

Morgan Lewis

NAVIGATING ESG ISSUES FOR PUBLIC COMPANIES

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Presenters



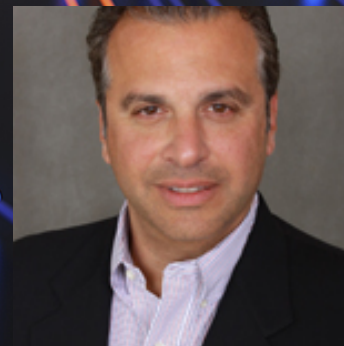
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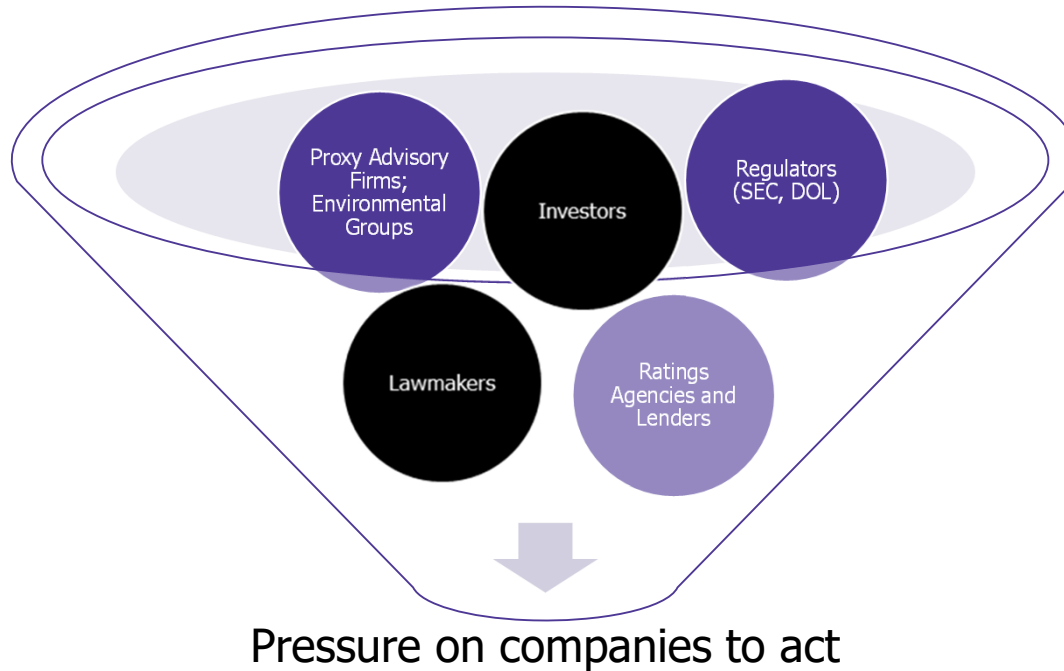
Overview

- I. What's New with ESG?
- II. Trends in ESG Disclosures
- III. Risks and Best Practices with ESG Disclosures
- IV. Takeaways and A Regulatory Preview of 2022 and Beyond



What's New with ESG?

Who Is Paying Attention to ESG

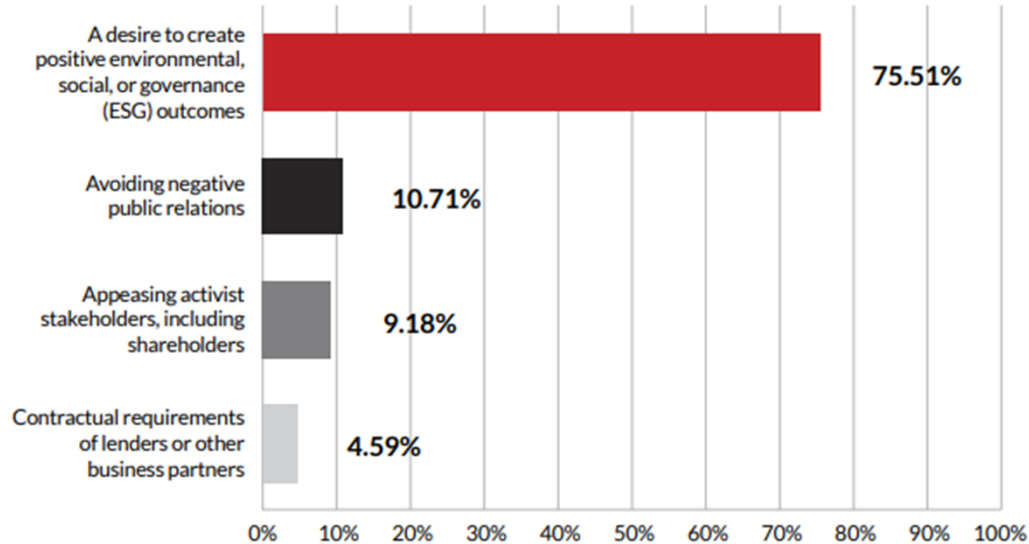


ESG in 2021...and What's to Come in 2022

- During 2021, companies continued to focus efforts on ESG disclosure and reporting against a backdrop of increased scrutiny from the SEC and lack of clarity regarding new regulations and guidance
- Areas of focus for 2022
 - Climate change
 - Human capital management
 - Diversity & inclusion
 - Social initiatives
 - Community and philanthropic endeavors
 - Executive compensation ESG metrics

What Drives ESG Disclosures?

What is the primary motivation behind your company's ESG initiatives?



Source: Intelligize Survey (August 2021)

ESG Issues for 2022 (and Beyond)

- **Year 2 of the SEC's Human Capital Management Disclosure**
- **The SEC and Climate Change Disclosures**
- **Nasdaq's Diversity Disclosure**
- **ESG-Focused Shareholder Proposals**
- **Decarbonization and the Push to Net Zero**
- **The Slow Crawl Toward (Maybe) Reporting Standardization**



Human Capital Disclosures – Year 2

Year 2 of Human Capital Management Disclosure

- Benchmark, benchmark, benchmark!
- EEO-1 data? Not so fast...
- ...but do consider additional quantitative disclosures:
 - Diversity metrics (i.e., women and people of color)
 - Retention and recruitment efforts; attrition rate (if favorable)
- Other common areas of disclosure to consider:
 - Rank-and-file employee benefits
 - Mission statements and core value
 - Community and/or social impact
 - Employee engagement
 - Ongoing response and benefits to employees as a result of COVID 19

Human Capital: Takeaways from Larry Fink's Letter

- “A new world of work - No relationship has been changed more by the pandemic than the one between employers and employees.”
 - Larry Fink's 2022 Letter to CEOs
- In drafting this year's disclosure, keep the following in mind:
 - Are turnover rates something we can (and should) tout based on our peer group/industry?
 - What can we say about wage increases or other benefits? What about continuing COVID-specific benefits?
 - Are mental health benefits available to the entire employee base?
 - How is the company demonstrating innovation with an employee population that remains largely remote?
 - How is management retaining core values and company culture, and promoting employee engagement?

Important Reminders in Drafting “Year 2” Disclosure

- Ensure all disclosure can be backed up and cleared with legal and external auditors
- Where appropriate, ring-fence descriptions of available benefits to the correct employee populations
- Tie quantitative disclosures to a specific date
- Conform disclosure – both substance and level of disclosure – with external sustainability report, ESG website and anticipated proxy disclosure
- Next year you can always disclose more, but will be hard to pull back

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Climate Change Disclosures

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Climate Change – What’s New with the SEC?

- In early 2021, both the Division of Corporation Finance and the Division of Enforcement signaled an enhanced focus on climate change disclosures
- In September 2021, Corp Fin issued a “sample comment letter” noting the following specific areas of focus and lines of inquiry:
 - Callouts if companies provided more expansive disclosure in CSR reports than in SEC filings
 - Risk factors, including:
 - Material effects of transition risks related to climate change, including regulatory changes
 - Material litigation risks related to climate change
 - MD&A, including:
 - Climate-related trends (e.g., decreased demand for goods or services that produce significant greenhouse gas emissions)
 - Material increased compliance costs related to climate change

Climate Change and the SEC – When Are the New Rules Coming?

- In June 2021, the SEC published its regulatory agenda that included proposed rule amendments “to enhance registrant disclosures regarding issuers’ climate-related risks and opportunities”
- At the time, these rules were expected to be proposed in October 2021
- In July 2021, SEC Chair Gary Gensler stated in remarks that he had requested proposed rulemaking by the end of 2021 relating to “a mandatory climate risk disclosure rule”
- Recently, Corp Fin Director Renee Jones signaled that Corp Fin expects to have a proposed rules before the Commission by March 31st

Climate Change Rules and “Scope” of Disclosure

Scope 1	Scope 2	Scope 3
Scope 1 emissions are direct GHG emissions that occur from sources that are controlled or owned by an organization (e.g., emissions associated with fuel combustion in boilers, furnaces, vehicles)	Scope 2 emissions are indirect GHG emissions associated with the purchase of electricity, steam, heat, or cooling.	Scope 3 emissions are the result of activities from assets not owned or controlled by the reporting organization and include all sources not within an organization’s scope 1 and 2 boundary. The scope 3 emissions for one organization are the scope 1 and 2 emissions of another organization (e.g., a supplier). Scope 3 emissions, also referred to as value chain emissions, often represent the majority of an organization’s total GHG emissions.

Source: EPA.gov

- A recent *Reuters* article posited that there remains disagreement among SEC Staff in terms of how expansive the climate disclosure rules should be
- If the SEC does require Scope 3 disclosures, US issuers would face a stricter disclosure regime than current EU regulations and existing Task Force on Climate-Related Financial Disclosures standards

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DE&I and New Nasdaq Disclosure Requirements

Nasdaq Board Diversity Disclosure Rule

- In August 2021, the SEC approved Nasdaq's board diversity rule, which is a disclosure standard designed to:
 - Encourage diversity threshold objectives for Nasdaq-listed issuers
 - Provide "apples-to-apples" disclosure regarding board composition among companies
- Nasdaq will require listed companies to **"comply or explain"** with board diversity requirements, which will require most Nasdaq-listed companies to have at least:
 - One director who self-identifies as female (regardless of the director's designated sex at birth)
 - One director who self-identifies as an underrepresented minority or LGBTQ+
- Companies also must provide a **board diversity matrix** disclosing self-identified board diversity
- The rule provides some flexibility:
 - A company may choose to disclose why it does not meet the diversity objective (i.e., in proxy or on website)
 - Smaller reporting companies and foreign issuers can comply with the diversity objective by including two female directors
 - All companies with five or fewer directors can comply with the diversity objective by including one diverse director
- Nasdaq also is providing companies with access to board recruiting services

Nasdaq Diversity Disclosure – Dates for Compliance

- Companies must disclose their initial board matrix in 2022
 - If a company files its 2022 proxy before August 8, 2022 and does not include the matrix in the proxy, it can wait until August 8th and provide the matrix on its website
 - If a company files its proxy on or after August 8th, then it must include the matrix in the proxy or post the matrix on its website
 - If a company does not intend to file a 2022 proxy, then the company has until August 8th to provide the matrix on its website
- Listed companies must comply with the new Nasdaq diversity rule by the later of the below dates or the date of the company's annual proxy statement in the same year:
 - Aug. 6, 2023* (one director) and Aug. 6, 2025 (two directors) – Nasdaq Global Select and Nasdaq Global Market
 - Aug. 6, 2023* (one director) and Aug. 6, 2026 (two directors) – Nasdaq Capital Market
- If a company fails to meet these goals, it must provide an explanation regarding its non-compliance by the later of 180 days from the deficiency date or the company's next annual shareholders meeting.

**Later of this date or the date that company files its proxy materials*

Diversity on Boards and More on the Nasdaq Rule

- For purposes of Rule 5605(f), “Diverse” means an individual who self identifies in one or more of the following categories: female, Underrepresented Minority or LGBTQ+
- Underrepresented Minority means any person who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities
- Unlikely that NYSE will follow suit
- Current disclosure is largely based on self-identification; note the potential for liability under the securities laws for opportunistic or unproved identifications

Steps to Consider Taking on Board Diversity

- Add diversity questions to D&O questionnaire (ensure that these are crafted as “self-identifying” and that the respondents explicitly give permission for the information to be shared in SEC filings)
- In addition to gender and race/ethnicity questions, many companies are including questions relating to whether directors and officers self-identify as LGBTQ+, as well as other questions such as ethnic diversity and veteran status
- For 2021, the vast majority of companies presented their board diversity on an aggregate basis, with some opting to clarify how they determined that a certain percentage of the board was diverse
- Very few companies “early adopted” the Nasdaq form of matrix in their 2021 disclosure

Diversity and Inclusion – ISS and NYC Comptroller Updates

- ISS has asked companies for disclosure of the race/ethnicity of each director and named executive officer, both on an aggregate and self-identified basis
 - Indicated that this outreach is an effort to ensure the accuracy of data in research and proxy reports
- NYC Comptroller Scott Stringer has asked companies to adopt a “Rooney Rule” diversity search policy requiring that qualified female and racially/ethnically diverse candidates be included in the pool of nominees from which directors and CEOs are selected
- NYC Comptroller also has called for companies to publicly disclose their annual EEO-1 report data in order to match their statements regarding commitments to diversity and inclusion



Shareholder Proposals – What Happened in 2021, and What's to Come

Example Proposals Voted Upon in 2021

Proposal Type	Proposal Topic	Companies Receiving Such Proposals
Workplace Diversity	<ul style="list-style-type: none"> • Reports on effectiveness of programs related to recruitment, retention, and promotion of protected classes 	<ul style="list-style-type: none"> • American Express • Berkshire Hathaway • Charter Communications • International Business Machines • Union Pacific • United Parcel Service
Climate Change	<ul style="list-style-type: none"> • Scope 3 greenhouse gas emissions reduction • Reports on conforming to public statements regarding environmental goals • Say on climate 	<ul style="list-style-type: none"> • Chevron • ConocoPhillips • Phillips 66 • Sempra Energy • United Airlines • Delta Airlines
Political Activities	<ul style="list-style-type: none"> • Political and electioneering congruency report 	<ul style="list-style-type: none"> • Home Depot • JPMorgan Chase • Pfizer
COVID-19	<ul style="list-style-type: none"> • Reports on COVID-19 drug pricing and access • Essential workers' rights and safety 	<ul style="list-style-type: none"> • Johnson & Johnson • Pfizer • Merck • Wendy's

Environmental and Social Proposals Generally

- Environmental and social proposals composed an increasing percentage of proposals receiving majority support – increasing from 33% in 2020 to 42% in 2021
- Environmental proposals increased 13% year over year
 - Most of this increase was driven by proposals related to climate change
- Social proposals increased 37% year over year
 - Civil rights, human rights, and racial justice issues went to vote more frequently and received higher support

Environmental Proposals

- Environmental and Sustainability Proposals
 - There were 81 environmentally focused proposals submitted during the 2021 proxy season
 - 54 of these proposals focused on climate change
 - 5 of these proposals focused on sustainability
 - 22 of these proposals focused on other issues pertaining to the environment
 - Each proposal category enjoyed increased support in 2021 over 2020

Environmental Proposals

- Every proposal requesting that companies set greenhouse gas emission targets that went to a vote received majority support
 - These are no longer directed solely at finance and energy companies, but are now directed at all industries
 - Boards have come out in support of some of these proposals
- Five out of six proposals (83%) requesting information on climate lobbying received majority support
 - These proposals seek reports on how a company's lobbying, direct and through trade associations, impacts climate issues
- Increase in the say-on-climate proposals, which attempt to secure dedicated ballot items enabling investors to express views on companies' climate-related risk management on a recurring basis or to hold a vote on a company's climate transition plan
 - Management, as well as proponents, have been bringing forth say-on-climate votes primarily at European companies – all overwhelmingly supported

Social Proposals

- Submissions of social proposals increased by more than 20% year over year, to 293 submissions, of which 114 received a vote, and 18 received majority support
 - This increase was driven almost entirely by a near doubling year-over-year of submissions related to workforce diversity, equity and inclusion
- Prominent proposals included requests for EEO-1 reporting and policies and for reports on employee diversity
 - 2/3 of proposals asking companies to provide more information concerning the diversity of their workforces received majority support

Social Proposals (cont.)

- Proposals on human capital management received an average of 45% shareholder support in 2021, as opposed to 28% in 2020
 - All proposals asking for more information on mandatory arbitration policies that went to a vote received majority support
- 18 companies received proposals asking them to become public benefit corporations
 - These received extremely weak shareholder support
- Almost 40% of social proposals were ultimately withdrawn

Shareholder Proposal Trends for 2022

- Impact of revised Rule 14a-8
- Trend of increasing number of climate and environment-focused proposals likely to continue
 - Alignment with Paris Agreement goals, greenhouse gas emissions, and enhanced sustainability disclosure
 - Expect many “say on climate” proposals as well
- Concealment clauses
 - Removing harassment/discrimination from scope of non-disclosure/non-disparagement agreements
- Continuing focus on workplace equity
 - Expansion beyond gender and racial pay equity to include disclosure of recruitment, retention, and promotion of diverse employees
- Continuing focus on political spending and values congruency

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Trends in ESG Disclosures

ESG is “The” Trend

- “The biggest economic trend of 2021 is that we are now in a full blown ESG-driven economy” – *Forbes*, December 2021
 - Director and executive recruitment is focused on ESG expertise like never before
 - Exponential rise in the number of Chief Sustainability Officers and Chief Diversity Officers
 - Companies are now at an inflection point

Trends in ESG

- Greenwashing concerns –
 - The SEC is focused on companies that tout ESG commitments but provide limited (or no) information as to how they plan to accomplish such commitments
- Net Zero/Scope 3 Emissions
 - According to *Harvard Business Review*, more than 2,000 companies have set a science-based carbon target
 - Difficulty and lack of standardization with reporting on Scope 3 emissions
- Forced Labor
 - Effective June 21, 2022, U.S. law generally will prohibit imports of products from China's Xinjiang Uyghur Autonomous Region, meant to address reported violations of human rights in the region
- DE&I
 - Companies continue to expand diversity and inclusion efforts, including by establishing Chief Diversity Officer positions

The Move to Net Zero

- The UN is seeking net zero emissions by 2050
- More companies are disclosing commitments to carbon neutrality
- According to *Forbes*, as of March 2021 over 20% of the world's 2,000 largest public companies have committed to meet net zero targets
- BlackRock is focused on –
 - Companies setting short-, medium-, and long-term targets for GHG reductions, which Larry Fink views (together with the quality of plans to meet such targets) as “critical to the long-term economic interests of ... shareholders.”
 - Companies issuing reports consistent with the Task Force on Climate-related Financial Disclosures
- Perception of lack of alignment between aspirations of net zero versus concrete plans to actually achieve these goals

Global Trends in ESG Reporting for 2022

- In April 2021, the European Commission adopted a proposal for a new corporate sustainability reporting directive
 - Companies would need to report under new EU specific sustainability reporting standards
 - Directive would apply “double materiality” – not only how ESG issues impact the company, but also how the company’s actions and policies affect ESG-related matters, like climate change
 - Potential for broad impact on any entity engaged in an economic activity in the EU (with an estimated 50,000 companies impacted)
 - First set of standards are targeted for adoption in October 2022, with sector-specific standards to follow in 2023
- In July 2021, the Global Reporting Initiative announced that it was working with the EU on sustainability standards
- In November 2021, the International Financial Reporting Standards Foundation (IFRS) announced a new International Sustainability Standards Board to be charged with developing global ESG disclosure mandates,
- In December 2021, the Singapore Exchange (SGX) announced new climate-related disclosures (based on TCFD recommendations), effective for 2023, as well as new board diversity disclosures effective for 2022



Advising Boards and Best Practices and Legal Risks in Drafting ESG Disclosures

Advising Boards on ESG-Latest PWC Survey

- Boards and ESG – Takeaways from the Latest PWC Board Survey (2021)
- Fully 64 percent say that ESG is linked to their company's strategy, compared to only 49 percent last year. Yet only 25 percent say that their board understands ESG risks very well. In addition, an increasing number of directors say that diversity and inclusion (D&I) efforts are good for both their companies and boardrooms, and they recognize the need to build a culture of belonging.
- The survey reports that ESG is the topic that shareholders most want to discuss with directors, at 43 percent, followed by executive compensation (40 percent), strategy oversight and board composition (both 38 percent). Because many board members are not educated on the topic of ESG risks, some boards are forming committee to focus on the issue. While more directors are incorporating ESG into their companies' strategy, relatively few are tying executive pay to such metrics.
- Fully 62 percent of directors say that ESG is a part of risk management discussions, up from 55 percent last year. And 54 percent of them believe that ESG issues have a financial impact on their companies' performance.
- Directors at large companies (those with more than \$5 billion in revenue) are more likely to link ESG to company strategy than those at smaller companies (74 percent vs. 54 percent.) and 62 percent of directors at large companies report that ESG issues are regularly on their boards' agenda, compared to 38 percent at smaller companies.
- On the other hand, directors are not in favor of ESG regulations. Only 18 percent of directors say they support mandatory reporting or disclosure, while 67 percent support the current, voluntary approach. Fully 94 percent said they are offering some voluntary disclosure already.
- Additional findings of the survey addressed D&I issues. One half of the directors survey support tying pay to D&I goals. Only 33 percent of directors believe that board diversity can "happen naturally," compared to 71 percent last year, a 38-point drop. Directors are pushing boards to promote diversity by planning ahead. "While directors aren't ready to embrace diversity mandates, they can make significant improvements by setting goals and creating an internal succession plan," the report says.

Advising Boards on ESG-Latest PWC Survey (Cont.)

- Among the directors surveyed, 69 percent say their companies have replaced a retiring director with a director who increased the board's diversity. In addition, 54 say their companies have disclosed information about board diversity in proxy statements, 33 say their companies have increased board size to add a diverse director, and 31 percent have engaged with shareholders on the topic of board diversity.
- While in the past three to five years, board diversity discussions have centered on gender, they have more recently turned to racial/ethnic diversity. Twenty-five percent said the single most important attribute their boards will prioritize in searching for a new director is racial/ethnic diversity.
- Most of the directors surveyed said that diversity brings unique perspectives to the boardroom (93 percent), and that diversity improves relationships with shareholders (90 percent). Eighty-five percent say DID that it enhances board performance, and 76 percent say that it improves strategy/risk oversight.
- Yet not all directors view the push toward diversity in a positive light. Fifty-eight percent say that diversity is driven by political correctness—up six points from 2020. Directors are more likely this year than last to say that board diversity results in the nomination of additional unneeded candidates (31 percent, compared to 26 percent last year). In addition, 27 percent say that the push for diversity can result in boards nominating unqualified candidates to address these issues.
- Still, directors are generally more in favor of taking steps to increase diversity, such as following the “Rooney Rule” of always interviewing a diverse slate of candidates (88 percent this year, compared to 82 percent last year). They also favor search firm policies of always offering diverse slates of candidates (85 percent vs. 81 percent).
- And when asked which steps their companies/boards have taken, or plan to take to address human capital and D&I issues, 74 percent said increased discussion of human capital or DE& strategy at the board level; 47 percent said investment in upskilling/retraining; 47 percent said providing additional metrics to the board; 46 percent said changing their approach to recruiting and hiring; and 39 percent said enhanced public disclosure of human capital or D&I metrics.

Advising Boards on ESG

Why should Boards care about ESG issues:

- Stockholders, stockholder advisory firms and other stakeholders (e.g. customers and employees) are increasingly holding boards and corporations more accountable for addressing ESG issues- COVID-19 catalytic effect
- Increase in ESG stockholder proposals for inclusion in proxies and ESG activist campaigns
- Buyers/investors increasingly conducting ESG due diligence
- Potential for increase in federal and state regulation on climate change and other areas, although overly prescriptive regulation could be met with challenges in court.
- Potential for increase in federal and state legislation on ESG reporting, although it is unclear in the divided US Congress that the votes are there at the federal level.
- Keeping up with peers and competitors - according to the [Governance & Accountability Institute](#), 90% of the companies in the S&P 500 Index published sustainability reports in 2019. Further, 65% of the Russell 1000 Index companies published sustainability reports in 2019, up from 60% in 2018. These numbers are expected to increase.

Advising Boards on ESG

ESG risk areas:

- Lack of measurability and reporting standards – no equivalent of GAAP for ESG measurement and reporting
- Litigation/activist campaigns from shareholders over alleged breach or fiduciary duties for failing to maximize profits or litigation/activist campaigns from other stakeholders (e.g. consumers/advocacy groups) over allegedly false or misleading statements concerning ESG commitments
- Proxy contests over ESG issues (Exxon-Mobil case)
- Increase in SEC investigations and enforcement over climate disclosures (letters to select companies) and cybersecurity/protection on confidential information. New SEC Enforcement Task Force-primary focus is on alleged “greenwashing” by ESG investment funds. Will this focus shift to public companies?

Advising Boards on ESG

- Current Delaware law mandates that “stockholders’ best interest must always, within legal limits, be the end” of business decisions made by directors of a Delaware corporation. (*In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013))
- Shareholder primacy does not prohibit directors from considering the interests of constituencies other than shareholders, but those “[o]ther constituencies may be considered only instrumentally to advance [shareholders’ best interests]” (*In re Trados*, 73 A.3d at 37)
- Therefore, it is crucial for the Board to begin any discussion of corporate purpose by asking not only why the interests of the Company’s various stakeholders should be considered, but also how benefitting a non-shareholder constituency ultimately impacts shareholder value

Advising Boards on ESG

“The objective and purpose of a corporation is to conduct a lawful, ethical, profitable and sustainable business in order to ensure its success and grow its value over the long term. This requires consideration of, and regular engagement with, all the stakeholders that are critical to its success (shareholders, employees, customers, suppliers, communities and society at large) as determined by the corporation and its board of directors using their business judgment. Fulfilling this purpose in such a manner is fully consistent with the fiduciary duties of the management and the board of directors and the stewardship duties of shareholders (institutional investors and asset managers), who are essential partners in supporting the corporation’s pursuit of its purpose. ”

Wachtell Lipton-Some Thoughts for Corporate Directors in 2022

Advising Boards on ESG

“In this environment, directors need to grapple with a host of questions about the practical implications of this new paradigm, such as adjusting existing board functioning to reflect stakeholder governance, defining corporate “purpose” and shaping corporate culture, integrating ESG considerations into long-term business strategy and measuring and delivering sustainable value to all stakeholders. Directors are also facing questions about what, if any, modifications should be made to communications and engagement efforts with shareholders and other stakeholders. In addition, the current pandemic has heightened the emphasis on effective and adaptive crisis management, and events of the past year have shone a light on the role of all market participants in combatting social and racial inequality. The legal rules as to directors’ duties have not changed. What have changed are the expectations of investors and other stakeholders for (1) greater transparency, (2) deeper board engagement and oversight, (3) greater opportunity to engage with directors and (4) responsible investor stewardship to further long-term, sustainable value creation. “

Wachtell Lipton-Some Thoughts for Corporate Directors in 2022

Advising Boards on ESG

Examples of actions that benefit other stakeholders but promote long-term shareholder value:

- Increasing employee wages
- Allocating resources to diversity and inclusion initiatives
- Offering fair terms to small, local suppliers and ensuring supply chain integrity
- Giving back to, and conscientiously engaging with, local communities
- Adopting environmentally sustainable measures

Advising Boards on ESG issues

- In the context of a sale of the business, the so-called *Revlon* duties do require profit maximization
- Unlike 44 other states, Delaware does not have a constituency statute
- Delaware has adopted a Public Benefit Corporation Statute that allows for stakeholder capitalism to be baked in the charter and override traditional fiduciary duties requiring profit maximization, including *Revlon* duties
- While there are a growing number of publicly-traded Benefit Corporations, this trend should not be exaggerated and they still represent a very small percentage of publicly-traded corporations and this alternate form does not appeal to the majority of stockholders who place return/share price before impact.

Best Practices for Implementing an ESG Program

- Define ESG goals, KPIs and rating systems/metrics, looking at peers/competitors
- Engage with C-Suite/Board on ESG goals
- Prioritize the time and resources needed to support ESG goals
- Engage with other internal stakeholders, along with third-parties, advisors, shareholders and other stakeholders, on achieving ESG goals
- Communicate strategic importance of ESG goals with disclosure team
- Develop disclosure and reporting policies and procedures
- Consider forming ESG reporting and disclosure committee

Best Practices for ESG Reporting – US Chamber of Commerce

- When possible, ESG disclosure should focus on a company's risks and opportunities with sufficient potential to impact the company's long-term operational and financial performance in light of its business and should discuss the company's approach to risk management, making the connection, to the best of their ability, between the ESG topics on which they report and the company's long-term value creation strategy
- Before preparing its ESG disclosures, a company should consider which audience (or audiences) is the intended recipient of its reports and should tailor the tone and content of its reports accordingly, particularly regarding information that would be most useful for investors or whether for other ESG-oriented stakeholders

Best Practices for ESG Reporting – US Chamber of Commerce (cont.)

- Preparers of ESG reports should consider how best to liaise with relevant departments and functions within the company to ensure that all relevant information is collected and reviewed and that diverse perspectives and inputs are accounted for
- However, when it comes to determining whether information is material or not as a matter of law, that assessment should reside with a company's legal department
- In their ESG reports, companies should clearly define in plain English technical terms and terms that do not have a universally accepted definition
- It is important to allow companies discretion in how they report and discuss ESG information
- Each company should maintain the flexibility to determine which ESG factors and related metrics are relevant to it and what disclosure is meaningful for its stakeholders and not necessarily what is identified in various third-party frameworks and standards

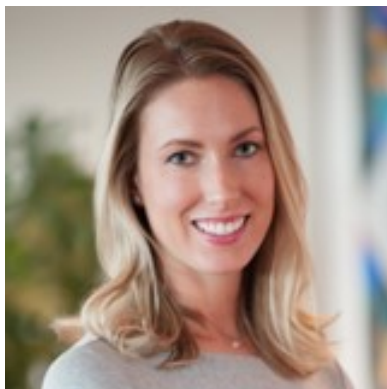
Best Practices for ESG Reporting – US Chamber of Commerce (cont.)

- ESG information should be easy for users to find, such as through dedicated ESG disclosure web pages and links
- ESG reports need not be incorporated into SEC filings to accomplish this objective, nor should ESG information be required as part of an SEC filing if it is not material under the Supreme Court's well-established definition of materiality for federal securities law purposes
- Finally, a company should consider including in its voluntary ESG reports a description of the company's internal review and audit process or any external verification of the information that the company received

Takeaways

- Now more than ever, it is critical that all public disclosures relating to ESG – whether in an SEC-filed document or otherwise – are thoroughly vetted and can be backed up
- The SEC will continue to scrutinize broad statements of commitment without any disclosure as to actionable plans
- Expect climate disclosure proposed rules in the first half of 2022
- Focus on social/racial equality and DE&I matters will continue

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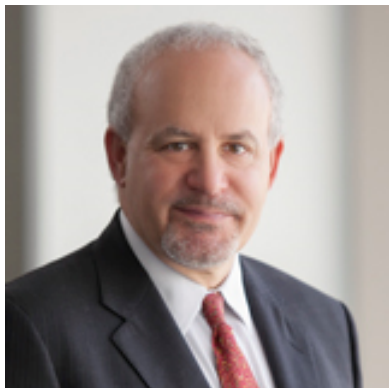
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Celia A. Soehner focuses her practice on counseling public companies and their boards with respect to corporate governance, federal securities, stock exchange, shareholder engagement, and executive compensation matters.

Drawing on her previous tenure as an attorney-advisor with the US Securities and Exchange Commission (SEC) in the Division of Corporation Finance, Celia has experience with securities disclosure issues that impact public companies' ongoing reporting obligations and proxy-related matters that impact public companies and their officers and directors. She also advises companies in connection with public capital raising transactions, including through IPOs, secondary offerings, and debt offerings.

Celia currently serves as the deputy leader of the firm's capital markets and public companies practice and co-chairs the firm's environmental, social, and governance (ESG) and sustainable business team.

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Carl Valenstein focuses his practice on domestic and international corporate and securities matters, mergers and acquisitions, project development, and transactional finance. He counsels extensively in the life science, telecom/electronics, and maritime industries, and has worked broadly in Latin America, the Caribbean, Europe, Africa, Asia, and the Middle East.

He previously served as co-chair of the International Section of the Boston Bar Association and co-chairs the firm's environmental, social, and governance (ESG) and sustainable business and Cuba initiatives.

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Erin Martin focuses on counseling public companies and their boards with respect to securities regulation, capital market transactions, and corporate governance matters, drawing on her long tenure at the US Securities and Exchange Commission (SEC) in the Division of Corporation Finance. Erin brings extensive and specialized experience relating to complex matters of SEC disclosure and compliance.

Before joining Morgan Lewis, Erin served as legal branch chief in the SEC's Office of Real Estate and Construction, where she oversaw the legal reviews of transactional filings and periodic reports filed by a wide range of public companies, including special purpose acquisition companies (SPACs), real estate investment trusts (REITs), real estate platforms, and real estate-related finance companies.

She is admitted in New York only, and her practice is supervised by DC Bar members.

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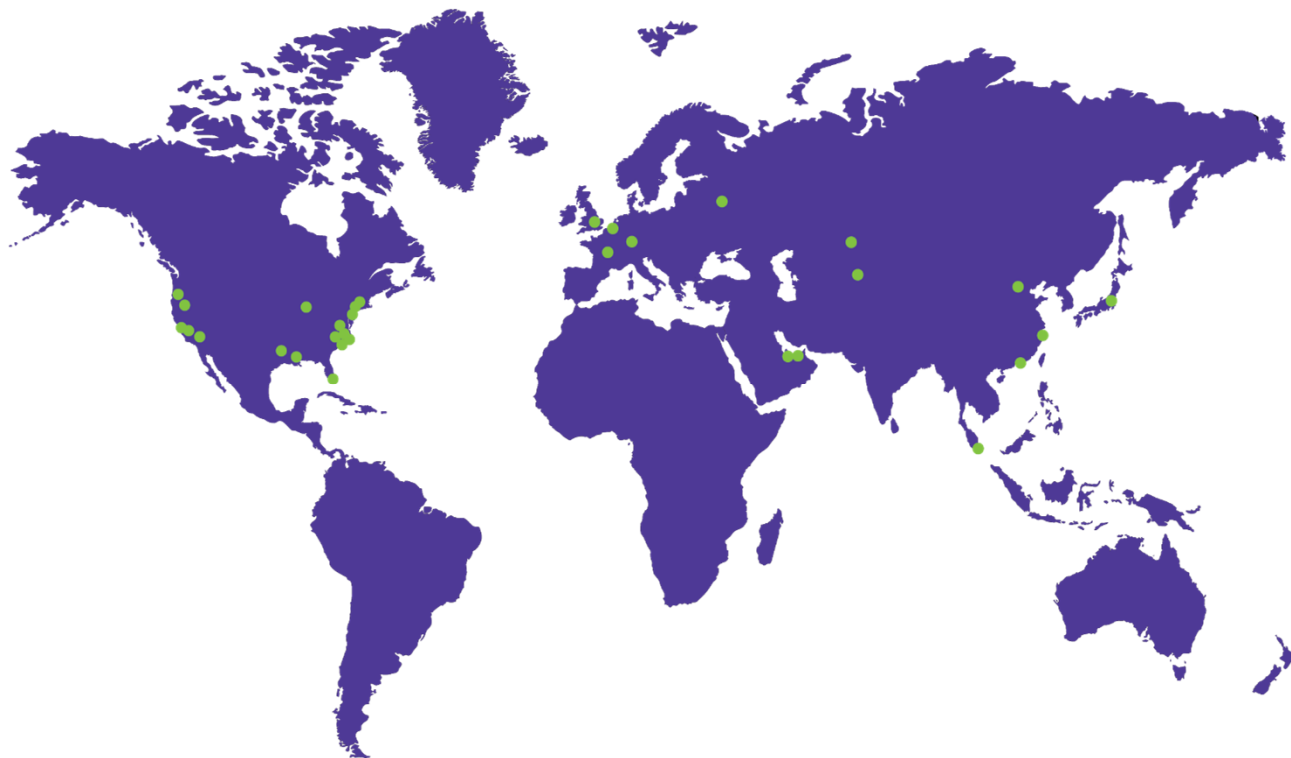
Joseph has broad experience in product innovation and development, leading large scale strategic technology projects and developing industry transforming communication channels. During his career he has started and led business units, a technology innovation lab, and had various leading roles in strategic planning and development. Joseph's ventures have led to joint ventures, partnerships and reseller agreements with major multi-national companies, boutique vendors and securities clearing companies.

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