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**TECHNOLOGY
MAY-RATHON**

Navigating ESG Issues in the Technology Industry

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ESG Overview

The background of the slide is a dark, abstract digital landscape. It features a grid of glowing lines that recede into the distance, creating a sense of depth. The lines are primarily blue and purple, with some red and orange accents. At the end of each line is a small, bright dot, resembling a star or a data point. The overall effect is that of a futuristic, data-driven environment.

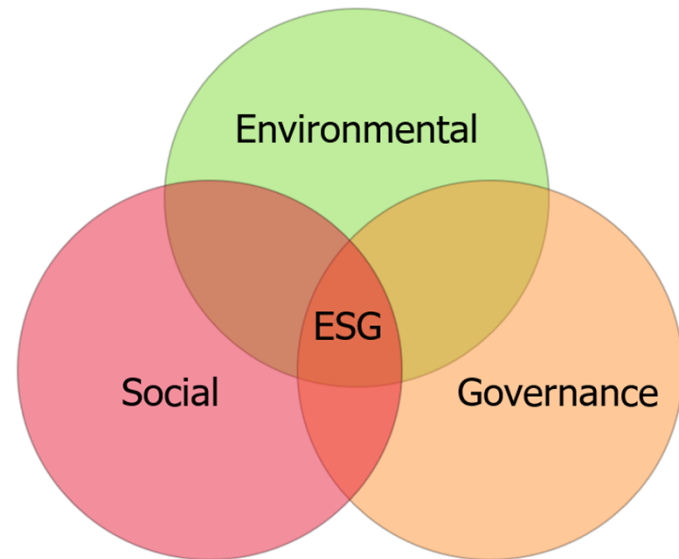
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Discussion Topics

- **ESG Basics**
- **ESG in Practice and in the US**
- **US compared to EU/UK**
- **What's new with ESG?**
- **ESG Risk Management**
- **ESG Disclosures**
- **What's on the Horizon?**

ESG Basics

- **Why are we here?**
- **Why is ESG part of the May-rathon series?**



Environmental

**Climate Change Policy
and Carbon Emissions**

Deforestation

Air and Water

Environmental

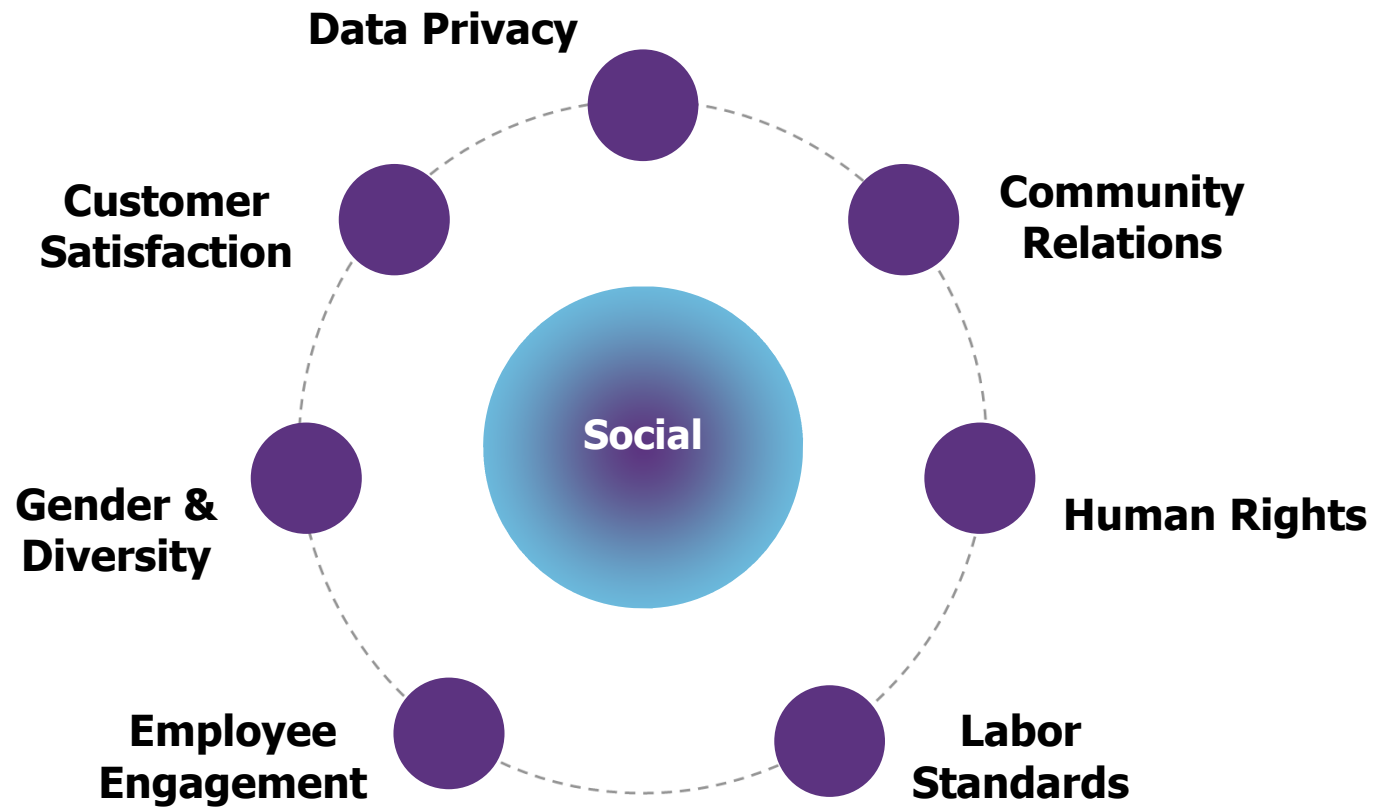
Energy Efficiency

Biodiversity

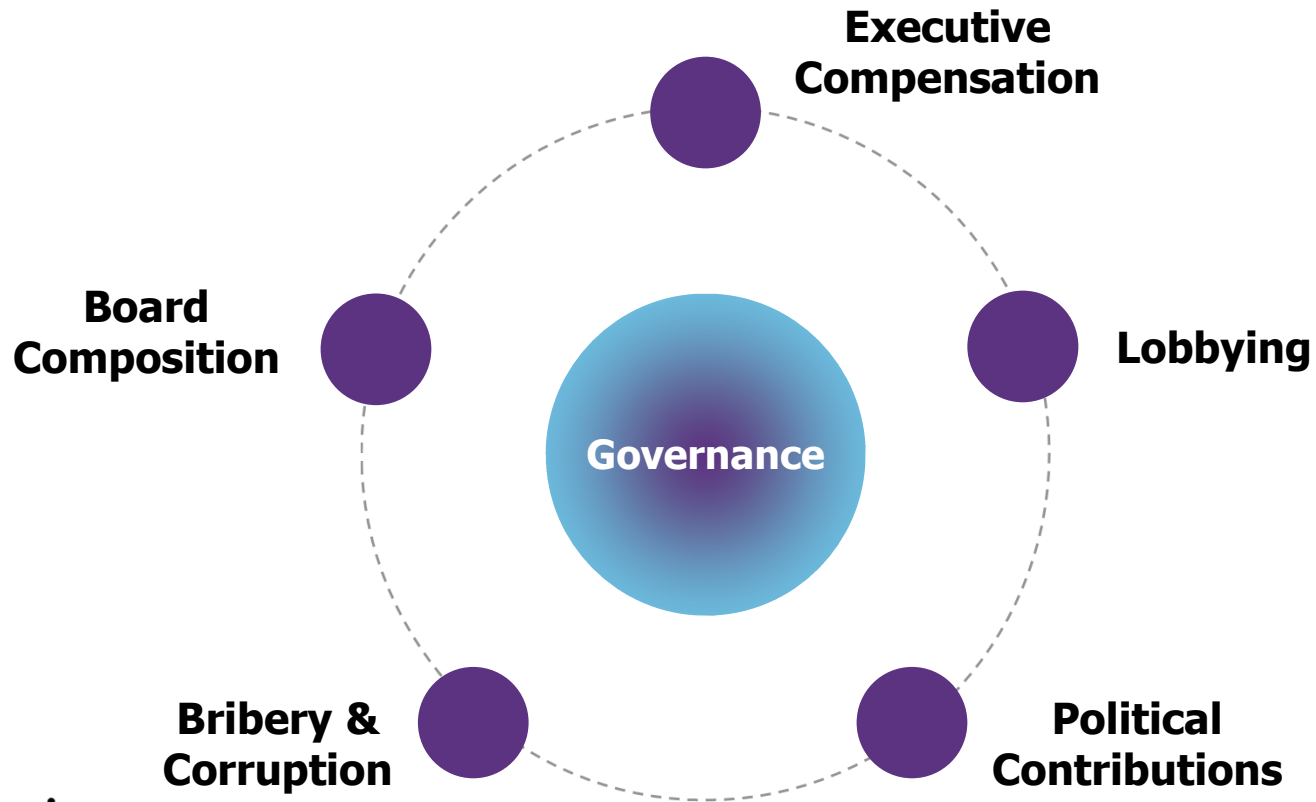
Waste Management

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Social



Governance



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ESG Basics

- **Decades of History & Related Concepts**
 - Socially Responsible Investing (SRI)
 - Corporate Social Responsibility (CSR)
 - Impact Investing
- **Misconception of an exclusive focus on “morals” or “norms”**

ESG Basics

- **Various Investing Approaches**
 - Negative screens (typically values-based)
 - **Proactive sustainability-focused analytics/perspective — “ESG investing”**
 - Corporate engagement and impact investing
- “Consider ESG as a **lens** through which **investors** can identify **potential investment risks** and **opportunities** in a **systemic way**”
 - *United Nations Principles for Responsible Investment*

ESG in Practice

Voluntary Frameworks and Standards

Carbon Disclosure Project (CDP)

Global Reporting Initiative (GRI)

Climate Disclosure Standards Board (CDSB)

International Integrated Reporting Council (IIRC)

Climate Financial Risk Forum

Principles for Responsible Investment

Sustainable Accounting Standards Board (SASB)

TCFD recommendations on climate-related disclosures

ESG in Practice

- Ratings agencies
- Second-party opinions
- ESG corporate policies
- Questionnaires

- **Greenwashing**

ESG in EU/UK compared to US

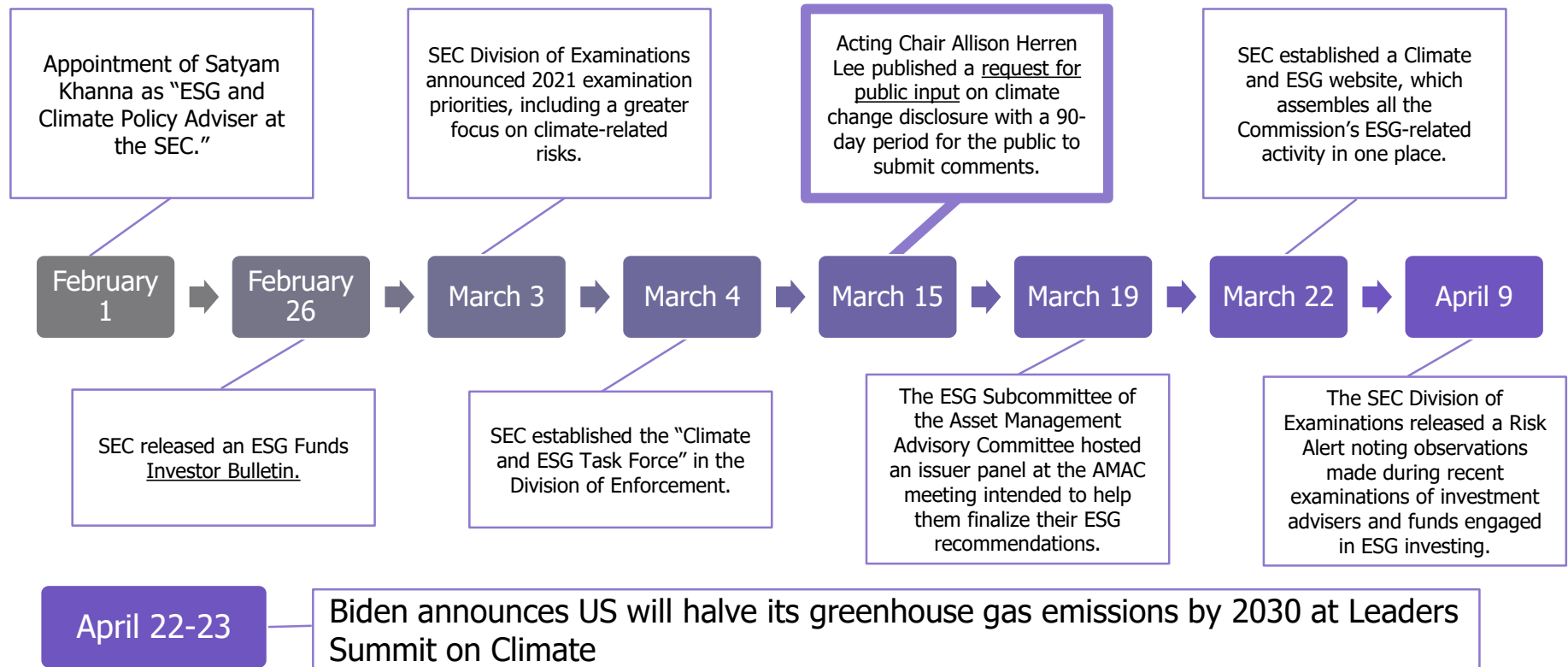
- **EU/UK**
 - **Mandating Disclosures**
 - **Regulatory Action**
 - **Innovating Terms**

- **US**
 - **Financial Materiality Threshold**
 - **Enforcement**
 - **Market Participants**

ESG in Practice in the US

- **Historical participants** (DFIs, impact investors, mission funds)
- **Environment, Energy, Climate** (as a driver)
- **ESG & Social Funds & Frameworks**
- **Growing Investor Pressure**
- **Financial Materiality Threshold**
- **Change in Presidential Administration**

ESG in Practice in the US (Biden & SEC Activity)



ESG in Practice in the US

- **Sustainability-linked pricing adjustments in syndicated loan market**
- **LSTA/LMA/APLMA's**
 - Sustainability-Linked Loan Principles, May 2020
 - Green Loan Principles, updated February 2021
 - Social Loan Principles, April 2021
- **Focused on:**
 - Sustainability Strategies, Target Setting, Use of Proceeds, Project Evaluation and Selection, Management of Proceeds, Reporting



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ESG in Practice in the US

Corporate and Finance Client Questions:

- ESG Disclosures
- ESG Diligence Questionnaires
- ESG KPIs, Reporting
- Sustainability Pricing Terms
- ESG/Sustainability Covenants

ESG in Practice in the US

ESG Disclosures & Diligence Questionnaires:

- No market standards
- Vary by framework (if using)
- Vary by industry (see SASB materiality map)
- Can involve third-party consultants/auditors
- Can involve third-party ratings

ESG in Practice in the US

ESG KPIs, Reporting:

- No market standards, but most commonly annually
- Requires agreed-upon baseline report, score, metric
- Bespoke, industry, and business-reliant
- Inherent risk without third-party involvement

What's Next?

What is the potential impact in the US market?

ESG Issues for Technology Companies to Consider

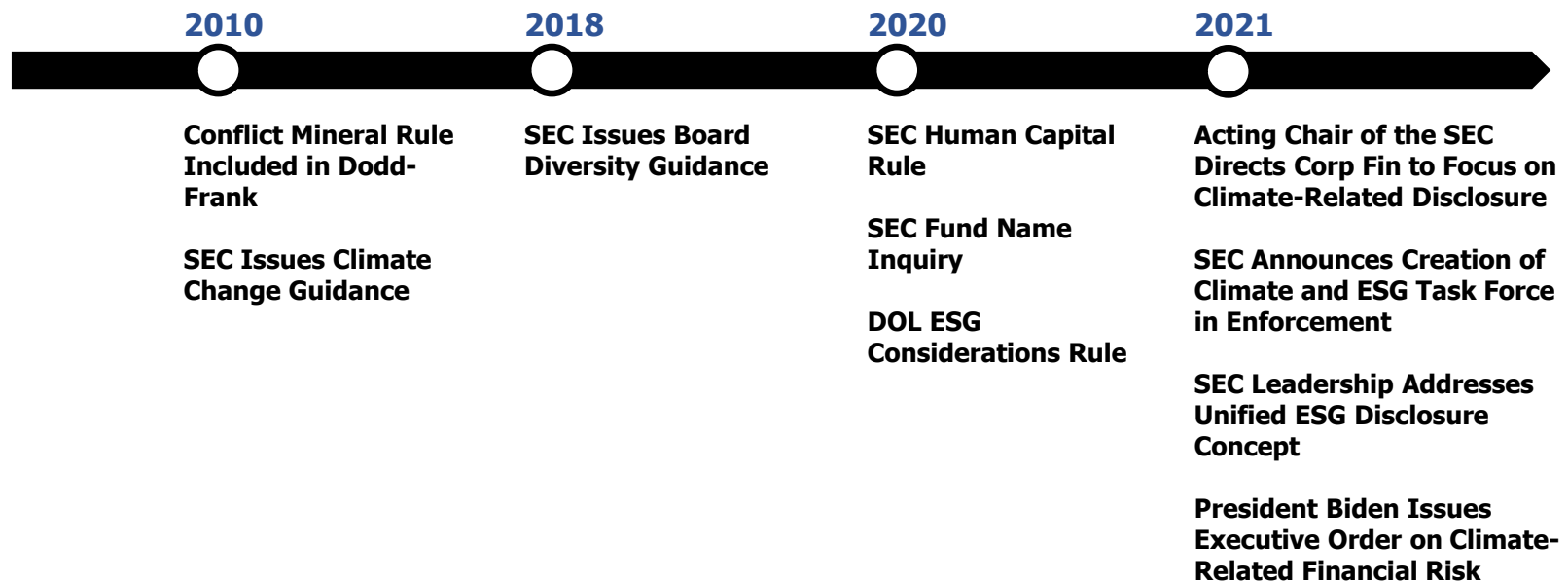
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What's new with ESG?

- Continued push from the Biden administration/SEC leadership to advance climate change efforts
- Focus on D&I initiatives and disclosure will continue
- Expect to see more of a push on quantitative disclosure of human capital information
- ESG litigation hasn't been quite the bomb everyone expected ... but there's still time
- Tailwinds from Europe and a GAAP-like ESG standard? Not yet.

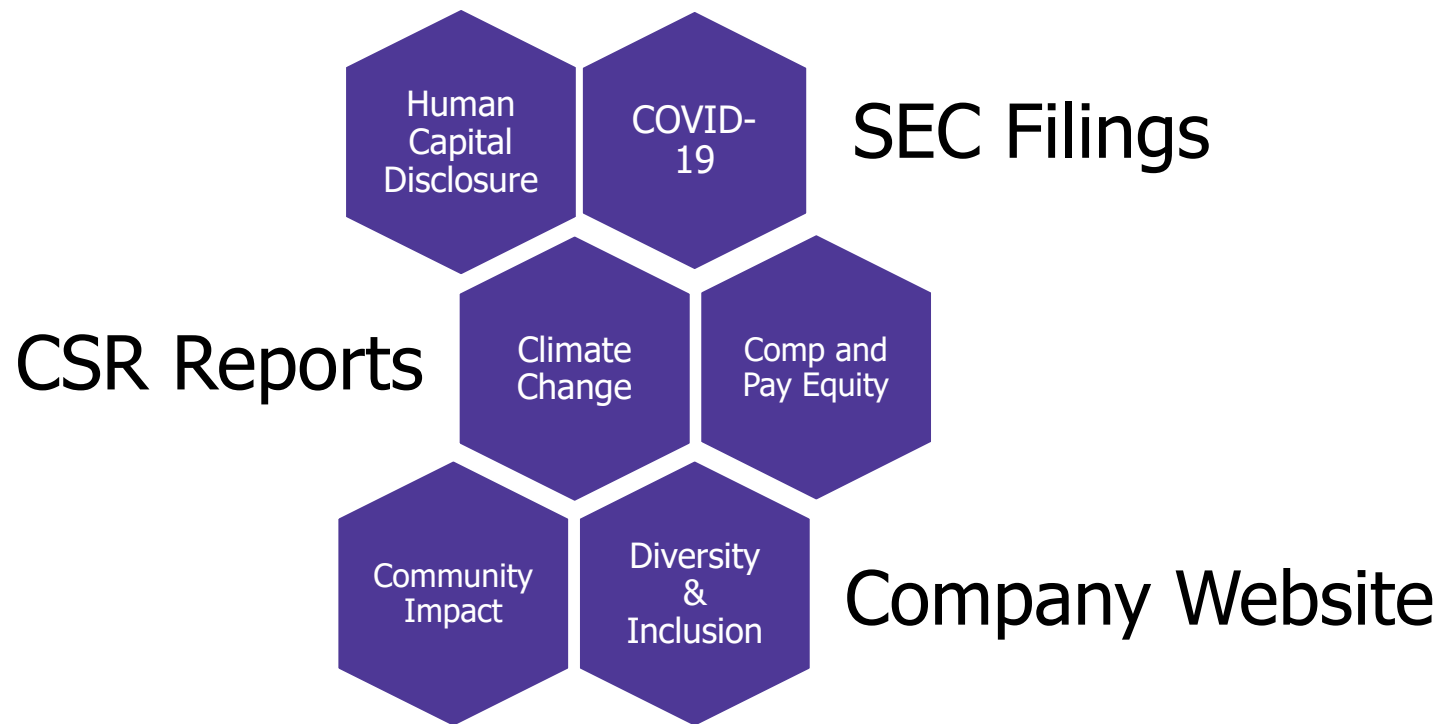
What's new with ESG?



Difference Between ESG and CSR

- Corporate Social Responsibility (CSR) is an older concept that corporations should be accountable to society and not invest in harmful or unethical businesses
- We can think of CSR as a precursor to ESG
 - CSR lacked the focus on measurability of results using key performance indicators (KPIs) or reference to third-party standards/metrics, which came out of impact investing
 - Criticized for being a footnote in an annual report or marketing tool

Where Do Companies Address ESG Disclosures?



Focus on ESG litigation

- An April 2021 study¹ states that global climate litigation has grown dramatically in recent years:
 - Between 1986 and 2020, 1,727 litigation cases were documented worldwide: 1,308 in the US and 419 in other jurisdictions and regional and international courts
 - More than half of the total recorded cases have been brought since 2015
- ESG litigation to date has focused on climate change or catastrophic environmental events
- Expect to see this broaden to also include social issues, such as D&I and social conditions at supply-chain partners
- Public companies are exposed to the following types of ESG litigation:
 - Litigation focused on a company's business and operations as they relate to ESG issues
 - Litigation focused on governance
 - Litigation focused on a company's ESG disclosures
 - Litigation alleging breach of duty of care or duty of loyalty
 - Informal ESG disputes

1. The Geneva Association, *Climate Change Litigation: Insights Into the Evolving Global Landscape*, April 2021

ESG Risk Management – Things to Consider

- Institutional investors and proxy advisory firms are focusing heavily on Board oversight of ESG and ESG risk management
- Keep the following in mind:
 - Lack of measurability and reporting standards – currently, there is 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
 - Increased SEC regulation (e.g., human capital) and enforcement limiting board discretion
 - Increased federal and state legislation (e.g., Senator Warren’s proposed Accountable Capitalism Act, California legislation mandating board diversity) limiting board discretion or creating private rights of action

ESG Risk Management – Best Practices

- Fulsome and Continuous Education on Relevant ESG Topics
 - Ensure management has appropriate ESG knowledge as it impacts KPIs and business
 - Build in board oversight, and identify in public disclosures which committees/directors have responsibility for ESG matters; ensure that the directors with this responsibility have the requisite knowledge
 - For external reporting on KPIs, consider how data is collected and managed internally
- Focus on Public Disclosure
 - Conduct internal audits of ESG-related disclosures, and ensure that all statements can be backed up
 - For particularly material ESG disclosures, consider third-party verification
 - Consider what frameworks are currently used for reporting, and what frameworks may be used in the future – and prepare accordingly
 - Use forward-looking statements where appropriate
 - Know the difference between disclosing commitments/targets and stating aspirational goals

ESG Litigation – The Latest

- In March 2021, a U.S. District Court (N.D. Cal.) granted Facebook’s motion to dismiss a lawsuit filed against it alleging that Facebook made misleading statements about diversity
- The plaintiffs’ lawyers argued that statements in the 2019 and 2020 proxy statements — that Facebook is committed to diversity — were materially false
- The court found that the plaintiff did not plausibly plead a materially false statement because, among other matters, the aspirational assertions in the proxy statements were non-actionable
- The court’s opinion also provided a summary of whether statements in a proxy or other SEC filings are in the nature of “non-actionable puffery or aspirational,” such as:
 - Statements to commit to certain “shared values” are not capable of objective verification
 - Statements about commitment to a “diverse workforce” and “an inclusive and positive working environment” were “immaterial puffery”
 - Commitment to ethical practices is “inherently aspirational and hence immaterial”
 - Commitment to highest standards of governance is “quintessential, non-actionable puffery”



Disclosure?

Consider:



Industry.

What specific ESG disclosures are germane to our industry?



Peer group.

What are our peers doing?



Level of stakeholder engagement.

Have we received feedback from shareholders, employees, board members, activists, proxy advisors, or other institutions?

Unified Disclosure Standard?

- In July 2020, the GAO issued a report acknowledging the lack of comparable ESG disclosures
 - Sen. Warner: “It is time for the SEC to establish a task force to establish a robust set of quantifiable and comparable ESG metrics that all public companies can adhere to”
 - In August 2020, SEC Commissioner Allison Herren Lee said that the SEC should “get investors the standardized, consistent, reliable, and comparable ESG disclosures they need to protect their investments and allocate capital toward a sustainable economy”
- In his 2020 letter to CEOs, Larry Fink asked companies to report based on TCFD and SASB recommendations; in his 2021 letter, Mr. Fink stated the following:
 - **We strongly support moving to a single global standard**, which will enable investors to make more informed decisions about how to achieve durable long-term returns
- More recently, **SEC leadership has expressed support for a unified disclosure standard**

1

From PwC's 2020 annual corporate directors' survey on ESG:

- 55% of directors considered ESG issues to be a part of the board's enterprise risk management discussions
- 49% saw a link between ESG issues and the company's strategy
- 51% recognized that ESG issues were important to shareholders
- 38% said ESG issues have a financial impact on the company's performance—down from 49% in 2019
- 32% thought that the board needed more reporting on ESG-related measures

2

NYU Stern Center for Sustainable Business analyzed the credentials of directors at Fortune 100 companies

- The study "found that very few sectors and very few companies were adequately prepared at the board level for issues that were already affecting their performance"

3

Remember: Against the backdrop of the current ESG landscape, where many non-stockholder constituencies are asking for a company to act, under Delaware law, directors must always keep stockholders' best interests at the end of business decisions

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What is “Human Capital Management”?

“Human capital management” includes:

- Diversity and inclusion
- Corporate culture and values
- Employee development, wellbeing, and engagement
- Compensation and non-monetary benefits

What is “Human Capital Management”? (cont.)

Human capital disclosure could cover:

- Worker recruitment
- Employment and hiring practices
- Employee benefits and grievance mechanisms
- Workplace health and safety
- Strategies and goals related to human capital management
- Legal and regulatory proceedings related to employee management
- Existence of collective bargaining agreements
- Employee compensation and incentive structures

How to Discuss Human Capital Management?

- Diversity & Inclusion
 - Percentage of diverse leaders (board and executive team)
 - Percentage of diverse hires
 - Percentage of diverse workforce
- Employee Health & Wellness
 - Health and safety metrics
 - Favorable changes in recordable injury rate
- Compensation & Benefits
- Employee Hiring, Development & Retention
 - Attrition rates
 - Internal survey metrics
- COVID-19

What's On the Horizon?

- President Biden's campaign promise to require companies to disclose climate risks and GHG emissions ⇒ coupled with leadership changes, this translates to additional SEC action on this front
- Increased transparency on D&I initiatives
- Additional push to disclosure framework harmonization
- Heightened risk of litigation centering on ESG disclosures
- Continuing impact of COVID-19
- Compensation tied to ESG metrics
- ESG activism

Takeaways

- Benchmark ESG efforts against peers and broader industry
- Ensure that all ESG disclosures are thoroughly vetted
- Consider integrating TCFD and SASB frameworks, and identify material metrics
 - Indicate in the body of the disclosure document how factor correlates to each reporting framework being used
 - Indicate the extent to which a framework element is not being reported upon and why
- Highlight the intersection of programs with UN SDGs or other UN initiatives
- Highlight participation in industry ESG-related initiatives

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Questions?

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Before we begin: Morgan Lewis and Global Technology

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Check back to our Technology May-rathon page frequently for updates and events covering the following timely topics:

21st Century Workplace	Diversity, Environment, Social Justice	Medtech, Digital Health and Science
Artificial Intelligence and Automation	Fintech	Mobile Tech
Cybersecurity, Privacy and Big Data	Global Commerce	Regulating Tech

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Biography



Matthew Edward Scherneck

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Matthew advises direct lenders, mezzanine investment funds, and venture capital investors in a variety of debt and investment transactions with borrowers of all sizes, types, and structures. Matthew also counsels private equity clients and corporate borrowers on domestic and cross-border acquisition financings, out-of-court restructurings and workouts, bankruptcy matters, ESG and impact investment financings, and real estate financings. Matthew leads transactions spanning diverse industries, including financial services, real estate, retail, life sciences, healthcare, technology, food and beverage, hospitality, film and music entertainment, media, and telecommunications.

Matthew advises clients of all kinds on the financing aspects of sustainable investments with a broader social impact. He has broad knowledge and experience structuring and negotiating loan documents to embed and track social impact through ESG-oriented covenants and impact investment financing transactions.

Matthew serves as the New York office local practice group leader for the finance practice. He also serves as a leading member of the Morgan Lewis CARES Act Loan Program Task Force, working with this cross-practice team, composed of 40-plus lawyers, to advise hundreds of clients and colleagues on all aspects of COVID-19-related federal loan programs, namely the Main Street Lending Program, on which Matthew co-authored market-leading publications, and the Paycheck Protection Program. Matt has also been sought after by top-tier organizations to speak on market practice during the COVID-19 pandemic, including the Loan Syndications and Trading Association (LSTA) and the American Bar Association (ABA).

Biography



Celia A. Soehner

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Celia 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.

In keeping with Morgan Lewis's commitment to serving the public good, Celia serves as chair of the Pittsburgh office pro bono committee. Celia also is actively involved in the local arts community, including through her service on the board of directors of the Pittsburgh Opera.

A central tenet of Celia's practice is ensuring that companies and their boards are abreast of the latest disclosure, governance, and regulatory issues and trends. To this end, Celia often presents at events and webinars on topics relating to SEC initiatives and corporate governance and executive compensation hot topics, and helps to lead the Morgan Lewis Public Company Academy.

While at the SEC, Celia received the 2011 Chairman's Award for Excellence, and was a member of the Rule 14a-8 Shareholder Proposal Taskforce.

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



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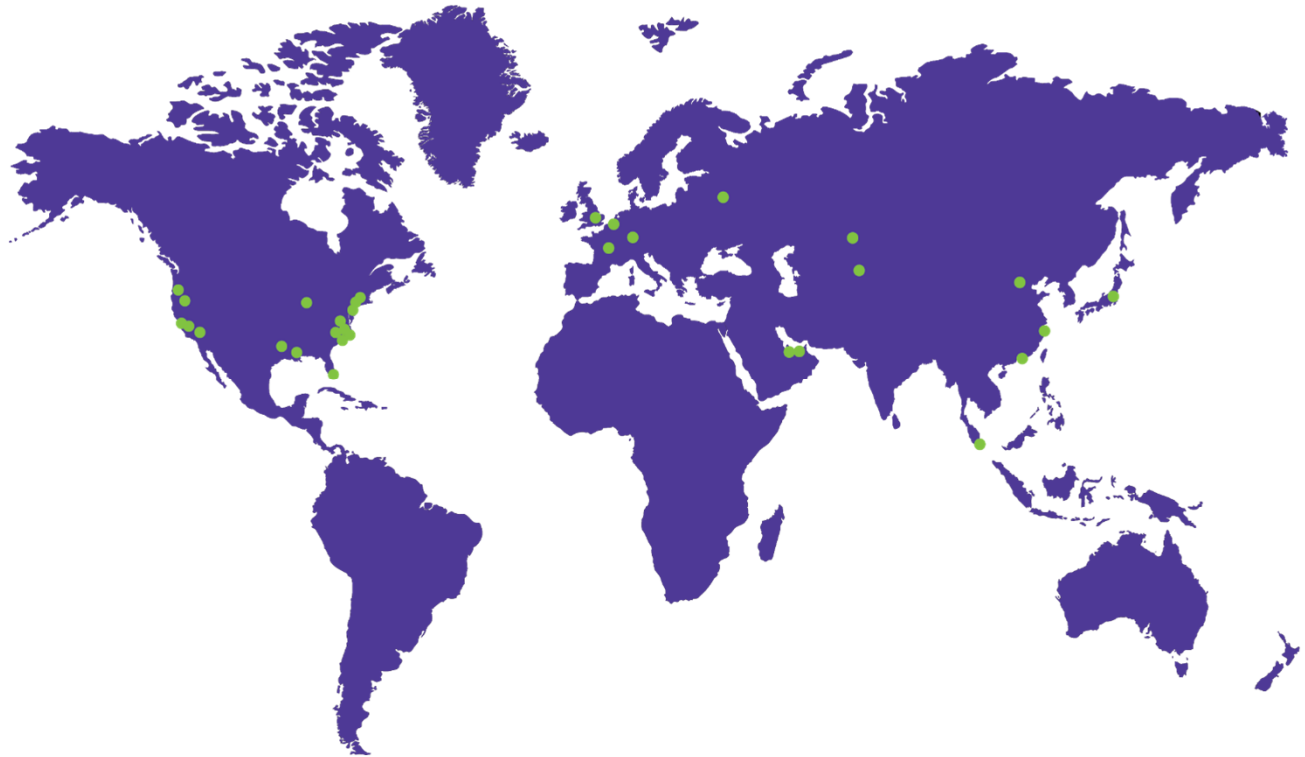
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