



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 study¹ 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

¹ <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,⁵ 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 Initiative²
- Standards issued by the Sustainability Accounting Standards Board (SASB)³
- The framework of the International Integrated Reporting Council⁴

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 2021,⁶ 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 2021,⁷ 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.

⁶ 86 Fed. Reg. 27,967 (May 25, 2021). ⁷ 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.⁸ 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.

⁸ 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

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For a collection of resources addressing ESG issues, see

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

For an analysis of conflict minerals disclosures, see

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

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

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

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

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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.

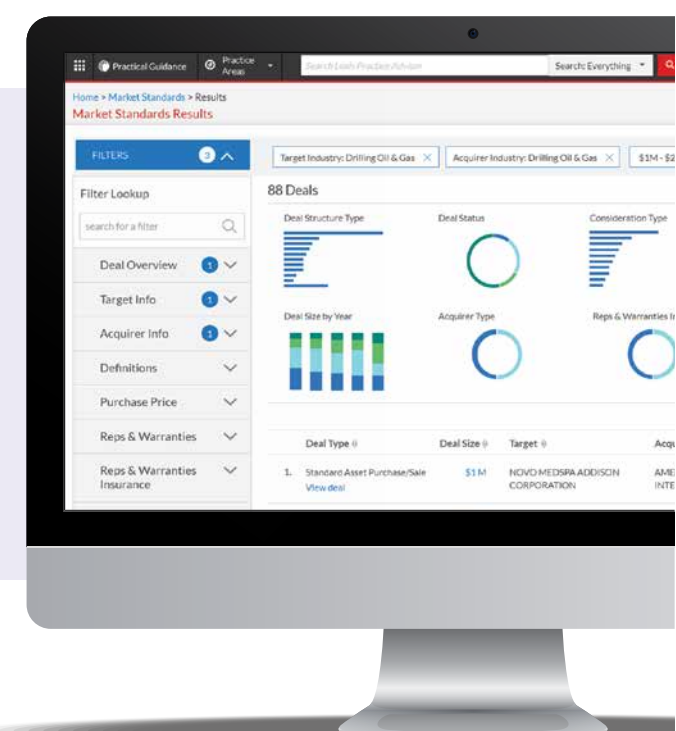
Moreover, attorneys can help counsel the company on handling sensitive ESG issues:

- **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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