents.

#### Related Content

For a comprehensive introduction to green buildings and sustainable development, see

[3-17D ENVIRONMENTAL LAW PRACTICE GUIDE § 17D.01](#)

For additional coverage of factors driving green building development, see

[7E CURRENT LEASING LAW AND TECHNIQUES –FORMS § 21.02](#)

For more information about the responsibilities of an architect and construction manager with respect to achieving LEED compliance, see

[1-3 CONSTRUCTION LAW P 3.04](#)

For a review of provisions in commercial real estate leases addressing environmental concerns and issues, see

[GREEN LEASING](#)

For an examination of green building rating systems, see

[3-17D ENVIRONMENTAL LAW PRACTICE GUIDE § 17D.03](#)

#### AIA Document E204–2017, Sustainable Projects Exhibit

The Sustainable Projects Exhibit (SPE), AIA Document E204–2017, is an exhibit to the owner's agreement with the architect and the owner's agreement with the contractor, respectively. While the same exhibit is used, this does not alter the fact that the contractual relationships are solely between the owner and architect and the owner and the contractor. Section 6.2 of the SPE makes this clear by providing that the exhibit does not create a contractual relationship between the architect and the contractor, between the owner and any subcontractor, or between the owner and the architect's consultants.

The SPE is also not a remedies agreement. There are no events of default, no choice-of-law provisions, and no choice-of-remedies provisions. However, there are covenants given by the architect, the contractor, and the owner, respectively. Because the SPE is intended to be attached as an exhibit to an existing agreement between the owner and architect on the one hand, and the owner and contractor on the other, defaults and remedies will presumably be dealt with under those particular provisions of the main document.

Even though there are no default or remedies provisions in the SPE, there is exculpatory language. In Article 5, "Claims and Disputes,"

the owner, architect, and contractor waive consequential damages against each other "resulting from failure of the Project to achieve the Sustainable Objective or one or more of the Sustainable Measures." Presumably, owners will try to delete this article.

Even more protective of the architect and contractor than Article 5 is Article 6, "Miscellaneous Provisions," which provides:

The Owner, Contractor and Architect acknowledge that achieving the Sustainable Objective is dependent on many factors beyond the Contractor's and the Architect's control, such as Owner's use and operation of the Project; the work or services provided by the Owner's other contractors or consultants; or interpretation of credit requirements by a Certifying Authority. Accordingly, neither the Architect nor the Contractor warrant or guarantee that the Project will achieve the Sustainable Objective.

This exception is clearly far too broad from the owner's perspective, and as owner's counsel, you may wish to delete it in its entirety or limit it so that it is exculpatory only if the failure to meet the sustainable objective occurs primarily as the result of one or more of the three exceptions given (e.g., a failure of the owner to operate and maintain the project in accordance with the sustainability plan).

*Key Responsibilities of the Architect in the SPE*

Article 2 of the SPE sets forth the architect's responsibilities, including the following:

- If the sustainable objective includes a sustainability certification (e.g., achievement of a certain level of LEED designation), the architect will work with the owner to file an application and then fulfill all requirements of that certification. (§ 2.2)
- Before the conclusion of the schematic design phase, the architect will conduct a sustainability workshop with the owner and their respective consultants and establish the sustainable objective. (§ 2.3)
- Following the sustainability workshop, the architect will prepare a sustainability plan, described as "a Contract Document that identifies and describes: the Sustainable Objective; the targeted Sustainable Measures; implementation strategies selected to achieve the Sustainable Measures; the Owner's, Architect's and Contractor's roles and responsibilities associated with achieving the Sustainable Measures; the specific details about design reviews, testing or metrics to verify the achievement of each Sustainable Measure; and the Sustainability Documentation required for the Project." (§ 1.2.3) Note that this section describes the sustainability plan as a "contract document." This appears to establish the sustainability plan as a binding contractual obligation of the architect just as if the sustainability plan was set forth in the text of the architect's agreement.



Michael Bonsignore and Eli Keene CLIFFORD CHANCE

# Infrastructure Greenification Opportunities for the U.S. Energy Grid

In this article, the authors explain that as the Biden Administration lays out its vision for a clean energy future, a confluence of economic and policy factors is providing a unique opportunity to greenify the power grid's physical infrastructure by leveraging the economic opportunity in retired fossil power plants.

**THE UNITED STATES IS ON THE PRECIPICE OF A WATERSHED** moment for clean energy following the inauguration of Joseph R. Biden Jr. as America's 46th president. On the campaign trail and following his election and inauguration, President Biden has pledged and begun to implement an ambitious set of climate goals, striving to achieve net-zero emissions nationally by 2050,<sup>1</sup> with a goal of achieving carbon pollution-free energy generation by 2035, and to do so in a manner that encourages economic growth and environmental justice.

Federal energy policy under a Biden Administration stands to supercharge a transition already consuming the U.S. power sector, where a fleet of aging, carbon-intensive coal plants is moving rapidly to retirement. Between 2011 and the middle of 2020, American coal-fired power plants representing 95 gigawatts (GW) of capacity<sup>2</sup> were taken offline. While some of these shuttered generating stations have been converted to natural gas-fired plants, the majority have entered a state of limbo—ceasing operations but remaining unremediated and unutilized.



## Key Responsibilities of the Contractor in the SPE

Article 3 of the SPE sets forth the contractor's responsibilities, including the following:

- The contractor will "perform those Sustainable Measures identified as the responsibility of the Contractor in the Sustainability Plan." (§ 3.1)
- The contractor will meet with the owner and the architect to discuss alternatives in the event the owner or architect recognizes a condition that will affect achievement of a sustainable measure or achievement of a sustainable objective. (§ 3.2)
- The contractor will prepare the sustainability documentation required from the contractor by the contract documents (which include the sustainability plan). (§ 3.4)
- The contract will prepare a construction waste and disposal plan. (§ 3.7)

## Key Responsibilities of the Owner in the SPE

Article 4 of the SPE sets forth the owner's responsibilities, including the following:

- The owner will "perform those Sustainable Measures identified as the responsibility of the Owner in the Sustainability Plan." (§ 4.1)
- The owner will comply with the requirements of the certifying authority as they relate to the ownership, operation, and maintenance of the project. (§ 4.3)
- The owner will prepare, file, and prosecute appeals to the certifying authority arising from the revocation or reduction of an awarded sustainability. (§ 4.4)
- The owner will provide the services of a commissioning agent for the project. (§ 4.5)

## Final Thoughts on the SPE

While the SPE provides a roadmap for performing services in the design and construction phase of a sustainable building project, it does little to address the consequences of a failure to achieve the objective due to a default by one of the project participants. You will have to spell out the consequences of such a failure in the agreements to which this exhibit is attached or in the sustainability plan as a part of the contract documents. Liability insurers and construction lenders will want to have a voice during any such discussions among the parties. **L**

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RESEARCH PATH: Real Estate > Construction > Practice  
Notes

1. <https://joebiden.com/climate-plan/>. 2. <https://www.eia.gov/todayinenergy/detail.php?id=44976>.

While the rapidly expanding ranks of shuttered coal plants might initially call to mind images of blight and unemployment, there is opportunity lurking. As the number of old coal sites grows, developers, operators, and asset managers will have more opportunities to greenify these old assets, by converting them to renewable energy hubs and storage centers. By leveraging the physical attributes and advantages of these sites with a variety of policy incentives, greenification projects can pose an attractive opportunity to turn idling liabilities into new, clean, economically viable assets.

### Greenification: The Basics

For a developer, operator, independent power producer, or asset manager, aging and shuttered fossil plants present a few clear models for redevelopment, depending on the stage of the plant's life cycle. For generating stations that have already ceased operating, a site can be acquired, remediated, and outfitted with new solar and battery storage; carbon capture and sequestration technology; clean hydrogen; or any other variety of clean energy equipment, much as with any other new facility.

The same financing incentives can be deployed as would be used in a greenfield project, including tax equity financing via the investment tax credit (ITC), the premium tax credit (PTC), the Section 45Q tax credit,<sup>3</sup> or other tax credits. Existing infrastructure with remaining useful lifespan (including technical infrastructure such as substations, but also run-of-the-mill infrastructure, such as roads and parking) can be repurposed and built into the new facility.

A plant need not be sitting abandoned for it to present an attractive greenification target. An alternative model might involve greenifying a site while it remains in operation. Under this model, a fossil plant could continue to operate during a gradual revitalization ramp-up period, all while continuing to generate cash flows from its existing operations. As the coal-fired units on site enter retirement, new power purchase agreements (PPAs) could be entered into for clean energy generation on the site, leaving the owner with two very different, but continuously operating assets.

Despite the radically different asset classes, each model can present an owner or operator distinct advantages over greenfield developments.

### Leveraging the Opportunity in Shuttered Coal Power Plants

Repurposing retired industrial sites—including for renewable energy development—is not a new idea. The U.S. Environmental Protection Agency (EPA) launched its Brownfields Program in 1995, and state programs followed, encouraging the redevelopment of polluted or potentially polluted sites through provision of grants, technical assistance, and, following the passage of amendments to the Comprehensive Environmental Response, Compensation, and Liability Act in 2002, certain limitations on federal environmental liability.

Retired coal plants have already garnered some redevelopment interest in the United States. In 2018, Google broke ground on a new, \$600 million data center, sited on the campus of the Widows Creek fossil plant in Jackson County, Alabama, a 1.6 GW Tennessee Valley Authority-operated facility that was shuttered in 2015.

But the repurposing of coal plants specifically for clean energy generation, storage, and technology is a separate, growing phenomenon, with some attractive benefits for the right participants. The benefits and potential opportunities available to greenification projects include:

- **Existing infrastructure.** While coal-fired plants themselves may continue to become outdated and uneconomical to operate, the existing transmission infrastructure associated with these power stations can be utilized and repurposed. In practice, utilizing a plant's existing interconnection and transmission infrastructure and the ability to avoid initiating a new interconnection process solves one of the biggest complications facing clean energy projects today—obtaining access to the grid. And while greenfield renewables projects frequently struggle with the lack of transmission infrastructure to bring power to load centers, dated fossil plants largely present the advantage of being sited in or near urban areas.
- **Location, siting, and permitting.** Unlike with greenfield projects, greenifying an existing power station means that the project site will already be zoned for industrial use and (likely) owned by a single landowner, significantly easing the site acquisition phase of project development (though additional environmental permits may be needed, depending on remediation and development activities).

In addition, the fact that many existing structures are located near energy and transportation hubs provides unique geographic advantages. For example, in the burgeoning offshore wind industry, certain developers have already begun exploring opportunities to acquire retired generating

3. 26 U.S.C.S. § 45Q.





stations located near the coasts to store the energy generated offshore (through rapidly advancing storage technology) that will inevitably face complications coming onshore and online.

■ **Cost opportunities.** While every plant and potential transaction will have its own unique cost considerations, as a general matter there is economic opportunity in greenifying distressed or soon-to-be distressed assets. Sites themselves can be obtained for as little as one dollar,<sup>4</sup> financed or refinanced, and revitalized at a fraction of typical development costs.

As discussed above, existing infrastructure can be repurposed for the new facility, cutting construction costs. These savings come on top of a trend of falling development costs for clean power installations, where the price of components (including photovoltaic panels and batteries) continues to fall and clean tech capabilities (including clean hydrogen and carbon capture utilization and storage (CCUS)) are accelerating.

■ **Emergence of storage, carbon capture, clean hydrogen, and related technology.** Another recent trend making greenification an economic reality is the booming technological advances and practices in the energy storage, CCUS, and clean hydrogen businesses. The storage market in the United States is growing exponentially, and it will only continue to grow as technological advances emerge (such as long-duration battery storage), larger batteries get built, and costs continue to fall.

Relatedly, following the Internal Revenue Service’s recent clarification of the 45Q tax credit for carbon capture and sequestration project and President Biden’s recent executive orders on climate change, the U.S. carbon capture industry could also see significant growth in the coming years.

Clean hydrogen, likewise, is becoming increasingly viewed as key to a net-zero emissions economy due to its potential industrial and transportation applications. While the economics of clean hydrogen remain difficult, certain utilities and project developers, such as NextEra, are already pursuing greenification projects at retired coal plants, or updating existing natural gas plants, to use turbines that can be powered by natural gas in the short term with the goal of converting completely to clean hydrogen in the long term.

■ **Community buy-in and environmental justice.** Among the primary motivations for the EPA Brownfields Program were complaints that abandoned brownfield sites were a physical blight on communities, and shuttered coal plants are no exception. One of the most beneficial aspects of greenifying idle plants is that it allows generators to develop community buy-in.

In today’s environmental, social, and corporate governance-driven investing world, replacing a polluting power source with clean power can help achieve buy-in from the full range of stakeholders: from local community members to shareholders.

Federal and state incentives—including tax credits offered by a number of states for remediation and redevelopment of brownfields—may further support the economics of greenification projects.

### Government Programs Can Help

One critical advantage of greenification projects is the broad variety of government incentives that may be available to them. A number of state and federal programs exist specifically to promote the redevelopment of brownfields and the revitalization of the communities in which they are sited.

These programs are likely to receive renewed focus under the Biden Administration. In one of the Administration’s first climate actions, an executive order on “Tackling the Climate Crisis at Home and Abroad,” the federal government was specifically directed to coordinate efforts on turning idled dirty energy assets into “new hubs for the growth of our economy.” Among the government programs and incentives already in existence today are:

■ **RE-Powering America’s Lands.** The RE-Powering America’s Lands program,<sup>5</sup> launched in 2008, has established itself as a clearinghouse for information about these projects by identifying sites, commissioning feasibility studies, convening stakeholders, and promoting the use of liability comfort letters. The RE-Powering program also maintains a compendium of renewable energy projects on contaminated lands, identifying 417 such installations to date (though only two such projects are sited on retired coal-generating facilities).

■ **POWER initiative and the Appalachia Regional Commission.** In 2015, the Obama Administration launched the multi-agency Partnerships for Opportunity and Workforce and Economic Revitalization (POWER) initiative, aimed at revitalizing communities suffering economically from the decline of the coal industry. While much of the POWER initiative has lain dormant since 2016, the Appalachia Regional Commission (ARC)<sup>6</sup> has continued to receive funding to implement the program and could be a program revitalized through its grantmaking authority by the Biden Administration. ARC has used its grant-making authority to aid a number of coal plant conversion projects.

■ **Federal and state tax incentives.** Federal and state incentives—including tax credits offered by a number of states for remediation and redevelopment of brownfields—may further support the economics of greenification projects. These tax credits would be on top of any ITC, PTC, or 45Q tax incentives that a project may be eligible for, as well as any state-law renewables incentives.

■ **Department of Energy Loan Programs Office.** Pursuant to the Title 17 Innovative Energy Loan Guarantee Program (and other programs specifically related to the automotive sector and tribal lands), the Department of Energy Loan Programs Office (LPO) has more than \$40 billion in loan and loan guarantee authority to help develop innovative energy projects in the United States. Greenification projects involving renewable energy technology or CCUS could potentially take advantage of an LPO loan or loan guarantee.

With the release of its American Jobs Plan in March 2021, the Biden Administration specifically called for increasing the capacity of these and other government programs to engage with these projects. The American Jobs Plan pointed to the Economic Development Agency’s Public Works program and HUD’s Main Street program, both of which provide government grants for municipal-level revitalization projects. An increase in federal grant dollars for economic redevelopment may lead to increased pressure from communities themselves to bring former generating facilities into productive use.

### An Early Model for Success

While the opportunities to greenify retiring coal stations are growing rapidly, only a handful of these projects have been developed to date in the United States.

One of the early successes has been ENGIE North America’s redevelopment of Mount Tom station in Holyoke, Massachusetts. The 146-megawatt (MW) coal plant, originally built in 1960, powered down in 2014, and was immediately targeted by the city of Holyoke for redevelopment. The resulting redevelopment took only four years, with ENGIE opening a six-MW solar farm on the site in 2017 and a three-MW integrated storage system (at the time, Massachusetts’ largest) the following year.

The greenification of the Mount Tom site was made possible by the right alignment of opportunities and incentives. The Massachusetts Clean Energy Center—a state economic development agency—provided early technical assessments and assisted in convening stakeholders on the site’s redevelopment. Transmission infrastructure was repurposed, allowing easy interconnection with the grid.

4. <https://www.enchantenergy.com/farmington-agreement/>.

5. <https://www.epa.gov/re-powering>. 6. <https://www.arc.gov/>.

On the money side, tax equity financing was put in place for the redevelopment, and Massachusetts' renewable portfolio standard helped pave the way for the project's 20-year PPA with local utility HG&E.

The model may be rapidly scaling for success. In January 2021, rapper-turned-solar developer Akon announced the creation of the Black Sunrise Fund, with an initial investment of \$725 million, dedicated to recommissioning coal plants as solar energy facilities.

Similarly, just recently, J-Power and Fortress Investment Group have partnered on the development of a greenification hub on the site of the Birchwood coal plant in King George County, Virginia.

### Some Key Issues Remain

Though greenification projects carry a number of advantages, as with any new project type, developers will need to work through some key issues.

The elephant in the room, of course, is environmental liability. While state and federal brownfields programs provide some comfort here, parties will need to carefully consider how known and unknown environmental liabilities are priced into and segregated within these transactions. With public support for greenification coming directly from the Biden Administration, it is not unreasonable to suspect that further incentives relating to environmental matters could be on the table for parties willing to take on such revitalization projects.

Financing considerations will also need to be addressed. Despite existing brownfields policies, lenders may remain skittish about the prospect of potential exposure under state and federal environmental laws. And even where a developer is greenifying a site it already owns, it may need to navigate its own financing covenants—either funding the greenification project with equity or convincing its lenders to assume a new type of project risk.

Finally, despite the various economic advantages, greenification results in a new scale of project. Only portions of a given site will be suitable for renewables development, and the resulting projects are likely to be a fraction of the capacity of the original plant, leaving a fundamentally different project in its place.

### Takeaways

As the Biden Administration lays out its vision for a clean energy future, a confluence of economic and policy factors is providing a unique opportunity to greenify the physical infrastructure of the U.S. energy grid. As more fossil plants continue to shutter, there will be increasing opportunity to repurpose the valuable infrastructure that has tied them to

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the grid for decades at attractive costs. A solar, storage, and carbon capture industry that is rapidly growing cheaper and more versatile is primed to seize the moment. And with a new administration that has organized itself on the principle of building back into a clean energy future, developers and operators may find themselves with very willing governmental partners. 

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**Celeste Mitchell-Byars** LEXIS PRACTICAL GUIDANCE

# Financial Institutions Gear Up for Climate-Related Financial Risk Implications under Executive Order 14030

President Biden recently signed Executive Order 14030, Climate-Related Financial Risk (May 20, 2021) (Executive Order)<sup>1</sup> to address the climate-related financial risks of federal programs. The Executive Order directs a number of federal agencies to take action to address climate-related financial risks. This article explores key areas of the Executive Order that could have potential implications for financial institutions.



The Executive Order establishes clear policy objectives to:

-  Advance consistent, clear, intelligible, comparable, and accurate disclosures on climate-related financial risk
-  Mitigate climate-related financial risks and drivers
-  Identify causes of and address disparate impacts on disadvantaged communities and communities of color
-  Drive the creation of well-paying jobs
-  Achieve a net-zero emissions economy by no later than 2050

<sup>1</sup> 86 Fed. Reg. 27,967 (May 25, 2021).

This Executive Order is directed to federal agencies in respect of federal programs. However, the Executive Order also highlights that the failure of financial institutions to account for climate-related financial risk threatens the competitiveness of companies and markets, negatively impacts consumers, and hinders the ability of financial institutions to serve their community appropriately and adequately. It stands to reason that financial institutions should expect increased regulatory focus on financial risks arising from climate change, including weather events that increase physical and transition risks.

### Summary

Key provisions of the Executive Order and implications for financial institutions are summarized below.

#### Government-Wide Climate-Related Financial Risk Strategy

The Executive Order calls for development of a government-wide climate-related financial risk strategy (strategy) to address climate-related financial risks. The strategy will focus on:

- Measuring, assessing, analyzing, and mitigating climate-related financial risk to government programs, assets, and liabilities
- Assessing the financing needs associated with achieving net-zero greenhouse gas emission and adapting to impacts of climate change
- Evaluation of private and public investments to meet financing needs while advancing economic opportunities, worker empowerment, and environmental mitigation in disadvantaged communities and communities of color

Achieving net-zero greenhouse gas emission by 2050 is the goal stated in the Executive Order. Significant federal funding is earmarked for emission-reducing solutions, and financial institutions will be relied upon to provide sustainably linked loans and other climate commitments. The assessment of the federal government climate-related fiscal risk exposure will be published upon completion and annually thereafter. Financial institutions should begin assessment of climate-related financial risk as it relates to federal lending programs. Institutions should expect regulatory changes around financial risk and regulatory reporting that impact key risk categories: credit, liquidity, operations, and strategy; changes to risk appetite to include climate-related financial risk; and enhanced risk management, particularly around stress-testing and modeling.

*Advancing Equality and Equity*

Agencies are asked to undertake analysis of the risk climate change will have not only on the federal government, but on the financial security and viability of consumers, businesses,

and the U.S. financial system. Advancing equity to create opportunities for improvement of historically underserved communities is another goal in the Executive Order. According to President Biden, advancing equity requires a systematic approach to embedding fairness in federal government decision-making processes, and working to redress inequities in federal policies and programs that serve as barriers to equal opportunity. Each agency is required under the Executive Order to examine and report on barriers to enrollment, access to federal benefits and service programs, and procurement and contracting opportunities for disadvantaged communities and communities of color.

#### Financial Regulators Assessment of Climate-Related Financial Risk

The Secretary of the Treasury is directed to work with the Financial Stability Oversight Council to perform climate-related financial risk assessments and provide recommendations on:

- Climate-related financial risks to the stability of the U.S. financial system and approaches to mitigate these risks
- Coordination and information sharing of climate-related financial risk data amongst agencies and executive departments, as appropriate
- Accountability reports on climate-related financial risk policies and programs
- Assessment and integration of climate-related financial risk to federal programs

Further, the Executive Order accounts for the potential of major disruptions in private insurance coverage as a result of climate change impacts. The increase in insurance payouts as a result of weather events, cost of assets, and property damage from extreme weather change, is predicted to have a substantial economic impact on the financial system. The agency is required to perform an assessment of climate-related issues and gaps in the supervision and regulation of insurers.

The financial regulatory agencies are to focus on climate change and financial risk attributed to many other risk areas including operations, credit, liquidity, reputation, and strategy risks. The emphasis of physical and transition risk in the Executive Order, as a component of climate-related financial risk, emphasizes the impact of these events on the financial system. Physical risk is the risk from climate change such that increased extreme weather conditions lead to supply chain disruptions and present physical risk to assets, publicly-traded securities, private investments, and companies. Transition risk is the global shift away from carbon-intensive energy sources and industrial processes.

The Executive Order directs federal agencies to develop climate-related financial risk disclosure guidelines that reflect behavioral-science insights and are consistent, clear, intelligible, comparable, and accurate.

#### Life Savings and Pensions

The Secretary of Labor is directed under the Executive Order to identify and recommend actions that can be undertaken by law to protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risks. The Employee Retirement Income Security Act (ERISA) sets out fiduciary duties and obligations that include responsibility for investing the savings or selecting employee investment alternatives. ERISA imposes these duties and obligations on fiduciaries of ERISA-governed employee benefit plans. The Executive Order provides for rulemaking under ERISA where such rules are designed to protect the interests of plan participants and beneficiaries. The Secretary of Labor is authorized to take actions including suspending, revising, or rescinding rules passed during the prior administration that do not consider ESG factors in investment of savings and pensions. Rulemaking to integrate ESG factors into retirement laws and regulations is a likely result of any action taken by this agency.

#### Integration of Climate-Related Financial Risk in Federal Lending, Underwriting, and Procurement

The Executive Order requires an assessment and integration of climate-related financial risk into federal financial management and financial reporting, especially as that risk relates to federal lending programs. The lending, underwriting, and procurement functions of a financial institution are likely to undergo changes once regulations are developed. The Executive Order is not intended to discourage lending or underwriting to companies that produce large amounts of carbon emissions. In fact, according to the Executive Order, preference in federal procurement and contracting may be advanced as necessary to companies that provide greenhouse gas disclosures and reduction targets in line with the Executive Order.

Amendments to federal programs and appropriate regulations will require:

- Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set informed reduction targets based on science and behavioral analysis
- Federal agency procurements to consider the social cost of greenhouse gas emissions in procurement and give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions where appropriate and feasible
- Federal lending policies and programs, as well as underwriting standards, loan terms and conditions, asset management, servicing, and procurement, to effectively integrate climate-related financial risk into overall processes

#### Climate-Related Financial Risk Disclosures

The Executive Order directs federal agencies to develop climate-related financial risk disclosure guidelines that reflect behavioral-science insights and are consistent, clear, intelligible, comparable, and accurate. The Executive Order does not contain a mandate for climate-related financial risk reporting. Such information on climate-related financial risk is essential for informed financial decision-making by individuals, businesses, and the government. It can be used to design government policies to better serve the American people. Financial institutions should expect changes to regulations requiring climate-related financial risk disclosures. The proposed changes are directed to be in line with the following components, spelled out in Executive Order 13707, Using Behavioral Science Insights to Better Serve the American People (September 15, 2015):<sup>2</sup>

- Streamlined forms
- Comprehensible content
- Effective presentation
- Promote public welfare, as appropriate
- Encourage or make it easier for Americans to take specific actions

<sup>2</sup> 80 Fed. Reg. 56,365 (Sept. 18, 2015).



### Environmental, Social, and Governance (ESG) Disclosures

Public companies are currently required under federal regulation to provide material information disclosures including those resulting from ESG matters. While there is no single regulatory standard for reporting on ESG, increasingly ESG disclosures are included in material information reports. ESG disclosures provide reporting on financial risks and impacts associated with climate change, an institution's use of natural resources, and the effect of its operations on the environment, diversity/inclusion, equity, and community investments and other matters that are material to shareholders. Consistent with current efforts by federal agencies, institutions will be required to disclose the impact of climate change and ESG matters as part of the company's financial statements.

### Greenhouse Gas Disclosure

The Executive Order establishes an Interagency Working Group to determine the social cost of greenhouse gases (carbon, methane, and nitrous oxide), whose recommendations will be used to advance the Administration's goal to reduce greenhouse gas emissions and other regulatory actions.

Greenhouse gases are proven to deplete the Earth's protective ozone layer resulting in extreme weather conditions due to climate change. The Interagency Working Group is directed to assess disclosures on the emission of greenhouse gas, particularly as it relates to federal lending programs and procurement. Anticipated changes to the Federal Acquisition Regulations will require federal suppliers to disclose:

- Greenhouse gas emissions and climate-related financial risk
- Greenhouse gas reduction targets

Regulations around climate-related areas are anticipated for financial institutions, both directly to ensure the stability of the U.S. financial system and indirectly through lending and investments in affected sectors. Financial risk reporting for climate-related change faces challenges in light of the lack of comprehensive and consistent data to analyze climate-related financial risks and equity by categories of race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability. Policymakers will need to coordinate approaches to mitigating climate-related financial risk; such efforts are currently being standardized in various areas.

### Implications for Financial Institutions

Climate change is inevitable and also fundamental to the core of this Executive Order. Key areas of the Executive Order will necessitate changes to laws and regulations by federal financial agencies thereby affecting the financial services industry. Agencies have begun amending policies and performing impact assessments of climate change on the financial system.

- The Federal Emergency Management Agency (FEMA) begun implementing the Federal Flood Risk Management Standards as set out in Executive Order 13690 of January 30, 2015 (Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input).<sup>3</sup> Executive Order 13690 was reinstated under this Executive Order, providing the go-ahead for FEMA to implement the standards. Federal Flood Risk Management Standard was established to address the increased flood risk as a result of climate change impact of flooding.
- The Securities and Exchange Commission (SEC) is continuing its focus on climate-related disclosure requirements. The SEC created a task force for climate change and ESG. ESG disclosure requirements for public companies are anticipated in late 2021.
- Other financial regulatory agencies, including the Federal Reserve Board, the Office of the Comptroller of the Currency, and many federal agencies have all conducted assessments on the impact of climate change to the financial system broadly and are proposing new goals and policies to advance the objectives of the Executive Order and in particular ensuring equal and equitable access to government programs by all Americans.

It is pertinent that institutions anticipate new or revised regulatory standards around climate-related financial risks and begin establishing a culture of preparedness within the institution, assessing government programs and climate-related financial risk disclosures to include physical and transition risk, incorporating climate-related financial risk into overall risk and controls framework of the institution, identifying and redressing inequities in the institution's policies and programs to ensure equal opportunity with a focus on disadvantaged communities and communities of color, and enhancing disaster recovery plans and other business continuity controls to mitigate financial risks in areas prone to extreme weather-related events. <sup>4</sup>

<sup>3</sup> 80 Fed. Reg. 6,425 (Feb. 4, 2015).



### Related Content

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Kevin L. Turner and Amy L. Edwards HOLLAND & KNIGHT LLP

# The International Climate Finance Plan

In this article, the authors discuss the five broad areas of focus of the International Climate Finance Plan that impact international private sector development.



**IN THE BIDEN ADMINISTRATION'S EXECUTIVE ORDER 14008,** "Tackling the Climate Crisis at Home and Abroad," on January 27, 2021, President Joseph Biden called for a climate finance plan "making strategic use of multilateral and bilateral channels and institutions, to assist developing countries in implementing ambitious emissions reduction measures, protecting critical ecosystems, building resilience against the impacts of climate change, and promoting the flow of capital toward climate-aligned investments and away from high-carbon investments."

Building on this commitment, the administration on April 22, 2021, released the U.S. International Climate Finance Plan (the International Climate Plan).<sup>1</sup> The stated goal of the International Climate Plan is: "The United States intends to double, by 2024, our annual public climate finance to developing countries relative to the average level during the second half of the Obama-Biden Administration (FY 2013-2016). As part of this goal, the United States intends to triple our adaptation finance by 2024."

1. <https://www.whitehouse.gov/wp-content/uploads/2021/04/U.S.-International-Climate-Finance-Plan-4.22.21-Updated-Spacing.pdf>.

The U.S. Department of Energy, including through its National Laboratories, will continue to lead international efforts to research, develop, and deploy technologies that reduce emissions, helping to drive down the costs of current and future technologies critical to reducing emissions around the world.

The International Climate Plan has five broad areas of focus, as outlined below, and this article focuses on the key items that impact international, private sector development.

## Scaling Up International Climate Finance and Enhancing Its Impact

- The Development Finance Corporation (DFC) will update its development strategy not only to include climate for the first time, but also to make investments in climate mitigation and adaptation a top priority. DFC will release calls for applications for climate-focused investment funds and other climate-related investment opportunities in partnership with aligned organizations. DFC will hire its first chief sustainability/climate officer to lead its internal and external coordination on climate-related investments. DFC also commits to providing \$50 million in technical assistance over the next five years to projects that advance U.S. and international climate objectives.
- The Millennium Challenge Corporation (MCC) adopted a new, agency-wide Climate Strategy in April 2021, centered on investing in climate-smart development and sustainable

infrastructure and aims to have more than 50% of its program funding go to climate-related investments over the next five years.

- The U.S. Department of Energy, including through its National Laboratories, will continue to lead international efforts to research, develop, and deploy technologies that reduce emissions, helping to drive down the costs of current and future technologies critical to reducing emissions around the world.
- The U.S. Trade and Development Agency (USTDA) plans to dedicate up to \$60 million over the next three years to advance climate-smart infrastructure solutions that will open emerging markets for the export of U.S.-manufactured goods, technologies, and services.
- The U.S. Department of the Treasury, through its Office of Technical Assistance, will provide technical assistance to help governments mobilize private-sector financing for high-quality infrastructure development, incorporating economic, environmental, social, and governance standards consistent with the G20 Principles on Quality Infrastructure Investment.





### Mobilizing Private Finance Internationally

- DFC will increase its climate-related investments so that, beginning in FY2023, at least one-third of all its investments are linked to addressing the climate crisis. DFC will collaborate with U.S. Agency for International Development (USAID), MCC, State, Commerce, the Export-Import Bank of the United States (Ex-Im Bank), and USTDA, with the goal of developing stronger project pipelines in the areas of climate mitigation and adaptation. DFC will work to develop a risk-sharing platform with private sector insurance partners to reduce barriers to financing climate projects.
- USTDA will leverage its relationships with private banks and development finance institutions around the world to mobilize private financing for climate-smart infrastructure projects overseas that use U.S. goods, services, and technologies. USTDA will also align its project preparation activities, where appropriate, to support climate-smart infrastructure projects that are suitable to receive financing and other support from the DFC and Ex-Im Bank.
- MCC will explore opportunities to bring in new private-sector partners and expand the use of blended finance

to catalyze private sector finance aligned with climate objectives. MCC will also leverage private sector finance for climate solutions by de-risking investments through a closer partnership with DFC and possibly the development finance institutions of international partners.

- Ex-Im Bank will identify ways to significantly increase support for environmentally beneficial, renewable energy, energy efficiency, and energy storage exports from the United States.
- USAID is scaling up private sector engagement to provide technical support to governments, including support for public-private partnerships; build the pipeline of activities; enhance the capacity of local private-sector, civil society, and governments to access and use finance; and create policy environments to facilitate private sector climate finance. USAID is exploring ways to further mobilize private sector investment in humanitarian assistance, as well as in renewable energy/energy efficiency, water security, climate-smart food and agriculture systems, adaptation, resilient infrastructure, and natural climate solutions, in collaboration with DFC and other agencies.

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### Ending International Official Financing for Carbon-Intensive Fossil Fuel-Based Energy

U.S. agencies will seek to end international investments in and support for carbon-intensive fossil fuel-based energy projects. However, in limited circumstances, there may be a compelling development or national security reason for U.S. support for a project to continue.

DFC will implement a net-zero emissions strategy to transition its portfolio to net-zero emissions by 2040, including by increasing investment in projects that capture and store carbon.

The Treasury Department, with partners in the Organization for Economic Cooperation and Development (OECD) and in close partnership with other U.S. government departments and agencies, will spearhead efforts to modify disciplines on official export financing provided by OECD export credit agencies (ECAs), to reorient financing away from carbon-intensive activities. It will also advocate to further incentivize ECA support for climate-aligned investments (e.g., broadening the scope of projects eligible for preferential terms), including in the area of adaptation and resilience, and to adopt methodologies to take climate risks into account when assessing risks to prospective loans and existing portfolio assets. Further, the Treasury Department will develop guidance on fossil fuel energy activities at multilateral development banks, which it will use as part of its criteria when casting U.S. votes on specific projects.

### Making Capital Flows Consistent with Low-Emissions, Climate-Resilient Pathways

The Treasury Department, in coordination with other U.S. agencies, will:

- Engage with the Financial Stability Board (FSB) and international insurance forums and coordinate with U.S. regulators engaging in financial standard-setting bodies and other forums, to improve approaches for assessing and managing climate-related financial risks
- Support and help guide, in coordination with U.S. regulators, the direction of work undertaken by the International Financial Reporting Standards Foundation, the International Organization of Securities Commissions, and the FSB toward consistent, comparable, and reliable climate-related financial disclosures and help shape any forthcoming recommendations or international standards to be compatible with the U.S. domestic framework and regulatory process
- Work with the State Department, USAID, DFC, and other agencies to promote climate-aligned infrastructure development, including by coordinating programs to facilitate climate-resilient investments under the Small and Less Populous Island Economies Initiative. The State Department, DFC, USAID, and Treasury Department will support efforts such as the Blue Dot Network and the development of indicators to identify climate-aligned infrastructure projects for investors through the implementation of the G20 Principles for Quality Infrastructure Investment.

### Defining, Measuring, and Reporting U.S. International Climate Finance

In order to provide for more detailed reporting, tracking finance for vulnerable populations, and enhanced reporting on mobilization and impact, the Administration will:

- Work with agencies to ensure that the full range of relevant public and private finance mobilized is reported clearly, accurately, and consistently.
- Encourage departments and agencies to track and report specific results achieved on the ground by U.S. climate finance, which will facilitate analysis of the effectiveness of such finance and assess value-for-money. Agencies will also be encouraged to track U.S. climate finance flowing to Small Island Developing States and Least Developed Countries and to efforts supporting indigenous peoples, women and girls, and other affected communities.
- Encourage departments and agencies to track the amount of U.S. development finance that has been screened for, or made resilient to, future climate risks.



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# How ESG and Social Movements are Affecting Corporate Governance

## Key Takeaways

- For businesses involved in the renewable energy, climate finance, and climate technology sectors, there has never been a more unified, whole-of-U.S.-government approach to supporting international project development in these areas. Now is the time to engage with DFC, Ex-Im Bank, and other U.S. agencies regarding your viable, bankable projects.
- The goals set forth in the International Climate Plan are ambitious, and meeting these goals is not within the sole control of the administration.
- Achieving these goals is dependent upon the cooperation of foreign governments (especially developing countries) in shifting development priorities toward climate finance and renewable production, which may not be feasible on the ground in many of these countries.
- Achieving these goals is largely dependent on the private sector. The U.S. model of development finance is grounded in mobilizing private sector capital in private sector-led projects. In short, there must be viable, bankable projects for U.S. government development finance capital and private sector capital to flow into.<sup>2</sup> 

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<sup>2</sup> For more detailed, agency-specific information related to the International Climate Plan, see:

- Development Finance Corporation, at <https://www.dfc.gov/media/press-releases/dfc-commits-net-zero-2040-increases-climate-focused-investments>.
- Export-Import Bank of the United States, at <https://www.exim.gov/news/exim-announces-chairs-council-climate-advice-increasing-support-for-clean-energy-exports>.
- U.S. Trade and Development Agency, at <https://ustda.gov/?s=ustda+launches+global+partnership>.
- Millennium Challenge Corporation, at <https://www.mcc.gov/resources/doc/doc-042221-climate-commitment>.
- U.S. Department of Energy, at <https://www.energy.gov/articles/doe-launches-international-clean-energy-initiatives-tackle-climate-crisis>.
- U.S. Agency for International Development, at <https://www.usaid.gov/news-information/fact-sheets>.
- U.S. Department of the Treasury, at <https://home.treasury.gov/news/press-releases/jy0134>.
- U.S. Department of State, at <https://www.state.gov/clean-energy-diplomacy-on-climate-bureau-of-energy-resources-enr/>.

This article provides guidance on the recent trends in Environmental, Social, and Governance (ESG), the #MeToo movement (#MeToo), and Black Lives Matter (BLM) impacting corporate governance and the workplace. In the aftermath of the recent police killings of George Floyd, Breonna Taylor, and Jacob Blake, as well as many others, there has been increasing pressure on corporations to take tangible action to address racial injustice in America.

**NUMEROUS COMPANIES AND ORGANIZATIONS HAVE** responded to these pressures by publicly denouncing racism and discrimination, supporting black-owned businesses, and donating to causes devoted to combating racial injustice. For example, in June 2020, Bank of America pledged \$1 billion to help communities address economic and racial inequality. Similarly, Goldman Sachs launched a \$10 million Fund for Racial Equity to support the vital work of leading organizations addressing racial injustice, structural inequity, and economic disparity. While the novel coronavirus (COVID-19) pandemic and the events surrounding the BLM movement have intensified discussions about the importance of addressing social injustice, corporate America already was at an inflection point with respect to its role in society, facing pressures from investors, consumers, and regulators to consider a broader range of stakeholders.

### What Is ESG?

ESG refers to a broad set of considerations that may impact a company's performance and its ability to execute its business strategy and create long-term value. Socially conscious stakeholders use ESG to measure the sustainability and societal impact of a company and its business activities. While ESG factors can affect a company's bottom line directly, they can also affect a company's reputation, and investors and business leaders are increasingly applying these nonfinancial factors in their analysis to identify the material risks and growth opportunities of a company.

### Companies' ESG Efforts

Industry leaders have pushed hard to advance ESG initiatives. For example, in his [2019 Letter to CEOs](#), BlackRock, Inc.'s Chairman and Chief Executive Officer, Larry Fink, encouraged companies to develop "a clear embedment of your company's purpose in your business model and corporate strategy." According to Fink, "Purpose is not the sole pursuit of profits but the animating force for achieving them" and "profits and purpose are inextricably linked." Thus, companies that fulfill their purpose and responsibilities to stakeholders—including prioritizing board diversity, compensation that promotes stability, and environmental sustainability—reap rewards over the long term.

Likewise, in August 2019, [the Business Roundtable issued a Statement on the Purpose of Corporation](#) (Statement) signed by

181 CEOs, expressing "a fundamental commitment to all of our stakeholders," including employees, suppliers, and customers, and not just shareholders. Specifically, the Statement expressed a commitment to delivering value to customers, investing in employees, dealing fairly and ethically with suppliers, and supporting the communities by embracing sustainable practices across businesses.

In line with these goals, following an overwhelming majority vote of 99% of voting shareholders, [on February 1, 2021, Veeva Systems](#), a computer software company, became the first publicly traded company and largest ever to convert to a public benefit corporation (i.e., a for-profit corporation that must consider the interests of various stakeholders, including employees, partners, customers, and shareholders). The company is also revising its certificate of incorporation to include a public benefit purpose.

In response to increasing pressure from different stakeholder groups—including investors, consumers, and governments—for more transparency about their environmental, economic, and social impacts, more companies are also making disclosures in their annual report or in a standalone sustainability report (also referred to as an ESG or corporate social responsibility report).

### Nasdaq's ESG Standards for Companies

Moreover, various institutions are creating standards and metrics to help integrate ESG into the investment process. For example, in May 2019, [Nasdaq launched its new ESG reporting guide](#) for public and private companies. Although Nasdaq does not require its listed companies to issue ESG reporting, it may track the participation of listed companies to better support their efforts. Nasdaq's ESG Reporting Guide includes 10 metrics for each of environmental, social, and corporate governance:

### Biden Administration ESG Efforts

The demand for consideration of ESG is not limited to the private sector. As part of his campaign, then-presidential candidate Joseph R. Biden set forth "The Biden Agenda for Women," which promised to pursue "an aggressive and comprehensive plan to further women's economic and physical security and ensure that women can fully exercise their civil rights."

NASDAQ'S ESG METRICS FOR COMPANIES		
Environmental (E)	Social (S)	Corporate Governance (G)
E1. GHG Emissions	S1. CEO Pay Ratio	G1. Board Diversity
E2. Emissions Intensity	S2. Gender Pay Ratio	G2. Board Independence
E3. Energy Usage	S3. Employee Turnover	G3. Incentivized Pay
E4. Energy Intensity	S4. Gender Diversity	G4. Collective Bargaining
E5. Energy Mix	S5. Temporary Worker Ratio	G5. Supplier Code of Conduct
E6. Water Usage	S6. Non-Discrimination	G6. Ethics & Anti-Corruption
E7. Environmental Operations	S7. Injury Rate	G7. Data Privacy
E8. Climate Oversight / Board	S8. Global Health & Safety	G8. ESG Reporting
E9. Climate Oversight / Management	S9. Child & Forced Labor	G9. Disclosure Practices
E10. Climate Risk Mitigation	S10. Human	G10. External Assurance

Source: ESG Reporting Guide 2.0<sup>1</sup>

As part of this Agenda, the Biden campaign promised to:

- Improve economic security by fighting for equal pay and expanding access to education and training
- Expand access to high-quality, affordable healthcare for all women
- Expand access to important workplace benefits and protections
- End violence against women

Shortly after President Biden took office in January 2021, he announced the creation of a new Gender Policy Council within the White House—a reformulation of the Obama Administration's [White House Council on Women and Girls](#), which the Trump Administration had dismantled. The Gender Policy Council intends to have high-level representation in all offices in the federal government and to collaborate directly with every agency to address issues impacting the lives of Americans, and particularly the lives of women.

### Entities' and Individuals' Opposition to ESG Efforts

Not everyone has been supportive of these ESG efforts. In response to the Business Roundtable's Statement, the Council of Institutional Investors, which represents many of the same companies as the Business Roundtable and many of the nation's largest pension funds, [issued a response](#) stating that "[a]ccountability to everyone

means accountability to no one" and that "[i]t is government, not companies, that should shoulder the responsibility of defining and addressing societal objectives with limited or no connection to long-term shareholder value."

Similarly, in a [letter dated February 12, 2021](#), a group of Senate Republicans on the Senate Banking Committee called on the Securities and Exchange Commission (SEC) to reject Nasdaq's recent proposal to require the companies listed on its stock exchange to include women, racial minorities, and LGBT individuals on their boards or explain in a public disclosure why they are not doing so. The letter, written by Senator Pat Toomey of Pennsylvania, expressed that while "[w]e commend individual firms for the proactive efforts they have already made in recruiting, promoting, and maintaining diverse talent . . . it is not the role of Nasdaq . . . to act as an arbiter of social policy or force a prescriptive one-size-fits-all solution upon markets and investors."

Notwithstanding the opposition and resistance to the consideration of environmental, social, and corporate governance factors by some stakeholders, recent events and industry practices indicate a trend toward greater focus on ESG as factors that different stakeholders will consider in evaluating the effectiveness, profitability, and sustainability of a company's corporate governance framework.

<sup>1</sup> Nasdaq, [ESG Reporting Guide 2.0, A Support Resource for Companies](#), May 2019, Page 13.

## Board, Management, and Workforce Diversity

In the aftermath of #MeToo and the BLM movement, there has been a greater push toward gender and racial diversity, not just at the board and management levels, but also in the workforce. Further, where companies fail to meet the expectations set by their stakeholders, they may face serious repercussions.

### Investment Firms' Diversity Initiatives

In September 2020, BlackRock Inc., the world's largest asset manager, revealed in its [Investment Stewardship Annual Report](#) that it had voted against board directors more than 1,500 times for insufficient diversity. While observing that there have been "significant improvements in gender diversity in the Russell 1000 and the STOXX 600," BlackRock expressed that it is "increasingly looking to companies to consider the ethnic diversity of their boards, as we are convinced tone from the top matters as companies seek to become more diverse and inclusive."

As a follow up, in December 2020, BlackRock announced in its [2021 Stewardship Expectations](#) plans to push companies for greater ethnic and gender diversity for their boards and workforces and reiterated that it will vote against directors who fail to act. In addition, the asset manager asked U.S. companies to disclose the racial, ethnic, and gender makeup of their employees—known as EEO-1 data—as well as measures they are taking to advance diversity and inclusion.

In January 2021, [State Street Global Advisors](#) expressed that its "main stewardship priorities for 2021 will be systemic risks associated with climate change and a lack of racial and ethnic diversity." In a letter to board members, the president and CEO of State Street Global Advisors observed that "[r]esearch has shown the positive impacts diverse groups can have on improved decision making, risk oversight, and innovation, as well as how management teams with a critical mass of racial, ethnic, and gender diversity are more likely to generate above-average profitability."

Building on the firm's [previous guidance from August 2020](#), State Street [announced in a letter to board members in early 2021](#) the following proxy voting practices to ensure companies are forthcoming about the racial and ethnic composition of their boards and workforces:

- **Racial and ethnic composition of boards.** State Street intends to vote in 2021 "against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not disclose the racial and ethnic composition of their boards."
- **EEO-1 Survey.** State Street intends to vote in 2022 "against the Chair of the Compensation Committee at companies in the S&P 500 that do not disclose their EEO-1 Survey responses."
- **Underrepresented community on the board.** State Street intends to vote in 2022 "against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not have at least one director from an underrepresented community on their boards."

Companies are facing challenges over how to recruit and retain a talented workforce, and having an appealing culture is one way to do both. The subject of corporate culture is equally important to stakeholders, who are starting to look closely at what companies preach in their corporate cultures, including their commitments to ethics and sustainability.

Following a similar approach, [Goldman Sachs CEO David Solomon](#) [announced](#) that Goldman Sachs will help take public only those companies in the United States and Europe that have at least one diverse board member. In 2021, Goldman Sachs raised this target to two diverse candidates for each IPO client. According to Solomon, this decision "is rooted first and foremost in our conviction that companies with diverse leadership perform better," including as evidenced by the fact that since 2016, U.S. companies that have gone public with at least one female board director outperformed companies that do not, one year post-IPO.

On February 17, 2021, global investment firm [The Carlyle Group](#) [announced](#) that it secured the largest ESG-linked private equity credit facility in the United States and the first to focus exclusively on advancing board diversity. The revolving credit facility directly ties the price of debt to the firm's previously set goal of having 30% diverse directors on the boards of Carlyle-controlled companies within two years of ownership. This effort was driven by Carlyle's research, which showed that "the average earnings growth of Carlyle portfolio companies with two or more diverse board members has been approximately 12% greater per year than companies that lack diversity, underscoring the correlation of board diversity with strong financial decisions and performance."

### EEO-1 Reports

While the diversity of management and the board is more readily visible to the public, the diversity of a company's workforce often is less evident. The most common method by which companies report and disclose racial and gender diversity in the workforce is through the employment information report, also known as [EEO-1](#) or [Standard Form 100](#), that is filed annually with the Equal Employment Opportunity Commission. Covered federal contractors as well as any employer with 100 or more employees must file the EEO-1. While a company is not required to publicly disclose its EEO-1 data, as discussed above, institutional investors are increasingly demanding disclosure of this data in companies' ESG reporting.

### Corporate Culture

[CEO Afsaneh Beschloss of The Rock Creek Group](#) expressed at an industry conference in September 2019 that shareholders "are important and will always be incredibly important, but their highest returns will come if a company is good in its management, if a company is sustainable and has good governance." In the post-

#MeToo era, corporate culture, or the set of values and behaviors that help define a company, is more important now than ever.

Companies are facing challenges over how to recruit and retain a talented workforce, and having an appealing culture is one way to do both. The subject of corporate culture is equally important to stakeholders, who are starting to look closely at what companies preach in their corporate cultures, including their commitments to ethics and sustainability. As studies have shown, companies with strong corporate cultures tend to perform better than those without. According to industry leaders, one of the biggest challenges in establishing and maintaining a positive corporate culture is when leadership does not have an interest in culture as an asset and does not understand that a company's culture is set from the top.

In 2018, BlackRock highlighted human capital as an investment issue in its [Investment Stewardship Annual Report](#). The report provided that for a majority of companies today, "value is driven by employees, collectively known as human capital, rather than physical capital such as machinery," and that companies ultimately depend on their employees to effectively execute the corporate strategy and operate at high standards.

That same year, pension fund giant CalPERS revised its [Corporate Governance & Sustainability Principles](#), adding a policy highlighting the board's role "in setting a high-performance corporate culture," which includes:

- Having a respectful treatment of employees
- Providing a workplace free from sexual harassment and other forms of harassment
- Fostering trust between employees and management
- Promoting ownership and accountability for an ethical corporation

In addition, CalPERS urged every public company board to "develop and disclose its efforts toward establishing effective corporate culture, including its anti-harassment policy, and the mechanisms through which the board learns about employee complaints, how the claims are addressed, and the actions taken." Among other things, CalPERS's revised corporate governance principles include disclosing sexual harassment (and other) settlements involving executives or board members and clawback of executive compensation as a result of sexual misconduct.



In April 2021, CalPERS issued its [Executive Compensation Analysis Framework](#), providing that companies should develop and disclose policies to recoup compensation made to executives during periods of fraudulent activity, inadequate oversight, misconduct including harassment of any kind such as sexual harassment, or gross negligence, which impacted or is reasonably expected to impact financial results or cause reputational harm.

### Corporate Compliance

ESG disclosures, like other corporate disclosures, are subject to regulatory compliance. As such, companies must be careful to ensure their disclosures are accurate and complete. In addition, companies are struggling to deal with multiple reporting frameworks and inconsistencies across each regulation. Indeed, there are numerous ESG indexes (1,000+) that investors can use to assess how a

company has addressed ESG. As discussed above, companies can be held to any number of these indexes depending on the preferences and standards established by different stakeholders, prompting many companies to comply with multiple ESG regulations.

#### Assessing ESG Risks

Companies should create or implement a set of standards to properly assess their ESG risks.

For example, the Organization for Economic Co-operation and Development has published the [Due Diligence Guidance for Responsible Business Conduct](#), which provides a framework for companies and stakeholders to understand and implement due diligence for responsible business conduct. Similarly, the [Corporate Human Rights Benchmark](#) ranks large companies based on their sustainability disclosures and provides a list of what those disclosures are. In addition, the [Sustainability Accounting Standards Board](#) provides industry-specific sustainability standards for 77 different industries.

#### Disclosure of ESG Reporting

In addition to assessing ESG risks, companies must also ensure that they fully and accurately disclose information in their ESG reporting and that such disclosures are consistent with information disclosed in other non-ESG-related disclosures. Companies that fail to do so may face potential liability for making misleading or deceptive statements. Indeed, the Federal Trade Commission (FTC) has been active in assessing ESG-related disclosures issued by companies for any discrepancies that may be viewed as “deceptive acts or practices” in violation of Section 5 of the Federal Trade Commission Act. In addition, companies may also be subject to liability under state consumer protection statutes for making misleading statements.

#### Climate and ESG Task Force

On March 4, 2021, the SEC announced the creation of a [Climate and ESG Task Force](#) in the Division of Enforcement. Per the SEC’s announcement, “the Climate and ESG Task Force will develop initiatives to proactively identify ESG-related misconduct,” “identify any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules,” “analyze disclosure and compliance issues relating to investment advisers’ and funds’ ESG strategies,” “evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues,” and “provide expertise and insight to teams working on ESG-related matters.”

#### Data Privacy and Cybersecurity

The focus on ESG also includes corporations being held accountable for how they handle sensitive data. Across the board, companies are considering data protection as a strategic initiative and are investing in expanding their technology to stay competitive. Moreover, as interest in ESG investing continues to grow, more companies are



amassing new types of personal information from employees and consumers, and adherence to cybersecurity and data privacy best practices to protect sensitive and private information is more vital than ever.

#### Facebook and Cambridge Analytica

A good example of the importance of maintaining good cybersecurity and data privacy practices is the 2018 scandal involving Facebook Inc. after it acknowledged that Cambridge Analytica LLC, a British consulting firm, improperly obtained the personal data of approximately 87 million Facebook users. In response to this scandal, Facebook spent billions of dollars on its technical infrastructure to improve data handling and safety.

Moreover, in 2019, Facebook entered into a [settlement agreement with the Federal Trade Commission](#), under which Facebook agreed to pay \$5 billion in penalties and submit to new restrictions on its business practices to improve the company’s consumer data protection and privacy practices.

Building on Facebook’s [2012 settlement with the FTC](#), which prohibited the company from making misrepresentations about the privacy or security of consumers’ personal information and the extent to which Facebook shares personal information with third parties, the 2019 settlement requires Facebook to establish “a comprehensive data security program” and exercise more oversight

over third-party applications and developers. Aside from the monetary repercussions, Facebook sustained significant reputational damage among consumers and investors who expressed serious concerns regarding the report. Moreover, in response to the scandal, Facebook was removed from the S&P 500 ESG Index after the index providers deemed the company had fallen short of meeting their criteria.

#### Global Reporting Initiative (GRI)

There has been a rise of privacy-related disclosures in sustainability reporting by companies. In 2000, the Global Reporting Initiative (GRI) launched the first global standards for sustainability reporting. Today, GRI’s sustainability reporting framework is the most widely used by for-profit and not-for-profit companies as well as governments throughout the world.

Under the GRI’s October 2016 reporting frameworks, known as the GRI Standards, [Standard 418](#) sets out reporting requirements on the topic of customer privacy, including losses of customer data and breaches of customer privacy. While privacy-related disclosures are intended to provide an evaluation of the success of data privacy policy and protection measures, such disclosures may also expose companies to potential liability under state and federal laws. As discussed above, companies should ensure that what they disclose in ESG reporting is not different from what they have disclosed in other privacy-related documents.

### Related Content

For a collection of Practical Guidance resources addressing ESG issues, see

#### ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) RESOURCE KIT

For guidance on EEO-1 self-identification requirements, see

#### EEO-1 SELF-IDENTIFICATION REQUIREMENT: KEY COMPLIANCE GUIDANCE

For state laws on harassment and discrimination protections in non-disclosure (i.e., confidentiality), settlement, arbitration, and no-rehire agreements that have arisen out of #MeToo, see

#### SEXUAL HARASSMENT AND DISCRIMINATION PROTECTIONS IN EMPLOYMENT-RELATED AGREEMENTS STATE LAW SURVEY

For analysis on compensation clawbacks, see

#### CLAWBACKS OF BONUSES AND COMMISSIONS: WAGE AND HOUR CONSIDERATIONS

For a summary of Practical Guidance content addressing workplace harassment, see

#### WORKPLACE HARASSMENT RESOURCE KIT

For assistance on setting up and administering a whistleblowing hotline for employees to report legal violations or violations of public policy, see

#### WHISTLEBLOWING HOTLINE CREATION AND ADMINISTRATION CHECKLIST



## Environmental Sustainability

Issues impacting climate change, including water scarcity, extreme temperatures, and carbon emissions, have elevated environmental considerations as a core component of ESG. According to [S&P Global](#), while ESG factors are the fundamental framework for measuring a company's sustainability, the environmental portion of ESG considers the company's use of natural resources and the effect of its operations on the environment, both in its direct operations and across its supply chains. Climate change is expected to increase the frequency of climatic events like hurricanes, floods, heat waves, and wildfires, which can impose significant financial implications, especially for those companies that fail to take appropriate action to mitigate their contribution to climate change and to adequately plan for the likely impacts of climate change by investing in more sustainable business practices.

### Taxonomy Regulation

In June 2020, the European Union became the first supranational regulator to establish a common set of standards for determining whether an economic activity is environmentally sustainable or not. The so-called [Taxonomy Regulation](#) provides that certain environmental objectives should be considered when evaluating the sustainability of an economic activity, including:

- Climate change mitigation
- Climate change adaptation
- Sustainable use and protection of water and marine resources
- Transition to a circular economy, including waste prevention, and increasing the update of secondary raw materials
- Pollution prevention and control
- Protection and restoration of biodiversity and ecosystems

The agreement provides that an economic activity should contribute toward one or more of the objectives and not significantly harm any of them. It is important to note that the Taxonomy Regulation does not require stakeholders to invest in taxonomy-eligible activities; instead, it provides the toolkit for assessing whether a financial product or business is environmentally sustainable.

In his [2021 letter to CEOs](#), BlackRock's Chairman and CEO, Larry Fink, asked companies to "disclose a plan for how their business model will be compatible with a net zero economy—that is, one where global warming is limited to well below 2°C, consistent with a global aspiration of net zero greenhouse gas emissions by 2050" and to disclose how this plan is incorporated into the company's long-term strategy and reviewed by its board of directors. This was building on a previous ask by BlackRock in 2020 that all companies report in alignment with the recommendations of the Task Force on Climate-related Financial Disclosures and the Sustainability Accounting Standards Board, which covers a broader set of material sustainability factors.

### ESG Best Practices

Companies should follow best practices outlined below for ESG compliance.

#### Implement Policies and Training Procedures

It is important for the board and management to set a tone from the top that any form of discrimination or harassment is not acceptable, and that the company will investigate promptly, and take appropriate actions, with respect to inappropriate behavior.

Companies need to reassess whether the legal and HR personnel are properly equipped to handle and track incoming complaints and sufficiently empowered to investigate.

#### Enforce Compliance with Policies and Procedures

Companies should provide mechanisms by which employees can report instances of discrimination or harassment in the workplace. Certain companies have created confidential reporting channels to the board of directors for allegations against senior management.

Companies may also consider revising their clawback policies to include reputational and economic harm that might arise from violations of company policies concerning workplace conduct.

#### Refresh Board Membership

Companies should consider refreshing their board membership every few years.

#### Ensure Compliance with Reporting and Disclosure Obligations

To help encourage corporations to share relevant details about their environmental and social efforts, the Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce released a [report](#) in 2019 on best practices for corporations to use as a guide when compiling their ESG disclosures. The following briefly summarizes those eight best practices:

- **Risk and opportunities.** The company's ESG disclosure should address the company's risks, opportunities, and approach to risk management that may affect the company's long-term operational and financial performance and discuss how the company plans to create value using the ESG matters contained in the report.
- **Audience.** The company should customize the content and tone of its reports for the intended audience, whether they are investors or other stakeholders.
- **Communication with relevant departments.** Company departments should coordinate to ensure they collect all "relevant" information (a determination ultimately made by the legal department) and provide diverse perspectives.
- **Clearly define terms.** The company should make sure its ESG reports are written clearly and plainly, with defined terms.
- **Discretion in how to report and discuss ESG information.** Notwithstanding the need for standards (as discussed above), the company should maintain the discretion to determine what factors and metrics make sense for their ESG reports based on their industry, operations, and needs of their stakeholders.
- **Explain metrics and topics.** The company should explain the basis for, and importance of, the metrics and topics disclosed.
- **Easy to find ESG information.** The company should make sure that its ESG information is easy to find, via the web or otherwise.
- **Internal review and audit process.** Consistent with the goal of transparency, the company should consider describing external verification and/or its internal review and audit process regarding the ESG information. [L](#)

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### Related Content

For practical guidance in drafting a complaint procedure for use by an employee who feels that he or she has been harassed, discriminated, or retaliated against, see

[COMPLAINT PROCEDURE](#)

For coverage of federal Equal Employment Opportunity Commission requirements, see

[EEOC RECORDKEEPING SCHEDULE CHART](#)

For model state settlement agreements, arbitration agreements, and other employment-related agreements, see

[EMPLOYMENT CONTRACTS STATE EXPERT FORMS CHART](#)

For an overview of workplace diversity and social and racial justice, see

[WORKPLACE DIVERSITY, LGBTQ, AND RACIAL AND SOCIAL JUSTICE RESOURCE KIT](#)

agreements and conducting investigations in response to inquiries under the Foreign Corrupt Practices Act. She also has advised clients on constitutional law matters, particularly First and Eighth Amendment jurisprudence. In addition to her civil litigation and trial practice, Ellen has significant experience with white-collar criminal defense matters and has represented clients responding to regulatory inquiries, requests, and enforcement proceedings initiated by the U.S. Department of Justice, SEC, Federal Trade Commission, Federal Reserve, Federal Energy Regulatory Commission, Consumer Financial Protection Bureau, National Association of Securities Dealers, FINRA, Internal Revenue Service, the Office of the New York State Attorney General, New York Stock Exchange, European Commission, and the UK Serious Frauds Office, among others.

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[RESEARCH PATH: Labor & Employment > Discrimination, Harassment, and Retaliation > Practice Notes](#)

Timothy Murray MURRAY, HOGUE & LANNIS

# Corporate Social Responsibility and the Supply Chain

Corporate social responsibility (CSR) is an amorphous concept that defies simple explanation. At its heart, CSR is a philosophy that a business entity has certain societal obligations beyond the bottom line of its owners—obligations to be a good citizen.

**IT IS AN ACKNOWLEDGEMENT THAT THERE ARE** stakeholders aside from the business entity's owners, including employees, local communities, and society at large, that are affected by the business entity's decisions. In essence, it is a form of corporate self-regulation, pursuant to which a company voluntarily agrees to carry out and monitor its business in a manner designed to ensure it is and remains in compliance with certain ethical standards and norms, which often involve social and environmental obligations and ethical labor practices. CSR standards often extend beyond what is required by applicable law and may also entail philanthropic and charitable activities.

CSR traditionally has been practiced by business entities via self-regulation, pursuant to which companies voluntarily engaged in practices that promoted CSR. The practice of voluntary CSR self-regulation is changing now, as laws have been enacted that mandate compliance with various CSR-related matters, as described below. It is therefore important for counsel to be conversant about concepts related to CSR since such issues are playing increasingly important roles in the operations of business clients.

## Common CSR Concepts

A commonly discussed CSR concept is sustainability. A 1987 United Nations report defined sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

Sustainability must balance often-competing interests. The effort to promote sustainability must make economic sense for the company both in terms of capital investments by the



company and costs to the consumer. It must also meet the customer's quality demands.

Another conceptualization of CSR was famously proffered by Prof. Archie Carroll, who envisioned the four social responsibilities businesses have as follows:

- **Economic responsibility.** This represents the basic responsibility of a business to be profitable. Economic responsibilities will sometimes be at odds with CSR considerations, as CSR compliance will often involve costs and expenditures that do not directly or immediately advance a company's profitability or bottom line.
- **Legal responsibility.** Legal responsibility represents the duty of a business to operate within the framework of legal requirements. Such responsibility is required, as a business will be subjected to civil and criminal penalties if it fails to conduct its affairs within the confines of the law.
- **Ethical responsibility.** This represents the responsibility of a business to do what is right, just, and fair. While ethical norms are embodied in both the economic and legal responsibilities, the ethical responsibility category is meant to embody society's expectations with respect to businesses that are over and above any legal requirements that might govern the business. While certain actions or conduct of a business may not violate the applicable laws and regulations that govern the entity, such activities may nonetheless be contrary to its ethical responsibility.
- **Discretionary or philanthropic responsibility.** This is perhaps the most controversial category and represents society's expectation that a business should assume social roles above and beyond its economic, legal, and ethical responsibilities. Examples of fulfilling a philanthropic responsibility could include making contributions to various charitable, social, educational, recreational, or cultural purposes.<sup>1</sup>

## CSR in the Supply Chain

CSR in the supply chain context raises a host of unique concerns. Application of CSR concepts to the supply chain requires companies operating within the chain ensure that third-party suppliers act responsibly with respect to human rights, labor rights, and stewardship of the environment. Third-party suppliers often operate from countries where there is inadequate regulation of these fundamental interests. Increasingly, one method employed to address this inadequacy is to enact domestic laws in the United States that require companies to demand accountability with respect to these critical interests within the supply chain.

## CSR Laws in the United States

The United States has adopted numerous laws and regulations that require compliance with various CSR interests. Many of

these laws relate to U.S. companies' dealings with foreign third-party suppliers.

The interest of anticorruption is promoted by the U.S. Foreign Corrupt Practices Act (FCPA).<sup>2</sup> The FCPA was enacted in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies. The FCPA was intended to halt such corrupt business practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace.

Wildlife protection is promoted by the Lacey Act, which makes it illegal to import or export certain protected wildlife, fish, and plants.<sup>3</sup>

Food safety is promoted by the Food Safety Modernization Act.<sup>4</sup>

The safety of children's products is promoted by the Consumer Product Safety Improvement Act.<sup>5</sup>

Misbranding and the false or deceptive advertising of fur products is governed by the Fur Products Labeling Act of 1952.<sup>6</sup>

Accordingly, it is essential that you have a thorough understanding of your client's business operations so you can ascertain which CSR laws may be applicable. As violation of these laws can result in significant civil and/or criminal penalties, it is essential that counsel ensure that clients are aware of, understand, and abide by all such laws.

## Trend toward Supply Chain Transparency

A recent trend in the United States is the burgeoning of federal and state laws mandating supply chain transparency. In the past, companies were largely left to their own devices regarding what, if any efforts, they implemented to prevent human rights violations that might exist in their supply chain. However, many governments, including the United States, are increasingly demanding that companies provide more information with respect to the origins of their products.

For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act requires disclosure of risks related to human rights in global supply chains, such as the use of conflict minerals.<sup>7</sup> Congress recognized the dire impetus for this law and emphasized that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo was being used to help finance conflict characterized by extreme levels of violence in the eastern Congo, especially sexual and gender-based violence, and was contributing to a humanitarian emergency therein.<sup>8</sup>

<sup>1</sup> See Symposium: *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 *Fordham L. Rev.* 1269, 1273-1274 (2009). <sup>2</sup> 15 U.S.C.S. §§ 78dd-1 to 78dd-3. <sup>3</sup> Lacey Act of 1990, 16 U.S.C.S. § 3372(a)(2)(A). <sup>4</sup> 21 U.S.C.S. §§ 2201-2252. <sup>5</sup> 15 U.S.C.S. §§ 2051-2089. <sup>6</sup> 15 U.S.C.S. § 69. <sup>7</sup> Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213-18 (July 21, 2010) (codified as amended at 15 U.S.C.S. § 78m). See G. Sarfaty, *Shining Light on Global Supply Chains*, 56 *Harv. Int'l L.J.* 419, 420 (2015). <sup>8</sup> See also Conflict Minerals Rule, 17 C.F.R. § 240.13p-1.

Organizations that engage in CSR activities often broaden their performance assessments to include metrics for meeting stakeholder interests.

### Why CSR Should Be Important to Companies

The potential conflict between CSR and corporate profitability is readily apparent. In short, there is the widely advanced principal that companies are in business to make money for their owners. The Michigan Supreme Court famously noted that “[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes.”<sup>13</sup>

In reaction to this philosophy, most states permit a corporation’s board of directors to consider the interests of constituents in addition to the interests of the corporation

Another important legislative initiative is the California Transparency in Supply Chains Act of 2010,<sup>9</sup> which mandates that every retail seller and manufacturer doing business in California and having annual worldwide gross receipts that exceed \$100,000,000 shall disclose its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.<sup>10</sup>

The importance of supply chain transparency legislation cannot be overstated. Domestic supply chain-related regulation is a means by which states can potentially set environmental and human rights-related norms for third-party suppliers and their host governments via multinational companies. Such regulations not only affect domestic companies but serve as an alternative to international law for shaping the behavior of foreign governments. Due to pressure from third-party suppliers, developing countries may pass legislation and strengthen their laws in order to prevent global companies from shifting their supply chains to other regions that have more favorable laws with regard to CSR issues.<sup>11</sup>

### Approaches Companies Can Take to Address CSR in Supply Chains

How does a business entity promote the principles underlying CSR? One writer explained:

Organizations that engage in CSR activities often broaden their performance assessments to include metrics for meeting stakeholder interests. Instead of a singular focus on financial results, they use a method known as the triple bottom line. This provides a framework for measuring performance as a balance of social, environmental, and financial outcomes. Also referred to as the 3Ps of people, planet, and profit, the foundation of the triple bottom line is the idea that it is in an organization’s best interests to consider its impact on society, the environment, and economic viability.<sup>12</sup>

#### Related Content

For guidance in developing a corporate social responsibility (CSR) plan to specifically address supply chain issues, see

 **DEVELOPING A CORPORATE SOCIAL RESPONSIBILITY SUPPLY CHAIN COMPLIANCE PROGRAM**

For assistance in locating materials on issues relevant to business entities conducting and monitoring their affairs in compliance with societal ethical standards, see

 **CORPORATE SOCIAL RESPONSIBILITY RESOURCE KIT**

For a sample corporate Foreign Corrupt Practices Act (FCPA) policy, see

 **FOREIGN CORRUPT PRACTICES ACT POLICY**

For a checklist that outlines the issues that counsel should consider when drafting an FCPA compliance program, see

 **FOREIGN CORRUPT PRACTICES ACT COMPLIANCE PROGRAMS CHECKLIST**

For recommended CSR clauses to address corporate responsibility representations by sellers or service providers in commercial agreements, see

 **CORPORATE SOCIAL RESPONSIBILITY REPRESENTATIONS CLAUSES**



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when making decisions. Counsel should ascertain the status of such laws in the jurisdictions that govern their corporate clients and determine whether such considerations are permitted by their respective boards.

To the extent that companies are legally permitted to engage in CSR, a pertinent question is, why should they? From an ethical perspective, it is often pointed out that businesses benefit from the infrastructure and other assistance provided by the community, so there is some measure of obligation to reciprocate.

Beyond that, the idea of doing well by doing good has long been a tradition in business. The public relations benefits of philanthropy and CSR are often touted. The ability to attract and retain a talented workforce is enhanced when a company practices CSR. Practicing CSR also reduces the likelihood of regulatory and statutory intrusions—if the company

voluntarily serves the greater good, there is less perceived necessity for the government to mandate it. Adherence to a strong CSR policy may help a company reduce compliance costs and help avoid costly and protracted litigation.

Companies can also use their CSR policies in their marketing and promotional efforts, which may help attract and retain customers. Customer preference often dictates that companies employ CSR initiatives. By way of example, many fast-food chains now provide healthier choices to remain competitive because customers want such options. There is no greater incentive for businesses to practice CSR than to respond to consumer preferences and, in some cases, demands. In such instances, by doing so such companies can enhance their bottom line through increased sales by attracting and retaining customers who may remain loyal to businesses that follow CSR practices that are in line with their personal beliefs and preferences. The COVID-19 pandemic has provided companies

9. Cal. Civ. Code § 1714.43(a)(1). 10. See also Federal Acquisition Regulations Anti-Trafficking Provisions (Strengthening Protections Against Trafficking in Persons in Federal Contracts), 77 Fed. Reg. 60,029 (Oct. 2, 2012). 11. See G. Sarfaty, *supra*. 12. John M. McKeller, *Supply Chain Management Demystified* 182 (McGraw-Hill Education, Kindle Edition 2014). 13. *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (1919).

of all types innumerable opportunities to implement—and tout their implementation of—CSR policies protecting the health and safety of employees and customers in the war against the virus.

Counsel can assist clients in developing and promoting their own CSR policies. Among other things, you can include various CSR representations and warranties in client agreements with third parties in the supply chain. Alternatively, clients can provide their existing CSR policies to suppliers and require compliance with such terms with respect to the subject agreement. Alternatively, the parties can agree to adhere to mutually acceptable national or international CSR standards.



#### Related Content

For an overview of the supply chain and critical supply chain legal issues, see

 [SUPPLY CHAIN FUNDAMENTALS](#)

For an examination of the measures that counsel can take to help clients avoid and resolve supply chain disputes, see

 [SUPPLY CHAIN DISPUTES](#)

For an analysis of the due diligence concerns that counsel should address when examining a target company's supply chain contracts, see

 [DUE DILIGENCE OF SUPPLY CHAIN CONTRACTS IN M&A TRANSACTIONS](#)

For advice on contractually mitigating a supplier's exposure to third-party participants of the customer's supply and downstream customer chain, see

 [THIRD PARTIES IN SUPPLY AGREEMENTS: MINIMIZING RISK](#)

For information addressing essential aspects of international corporate governance law and policy, see

 [CORPORATE GOVERNANCE IN INTERNATIONAL JURISDICTIONS](#)

Additionally, if you require a supplier of a client to comply with CSR standards or make CSR representations, counsel may also want to ascertain whether the supplier, in turn, requires its subcontractors or sub-suppliers to comply with any CSR standards or representations. Consider whether a requirement that suppliers include such terms in their agreements with subcontractors or sub-suppliers is warranted to ensure that all parties in the client's supply chain meet the desired standards. 

*Timothy Murray, a partner in the Pittsburgh, PA law firm Murray, Hogue & Lannis, writes the biannual supplements to Corbin on Contracts, is author of [Volume 1, Corbin on Contracts \(rev. ed. 2018\)](#), and is co-author of the [Corbin on Contracts Desk Edition \(2017\)](#).*

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Sarah E. Fortt VINSON & ELKINS LLP

# Keepers of the Green Gate: Duties of ESG Professionals

The market for Environmental, Social, and Governance (ESG) professionals is hot. As companies, consulting firms, financial institutions, law firms and government agencies race to build out their sustainability and ESG teams, qualified ESG professionals are in high demand.

**THIS DEMAND IS ALSO CREATING A PUSH FOR INDIVIDUALS** with more traditional professional backgrounds, who may not have any substantive experience in ESG, to quickly find their ESG expertise. I recently Googled “becoming an ESG professional” out of curiosity. “How to move into an ESG focused role with little to no ESG experience” was the fifth link.

This movement bothers me less than some may think. It is both normal and efficient for individuals to shift towards professions that they perceive to be in high demand, and arguably, spaces dedicated to sustainability should encourage those shifts to take place across many sectors of the global economy. However, the vastness of ESG can make the space particularly vulnerable to “competence greenwashing,”<sup>1</sup> where individuals may have some awareness but lack the expertise needed to meaningfully participate in the implementation of complex ESG strategies. This can be exacerbated by the fact that ESG is simultaneously incredibly broad and incredibly deep, but the markets, particularly in the United States, have thus far been more focused on the breadth than the depth, so individuals can know a little about a lot and know more than most. But a shift is here and is moving quickly, and in order for ESG professionals—whether we have been in the space



ESG is impossibly broad. No single individual, and no single organization, should be expected to address the full scope of every topic that falls under its global umbrella.

for years or are newcomers—to be helpful and not harmful, we must hold ourselves accountable to standards informed by the central tenets of ESG. As a governance attorney, I think about duties a lot—the duties companies owe their stakeholders, the duties boards and members of management owe their companies, the duties I owe my clients—and here I outline what I believe should be the duties of ESG professionals for the benefit of the organizations for which they work and the communities in which those organizations do business.

**The duty to self-educate.** The first duty of the ESG professional has to be the duty to educate oneself. The various spaces of ESG are all moving quickly; not a day goes by that does not bring significant events and developments. Even those who have been in ESG spaces for years may find it challenging to keep up to date on a day-to-day basis; however, our profession requires that we do the work of staying informed. Our profession also requires that we be unequivocally clear about the scope of our own competencies. No one person can be, nor should any one person try to be, all things to ESG. As calls for greater levels of sophistication in ESG standard setting and reporting continue to proliferate in the United States while ESG-related regulations expand and come into full effect in non-U.S. jurisdictions, ESG professionals need to weigh the benefits of focusing on breadth versus depth in their respective areas. While some ESG professionals should retain a focus on breadth in order to support collaborative efforts in the profession, as discussed below, many others should focus on depth, honing their expertise in specific subcategories of ESG. All should describe their areas of expertise accurately.

**The duty to collaborate.** ESG is impossibly broad. No single individual, and no single organization, should be expected to address the full scope of every topic that falls under its global umbrella. However, it is dangerous to think that just because ESG seems to be about everything, it is substantively about

nothing. This is one reason why I have emphasized in my other articles and talks that ESG should not be viewed as a single strategy, but instead as a series of lenses used to challenge our ideas about value, values, and the relationships between the two. Given this, collaboration among ESG professionals with different competencies and areas of focus is vital. True progress requires that those with expertise in sustainable finance, public policy, the environmental sciences, corporate governance and public disclosure, human rights, poverty and inequity, and community engagement—to name just a few—speak the same language and use that language to integrate more sustainable practices throughout the global economy. This requires intentional collaboration.

**The duty to evade and report on greenwashing.** If 2020 was the year ESG grew up, 2021 may be the year it finally starts to be truly defined.<sup>2</sup> Although many of the efforts to define ESG are in the “E,” efforts to identify and measure the determinants of social outcomes are also underway. These efforts to define and measure ESG initiatives, strategies, and outcomes are integral to shrinking the space in which organizations may freely engage in greenwashing; however, taken alone, they cannot eliminate greenwashing, nor can they help organizations prioritize among the good. For greenwashing in all its forms to be eliminated, and for organizations to be able to prioritize among ESG goals in the most effective and meaningful manner, ESG professionals must hold their organizations accountable.

As ESG professionals, we must remember that greenwashing is dangerous not only because it may mislead key stakeholders and create inefficiencies in the market, but also because it creates very real risks for the organization and can be used to discredit the central tenets of ESG. Greenwashing is often defined as providing misleading or incomplete information in an effort to create the perception that a company or its products, operations, or policies are environmentally

<sup>2</sup> Efforts to measure ESG include the EU Sustainable Finance Disclosure Regulation and the EU Taxonomy Regulation, which are designed to help businesses identify to what degree activities can be considered environmentally sustainable, and are becoming effective this year and early next year. Other efforts include the measures released by the World Economic Forum, and the efforts of the International Federation of Accountants and IFRS Foundation to create an international Sustainability Standards Board and promulgate a single global set of standards on climate-change risk by mid-2022. In September 2020, the Carbon Disclosure Project, the Climate Disclosure Standard Board, the Global Reporting Initiative, the International Integrated Reporting Council and the Sustainability Accounting Board announced that they would collaborate on working together to harmonize sustainability standards. In June 2021, nearly 500 investors managing over \$41 trillion in assets released a statement urging world governments to establish mandatory climate-related financial reporting; the statement was released ahead of the G7 Summit and COP26 to encourage further participation and collaboration. In the United States, the SEC has been signaling all year that companies can expect the Commission to use current rules to review companies' ESG disclosures and practices and to promulgate new ESG rules in the not too distant future. In April 2021, the Commission's Division of Examinations released a risk alert and review of ESG investing indicating that the staff had “observed some instances of potentially misleading statements regarding ESG investing processes and representations regarding the adherence to global ESG frameworks.” While the staff did not use term greenwashing, the implication was clear.

<sup>1</sup> <https://www.responsible-investor.com/articles/competence-greenwashing-could-be-the-next-risk-for-the-esg-industry>.



sustainable or otherwise ESG-friendly. I would define it more broadly. I would add to the definition any ESG efforts that do not directly relate to an organization's risks, operations, or strategies or that do not otherwise result in a material improvement of the environmental sustainability or social welfare of the communities in which the organization does business. Why this broader definition? In my experience, any expression of corporate values that is not backed up by a commitment of corporate value amounts to little more than virtue signaling and should be included in the definition of

greenwashing for the purposes of ESG professionals' duties to their organizations and the communities in which they do business. As ESG professionals we must be brave enough to actively avoid engaging in greenwashing and call it out if we do see it occurring in our organizations. This requires that we do more than demand that ESG efforts and disclosures be more meaningful than colorful marketing campaigns; we also must see that ESG efforts are integrated into our organizations and reflected in the organization's operational and strategic plans and audit and internal control processes.

**The duty to report on ESG risks and violations.** Back in 2014 and 2015, statements made by the then-Chair of the SEC, Mary Jo White, and the then-Deputy Attorney General, Sally Quillian Yates, memorialized the U.S. federal law concept of holding key individuals accountable for corporate wrongdoings.<sup>3</sup> The concept of gatekeeper liability has its root in the public policy behind the Sarbanes-Oxley Act; however, the legal concept has grown, evolved, and shifted since then to become a cornerstone of how legal, audit, and compliance professionals and certain members of management frame their duties in the context of corporate conduct. I would argue that ESG professionals should be guided by a similar concept, that we are in fact also gatekeepers. In establishing ourselves as those that guide our organizations with respect to ESG matters, we should also assume the duty to spot and prevent potential ESG misconduct. This includes identifying material ESG risks,<sup>4</sup> as well as identifying the ways in which our organizations are falling short of their ESG commitments. Given that ESG is, as I admit, impossibly broad, this responsibility should be tied to our areas

of competency—yet another reason for us to clearly articulate the scope of our expertise.

**The duty to self-examine.** Finally, ESG has to begin and end with the individual. Given the vastness of the questions ESG asks—questions about our values, purpose, and future, and the value we assign to them—ESG professionals as individuals absolutely must practice what we preach. In our quest to promote sustainability, are we willing to embrace the sacrifices we as individuals will be required to make? For every 100 articles and thought pieces championing methods for creating a more sustainable world, there are a very few that state this harder truth: We need to sacrifice to create a more sustainable world. And yet, are we brave enough to consider the ways in which our quest for a more sustainable world is informed by our own privileges and be willing to continue to reassess our own views accordingly? Ultimately, the challenge of ESG lies not in the “E” or the “S” or the “G” but in all of them together, and to be effective ESG professionals, we must consider both the sustainability and the equity of our own actions and efforts. **L**

#### Related Content

For an overview of issues related to ESG and corporate responsibility, see

 [ENVIRONMENTAL, SOCIAL, AND GOVERNANCE \(ESG\) RESOURCE KIT](#)

For a discussion of remarks by SEC chair Allison Lee on ESG issues, see

 [ACTING SEC CHAIR LEE'S SPEECH ON ADDITIONAL CLIMATE AND ESG INITIATIVES](#)

For a look at what public companies should be considering with regard to ESG disclosures, see

 [KEY ESG DISCLOSURE CONSIDERATIONS FOR PUBLIC COMPANIES](#)

*Sarah E. Fortt has spent a decade working with organizations in navigating their relationships and communications with key stakeholders, including their investors, regulators, employees, and communities. She regularly works with boards on managing their approaches to corporate governance, crisis management, succession planning, and board education. She is the mind behind the creation of Vincent & Elkins' ESG Taskforce, a novel cross-functional team that works to provide companies with end-to-end solutions for navigating non-financial risks and opportunities, including those relating to climate change, human rights, and corporate culture. Sarah is the consistent corporate governance voice across V&E's corporate governance approach, which includes working with companies across multiple industries. She regularly works with clients on crisis preparedness and response, including in the context of shareholder activism and cyber and data security breaches. She regularly helps clients create consistent, effective, and meaningful stakeholder communications. Sarah is also an experienced securities lawyer with a background in executive compensation.*

<sup>3</sup> See "A Few Things Directors Should Know About the SEC" and Individual Accountability for Corporate Wrongdoing. <sup>4</sup> In other articles, I discuss the concept of sacred cows in the context of corporate cultures. Sacred cows are people, products, practices, or principles that an organization will go to any lengths to protect. ESG professionals, if we are going to be gatekeepers of effective ESG practices, must also commit to calling out the material risks created by sacred cows.



# LexisNexis Joins Forces with LGBTQ+ Bar Association in Anti-Discrimination Efforts

As part of its commitment to the rule of law in the United States and across the globe, LexisNexis has joined forces with the LGBTQ+ Bar Association to bring awareness to critical issues facing the LGBTQIA+ community, including the use of the “panic defense” in the prosecution of violent crimes against members of the community.

**THE PANIC DEFENSE—THE ASSERTION THAT A VICTIM’S** sexual orientation or gender identity excuses a defendant’s violent actions, including murder—has been banned in 15 states—California, Illinois, Rhode Island, New York, New Jersey, Washington, Colorado, Virginia, Vermont, Oregon, Nevada, Connecticut, Maine, Hawaii, and Maryland—and the District of Columbia. The LGBTQ+ Bar Association has undertaken a campaign to ban the practice in all states and to enact federal legislation prohibiting its use.

As part of its commitment to support the work of the LGBTQ+ Bar Association, LexisNexis participated in the organization’s annual Lavender Law Conference & Career Fair, both as a paid sponsor and a presenter at the virtual event, July 28-30. The conference is the largest LGBTQ+ legal conference in the country with approximately 1700 attendees attending annually.

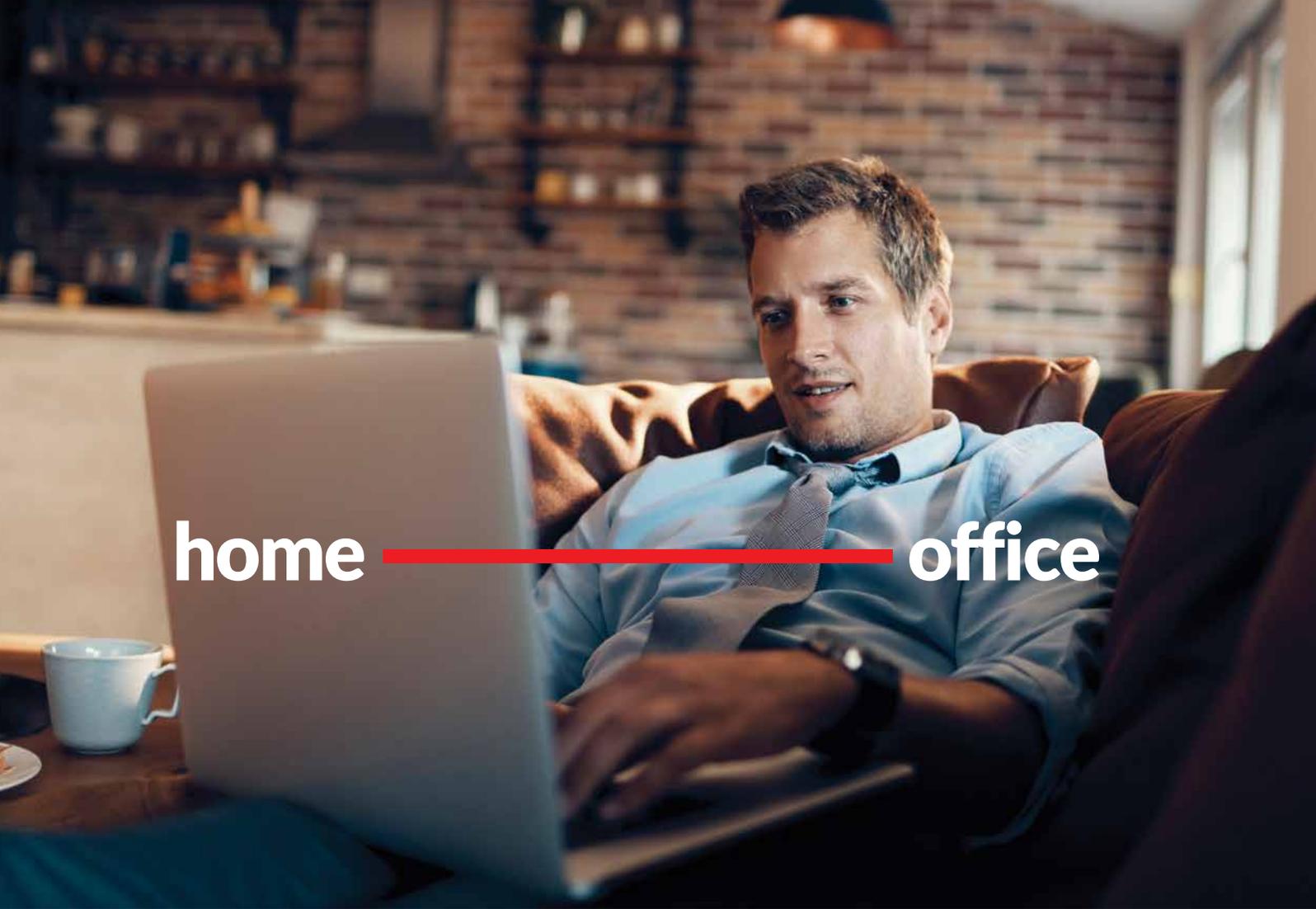
The Lexis presentation emphasized employment law materials, including litigation and transactional tools and other resources from LexisNexis Practical Guidance, for both employees and employers.

Eva Harte, a Practice Area Consultant for LexisNexis Practical Guidance who participated in the presentation, said, “As a prior

employment litigator, I strongly support Lavender Law and the momentum it generates around LGBTQ rights. I believe in the celebration of the unique dignity of each human being on this planet. Recent landmark cases interpreting Title VII, especially the 2020 Supreme Court *Bostock* case, recognize that an employee’s sexual orientation or gender identity is protected from sex-based discrimination. I am excited to be able to collaborate with law students and practitioners to continue the march forward to broaden inclusivity and diversity in the workplace and beyond.”

LexisNexis promotes the rule of law around the globe through its Rule of Law Foundation and its daily operations, products, and services; the efforts of its employees; and collaboration with customers, governments, non-profits, and intergovernmental organizations. Information about the LexisNexis Rule of Law Foundation is available at <https://www.lexisnexisrolfoundation.org/>.

For additional information about the LGBTQ+ Bar Association, visit <https://lgbtqbar.org/>.



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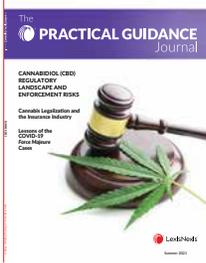
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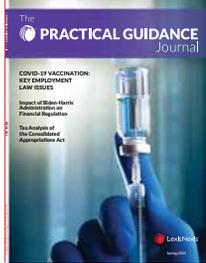


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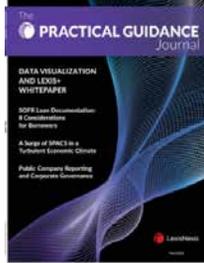
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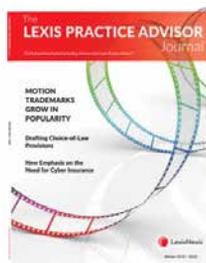
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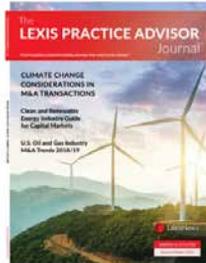
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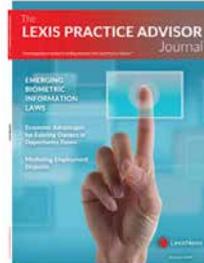
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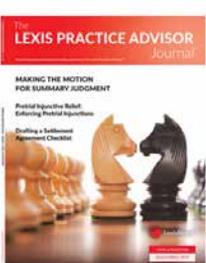
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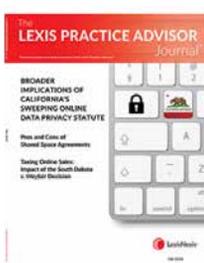
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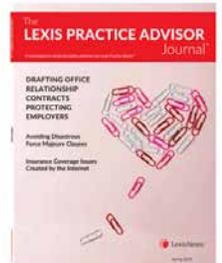
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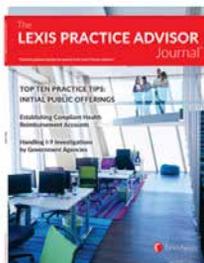
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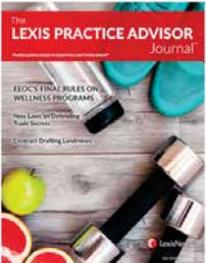
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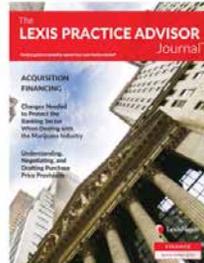
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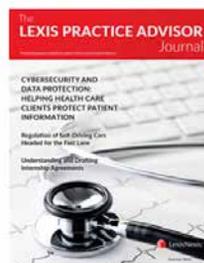
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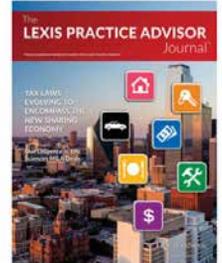
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