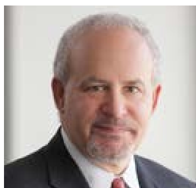
Practical Guidance

ESG Considerations for Public Companies

A Practical Guidance® Practice Note by
Conor Larkin, Celia Soehner, and Carl Valenstein, Morgan, Lewis & Bockius LLP

Conor Larkin
Morgan, Lewis & Bockius LLP

Celia Soehner
Morgan, Lewis & Bockius LLP



Carl Valenstein
Morgan, Lewis & Bockius LLP

This practice note focuses on environmental, social, and governance (ESG) as it relates to U.S. public companies, discussing (1) a background overview of ESG factors and history of ESG and the SEC, (2) the existing SEC disclosure regime, (3) developing ESG strategies and disclosures, (4) voluntary ESG disclosures, (5) what boards should be aware of, and (6) best practices in drafting ESG disclosures.

ESG refers to environmental, social, and governance-related factors that are utilized by a growing number of institutional investors and other capital markets participants to evaluate public companies and to inform decisions to invest (or maintain investments) in different companies, industries, and geographies. More broadly, ESG may refer to specific investment strategies such as sustainable, socially responsible, or impact investing, to the increasing number of ESG funds, or to related discussions about stakeholder capitalism and corporate social responsibility (CSR). This practice note does not cover state-specific ESG reporting requirements imposed on public companies.

For more guidance on ESG generally, see Environmental, Social, and Governance (ESG) Resource Kit.

Background

Overview of ESG Factors

The three primary categories of ESG encompass a broad scope of factors that public companies address in their public disclosures and broader strategies.

- E (Environmental) encompasses greenhouse gas emissions, climate change, energy use, water use, pollution, hazardous waste, recycling, and sustainability.
- S (Social) encompasses corporate giving and philanthropy, working conditions, workplace health and safety, compensation and benefits, internal pay equity, employee opportunity, labor and human rights, child and forced labor, diversity and inclusion, and supply chain integrity.
- G (Governance) encompasses board structure and composition (including diversity), executive compensation, shareholder rights, enterprise risk management, audit oversight, disclosure and reporting, ethics and compliance, privacy, and cybersecurity.

The ESG factors listed above are not exhaustive, and while certain factors are the subject of mandatory disclosure regardless of a company's ESG posture (e.g., executive compensation, board structure, human capital), the relevance of each factor may vary based on your client's industry, size, and geographic footprint, as well as peer company practices.

History of ESG and the SEC

The social factors of ESG can be traced back at least as far as the turn of the 20th century to the conspicuous corporate philanthropy of Andrew Carnegie, John D. Rockefeller, and Henry Ford. In 1953, the publication of Professor Howard Bowen's Social Responsibilities of the Businessman marked the beginning of a more sustained focus on the role of corporations in society. These beginnings, together with growing environmental consciousness in the 1960s and 1970s, contributed to the emergence of socially responsible investing in the 1970s and to the CSR movement, which advocated that corporations be accountable to society and the communities in which they operate, and refrain from investing in harmful or unethical businesses. Meanwhile, although the topic of corporate governance goes back centuries to the advent of corporations and limited liability companies, the current governance elements of ESG also took root in the 1970s, when the SEC first recommended that audit committees be composed of outside directors. In the late 1970s, the SEC issued an interpretative release summarizing legal and administrative actions with regard to public companies' environmental disclosures. See Interpretive Release No. 33-6130 (Sept. 27, 1979) and Release No. 33-6315 (May 4, 1981).

The SEC's enhanced focus on corporate governance and disclosure over the last few decades is well known and many governance reforms were adopted in the Sarbanes-Oxley Act of 2002 following the Enron and WorldCom corporate scandals. In addition, the SEC adopted the CEO Pay Ratio Rule in 2015 further to the Dodd-Frank Act of 2010. For more detailed information on the pay ratio rule, see Pay Ratio Disclosure and Pay Ratio Rule Presentation. The environmental and social antecedents of modern ESG were the subject of less regulatory attention, and while the CSR movement achieved broad support among public companies into the 2000s, it was frequently criticized for being amorphous and easily susceptible to becoming a marketing tool or footnote in an annual report.

The SEC leapt into the field on environmental and social ESG factors with its 2010 climate change release (2010 Release), which followed an investigation by the New York State Attorney General, who issued subpoenas to five energy companies regarding the adequacy their climate-related disclosure under the Martin Act, New York's securities law. The 2010 Release aimed to clarify how existing SEC disclosure rules could apply to climate change matters, including pursuant to Regulation S-K Item 101 (Description of Business), Item 103 (Legal Proceedings), Item 303 (Management's Discussion of Financial Condition and Results of Operations, or MD&A), and Item 503(c) (Risk Factors). Although relatively few comments ultimately were issued under this release, most comments related to risk factor and MD&A disclosure. For further discussion of the 2010 Release, see Existing SEC ESG Disclosure Regime; see also Commission Guidance Regarding Disclosure Related to Climate Change, available here.

Despite the headlines generated by the 2010 Release, and the CEO Pay Ratio Rule in 2015, the remainder of the decade saw little in the way of formal SEC action, and the evolution of ESG has primarily been driven by private ordering (e.g., nudging or explicit pressure by the proxy advisory firms, including ISS and Glass Lewis, shareholder proponents, and other organizations/stakeholders). However, in 2020, the SEC finalized rules relating to human capital management, which was the first set of regulations explicitly focused on this ESG issue. Following President Biden's inauguration in January 2021, there has been a sea change at the SEC in terms of focus on climate change and ESG. As a result, public companies must brace themselves for the likelihood of enhanced ESG disclosure requirements.

Existing SEC ESG Disclosure Regime

Climate Change

As it relates to public companies' SEC disclosure (i.e., in annual reports), until recently, the 2010 Release was the primary ESG-related guidance from the SEC. The interpretive release was intended to clarify how existing SEC disclosure rules could apply to climate change matters, including pursuant to Regulation S-K Item 101 (Description of Business), Item 103 (Legal Proceedings), Item 303 (Management's Discussion of Financial Condition and Results of Operations, or MD&A), and Item 503(c) (Risk Factors). The interpretive release identified four topical examples of climate change-related matters that public companies may need to consider, as follows:

- First, the impact of climate change legislation and regulation, including material impacts on a company due to compliance with such legislation and regulation (e.g., greenhouse gas emission regulations) and material

risks due to existing or pending climate change-related legislation or regulation

- Second, the impact of international climate change accords, such as the 1997 Kyoto Protocol and 2015 Paris Agreement
- Third, the indirect consequences of climate change regulation or business trends, such as decreased demand for products that produce significant greenhouse gas emissions, or increased demand for alternative energy generation and transmission -and-
- Fourth, the physical effects of climate change on a company's business, including the availability of natural resources such as water, or the impact of severe weather on a company's business or results of operations

Following the publication of the 2010 Release, the SEC's Division of Corporation Finance issued a limited number of broad-based comments to public companies eliciting more fulsome disclosure on climate change issues. Typically, these comments asked companies what consideration they had given to the interpretative release in preparing their disclosures and were focused on companies in the energy and financial industry sectors.

In February 2021, Allison Herren Lee, then acting chair of the SEC, directed the Division of Corporation Finance to "enhance its focus on climate-related disclosure in public company filings," noting that "investors are considering climate-related issues when making their investment decisions." Acting Chair Lee's statement noted that this enhanced focus would include a review of the extent to which companies are addressing the ESG factors identified in the 2010 Release, as well as compliance with applicable disclosure obligations and, presumably, would result in the issuance of comments by the SEC to public companies on climate-related disclosures. Acting Chair Lee also indicated that the results of this effort would inform an update to the 2010 Release.

In March 2021, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement, to be tasked with developing initiatives to identify ESG-related misconduct. The Task Force's initial focus will be to identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules. The SEC has solicited and is now evaluating comments from the public on potential updates to the climate disclosure release and will soon announce the next phase of the regulatory process. See Acting SEC Chair Lee's Speech on Additional Climate and ESG Initiatives and SEC's New Rulemaking Agenda: ESG, Investor Protection, and Insider Transactions. This process could take a while given the diversity of views on the subject and concerns expressed by some commentators that the SEC is moving towards more prescriptive rules and away from its traditional reliance on a materiality-based disclosure standards, allowing companies to disclose only what was material for them.

Human Capital Management

In 2020, as part of other updates to modernize portions of Regulation S-K, the SEC adopted new disclosure requirements mandating that public companies (other than smaller reporting companies) provide a description of their human capital resources, including in such description any measures or objectives that management focuses on in managing the business, to the extent material. In the adopting release, the SEC noted that "[h]uman capital is a material resource for many companies . . . and an important driver of performance." This new disclosure requirement is largely principles-based, and the adopting release did not define the term human capital, but indicated that companies should consider disclosing "measures or objectives that address the development, attraction and retention of personnel."

Typically, human capital management encompasses diversity and inclusion initiatives, corporate culture and values, employee development, well-being and engagement, and compensation and other benefits. Accordingly, this disclosure could cover matters such as employee recruitment and training, employment and hiring practices, employee benefits, workplace health and safety, strategies and goals relating to human capital management, the existence of collective bargaining agreements, and employee compensation and incentive structures.

In August 2020, then SEC Chairman Jay Clayton stated that as part of the human capital disclosure requirement, he expected "to see meaningful qualitative and quantitative disclosure, including, as appropriate, disclosure of metrics that companies use in managing their affairs." In practice, most companies have refrained from disclosing metrics (other than the number of employees at fiscal year-end), but among those that do, metrics include those related to diversity (i.e., percentage of diverse leaders, hires, or overall workforce), health and safety, attrition, and results of internal surveys.

In August 2021, the SEC approved Nasdaq's "comply or explain" board diversity proposal, requiring, subject to certain exceptions, each Nasdaq-listed company to (1) have, or explain why it does not have, at least two members of its board of directors who are diverse, meaning at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority or LGBTQ+; and (2) publicly disclose statistical information

regarding the diverse composition of its board of directors. See SEC Greenlights New Director Diversity Disclosure Requirements for Nasdaq-Listed Companies.

Developing ESG Strategies and Disclosures

Developing an ESG strategy and choosing the right venues for ESG disclosure require careful planning with many different stakeholders. Industry and peer company practice inform many public companies in their ESG efforts, but it is important to be mindful of your client's core audience for ESG content, which includes not just shareholders but also management, employees, suppliers, customers, and state, local, and community organizations in the areas where a company operates. When preparing to introduce or enhance ESG disclosures, companies benefit from undertaking an inventory of their current practices, policies, and disclosures, which may reveal opportunities to combine previously disparate activities and disclosures under the umbrella of ESG. In addition, stakeholder interviews with management, directors, employees, top shareholders, and key customers or suppliers may help identify which ESG factors are most relevant to the company's profile and strategy, and to its core audience.

After identifying the most important ESG factors, companies need to decide how and when to disclose information on these factors to their internal and external audiences. Standalone sustainability reports are a common practice, and for larger companies, these reports may become annual publications, often running to 50 pages or more. For smaller companies, or for companies whose ESG efforts are in their infancy, a more modest step toward enhanced disclosure could include select metrics and disclosure in a proxy statement or annual report. For a discussion of liability considerations relating to ESG disclosure placement, see Best Practices in Drafting ESG Disclosures.

There are a number of different frameworks available to companies that wish to utilize a third-party standard to organize and inform their ESG disclosures. Three of the most well-known frameworks are the Global Reporting Initiative (GRI), Sustainability Accounting Standards Board (SASB), and UN Sustainable Development Goals (SDGs). However, given the proliferation of frameworks and ratings agencies, there is great confusion in the market (and frustration among investors) about the differences in methodology between the frameworks, and the inconsistency of disclosure across different companies. One of the largest asset managers in the U.S., BlackRock, has advocated for a single standard and expressed a preference for companies to report based on SASB and the Task Force on Climate-Related Financial Disclosures (TCFD). See ESG Enters M&A Mainstream in a Year of Change — BlackRock CEO Leads ESG Charge. While investors are a key constituency for ESG disclosure, the decision about whether to utilize a third-party framework, and which to choose, should also be informed by the preferences of other company stakeholders, and the purposes the company hopes to achieve with its ESG disclosures. It is unclear at this time whether the SEC is going to mandate a single standard.

For more discussion of these reporting frameworks, see Corporate Sustainability — What Reporting Frameworks and Standards Guide the Disclosure of Corporate Sustainability Issues? and Key ESG Disclosure Considerations for Public Companies — SASB and GRI Announce Collaboration to Align Respective Reporting Standards Framework.

Voluntary ESG Disclosures

Although companies are mandated to disclose information only on certain select factors under the SEC's prevailing disclosure regime, historically most companies have disclosed ESG-related information on a broader array of ESG factors as a result of private ordering and pressure from external parties, including investors, stakeholders, activists, and members of the public. Stakeholders often push companies to make voluntary disclosures on ESG factors such as corporate responsibility, diversity and inclusion, community outreach and impact, and compensation and supply chain integrity. However, bear in mind that adopting ESG policies and making ESG disclosures is not without risks, as discussed in Things Public Company Boards Should Be Aware Of.

Corporate Responsibility

Public companies have a responsibility to be mindful of their role as corporate citizens. Because investors, stakeholders, and the public have become increasingly interested in knowing how companies act as responsible corporate citizens, it is important for companies to have a coherent strategy on corporate responsibility, which will often include detailed voluntary disclosures about how they are able to positively contribute to their workplace culture and to society and the environment. Compared to smaller public companies, large public companies often devote significant resources to publicize their voluntarily corporate responsibility initiates. These initiatives often involve specific strategies vis-à-vis climate change and GHG emissions, diversity, and community engagement. However,

there is no one size fits all solution to voluntary disclosures or ESG generally, and companies with fewer resources can still find means of demonstrating their corporate responsibility efforts, whether by including an ESG or corporate responsibility section in their annual report, or having an ESG section of their website in lieu of (or in addition to) a formal report.

Diversity and Inclusion

In the last few years, the increase of social movements in the U.S. forced investors and companies to focus on developing strong and effective diversity and inclusion initiatives. There continues to be a push for public companies to improve the diversity of their boards and workforce and to increasingly disclose information pertaining to their diversity and inclusion initiatives partly because investors recognize that companies that have diverse workforces and are more inclusive tend to perform better financially than companies that are not diverse or inclusive. Given the importance of this ESG factor, it is extremely common for public companies, especially large public companies, to voluntarily disclose specific information about the composition of their workforce by race, ethnicity, gender, socioeconomic background, and sexual orientation, their policies on equal pay and equal opportunity, their recruitment practices for recruiting diverse candidates, and their policies on combatting discrimination in the workplace. By voluntarily disclosing this information, public companies are able to show that are continuously trying to improve their efforts to advance diversity and inclusivity in their workplace and are tracking their progress and commitment to supporting racial and social justice. See ESG, MeToo, and Black Lives Matter: Key Corporate Governance and Workplace Issues. With the SEC's recent approval of Nasdaq's board diversity rule, it remains to be seen whether similar rules advancing diversity on public company boards will be adopted in the future.

Community Outreach and Impact

Public companies, especially large public companies, are expected to be transparent with investors, stakeholders, and members of the public about material ESG factors and should therefore voluntarily disclose information on their community outreach and impact initiatives to show that they committed to investing in and positively influencing their local communities. Many public companies choose to disclose information on the measures that they have taken or plan to take to support their local communities by highlighting that they:

- Support employees who volunteer for various social causes
- Finance social, community, or environmental projects
- Fund small businesses, especially minority-owned small businesses
- Donate to charitable organization
- Develop aid programs geared toward students in disadvantaged and underserved communities

Regardless of how public companies decide to engage in community outreach, it is important that they are honest about the effectiveness of their initiatives and their commitment to social impact.

Compensation and ESG

In their annual proxy statements, public companies are required to disclose the amount and the terms and conditions of compensation that their CEOs, CFOs, board members, and other highly ranked executive officers are subject to. Although it is not mandatory, more and more companies have started to provide numbers and graphics to show ESG in compensation disclosures. Specifically, many companies have started to regularly include the ethnic, race, gender, and age composition of senior executive officers, skills, expertise, and perspectives of senior executive officers, policies that address gender pay equality, and strategies for improving diversity in senior leadership programs. Because of the increasing importance of compensation and ESG initiatives, ESG rating providers, have enhanced their compensation category so that it includes a new factor that evaluates the level of disclosure of diversity and inclusion performance metrics.

Things Public Company Boards Should Be Aware Of

Boards of directors often ask if there is a conflict between the adoption of ESG policies and the board's duty to maximize stockholder value. If properly documented, there is no inherent conflict between certain ESG policies and the board's fiduciary duties, and the board's decision to adopt ESG policies should be protected by the business judgment rule. For more discussion on the business judgment rule and fiduciary duties of directors, see Fiduciary Duties of Board of Directors. Delaware law requires 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)). Stockholder primacy does not, however, prohibit directors from considering the interests of constituencies other than stockholders, but those "[o] ther constituencies may be considered only instrumentally to advance [stockholders' 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-stockholder constituency ultimately impacts stockholder value.

Delaware courts have held that the deferential standard of review under the business judgment rule applies to directors' "rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value" (eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010)). Accordingly, when approving an action that furthers the interests of a non-stockholder constituency, the board should (1) consult with management and external advisors as needed, so that each director is prepared to reach an informed decision and (2) document its decision-making process in a way that protects the board against claims that directors improperly allocated corporate resources to advance individual altruistic goals at the expense of stockholder value.

Further, it is necessary that public company boards consider ESG issues for a number of reasons:

- Stockholders, stockholder advisory firms, and other stakeholders (e.g., customers and employees) are increasingly holding boards and corporations more accountable for addressing ESG issues and COVID-19 has had a catalytic effect on these demands
- The uptick in ESG stockholder proposals for inclusion in proxies and ESG activist campaigns
- Buyers/investors are increasingly conducting ESG due diligence
- The anticipated increase of SEC regulation and enforcement on ESG issues
- The anticipated increase in federal and state legislation on ESG issues -and-
- Keeping up with peers and competitors, who increasingly are publishing sustainability reports and including ESG materials in proxy and other filed documents

Boards should be mindful, however, that adopting ESG policies is not without risks, including:

- Lack of measurability and reporting standards-no equivalent of GAAP for ESG measurement and reporting
- Litigation/activist campaigns from shareholders over alleged breach of 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 -and-
- Risks associated with compliance with new federal and state legislation and SEC regulations and enforcement

To implement an effective ESG strategy, the board should direct management to take the following steps:

- Define ESG goals, key performance indicators (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, stockholders, 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 in Drafting ESG Disclosures

When crafting ESG disclosures for an SEC filing or any other document which will be made available to the public, bear in mind the following best practices:

- Before drafting, focus on your client's particular risk profile and opportunities against the backdrop of long-term operational and financial performance goals. The content will depend heavily on the industry, business, and particular facts and circumstances, including the company's approach to risk management.
- Connect the dots between the ESG factors on which your client is reporting and its long-term value creation strategy.
- Use plain English. The current ESG disclosure framework is fractured, with no standardized disclosure. Ensure that the crafted disclosure makes sense and can be easily compared to what your client's peers are saying.
- Avoid language that could be interpreted as a firm commitment, as opposed to an aspirational goal, and include appropriate disclaiming language.
- Review any ESG disclosures to make sure they are properly validated and qualified because of potential liability.

- Highlight the appropriate ESG metrics/KPIs for your client's industry, any participation in industry initiatives, and any third-party validation of your ESG metrics/KPIs.
- Because of the strict legal liability with respect to disclosures included in documents filed with the SEC (10-Ks and proxies), care should be given to the location of the disclosure.
- Remember that there is still potential liability for fraud with respect to intentional misstatements made in sustainability reports that are posted on your client's website but not filed with the SEC.

For an overview of market trends in corporate governance and public company reporting in 2020 and early 2021 and the outlook for the remainder of 2021, including with respect to ESG disclosures, see Market Trends 2020/21: Public Company Reporting and Corporate Governance — Governance Trends – Environmental, Social, and Governance Initiatives.

Shabeena Sharak also contributed to this practice note.

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Articles

- Acting SEC Chair Lee's Speech on Additional Climate and ESG Initiatives
- SEC's New Rulemaking Agenda: ESG, Investor Protection, and Insider Transactions
- ESG Enters M&A Mainstream in a Year of Change
- Key ESG Disclosure Considerations for Public Companies
- ESG Board Committees, Part I: Five Considerations Before Adopting an ESG Board Committee
- ESG Board Committees, Part II: Five Steps to Achieve an Effective ESG Board Committee

Annotated Forms

- Shareholder Activist Engagement Board Memorandum
- Memorandum to the Board of Directors on Board Diversity Initiatives
- Shareholder Engagement Strategies for Environmental, Social, and Political Issues Board Memorandum
- Risk Assessment Interview Questions (Environmental Issues)

Conor Larkin, Partner, Morgan, Lewis & Bockius LLP

Conor F. Larkin advises clients on a broad variety of corporate matters, with an emphasis on mergers and acquisitions, joint ventures, finance and restructuring, and private equity investments, dispositions and acquisition financings. Conor also leverages his background as an investor relations consultant to counsel clients on securities law compliance and corporate governance matters. His oil and gas work includes representation of master limited partnerships and negotiating long-term storage, terminalling and throughput agreements. His life sciences work includes structuring and negotiating royalty monetization transactions.

Celia Soehner, Partner, Morgan, Lewis & Bockius LLP

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.

Carl Valenstein, Partner, Morgan, Lewis & Bockius LLP

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. Carl is the leader of the Boston office corporate and business transactions practice.

Carl is a member of the Morgan Lewis Committee on Foreign Investment in the United States (CFIUS) working group. He is a frequent speaker at conferences on a variety of international compliance and transactional topics.

In addition to his transactional practice, Carl advises clients on international risk management, including compliance with the foreign investment review process (Exon-Florio/CFIUS), export control and sanctions, anti-money laundering, antiboycott, and anticorruption (Foreign Corrupt Practices Act (FCPA)) laws and regulations. He also advises on internal investigations, enforcement cases, and dispute resolution proceedings relating to his transactional and regulatory practice.

Carl is fluent in Spanish and Portuguese, and also conversant in French and Italian. Prior to joining Morgan Lewis, Carl was a partner in the corporate practice of another international law firm, where he was also co-managing partner of the firm's Washington, DC, office, as well as co-chair of the firm's life sciences practice.

He is an adjunct professor at the University of Michigan and New York University Law Schools' International Transactions Clinics, focusing on impact investing. He also serves on the board of advisors of the Michigan Social Venture Fund, the first student-led impact investment fund, and the newly formed NU Impact fund. He is a founding member of the Impact Investing Legal Work Group.

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