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TECHNOLOGY MARATHON

Why Technology Companies Should
Care About ESG Issues

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Presenters



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What Is ESG



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ESG - "The" Trend or Woke Nonsense

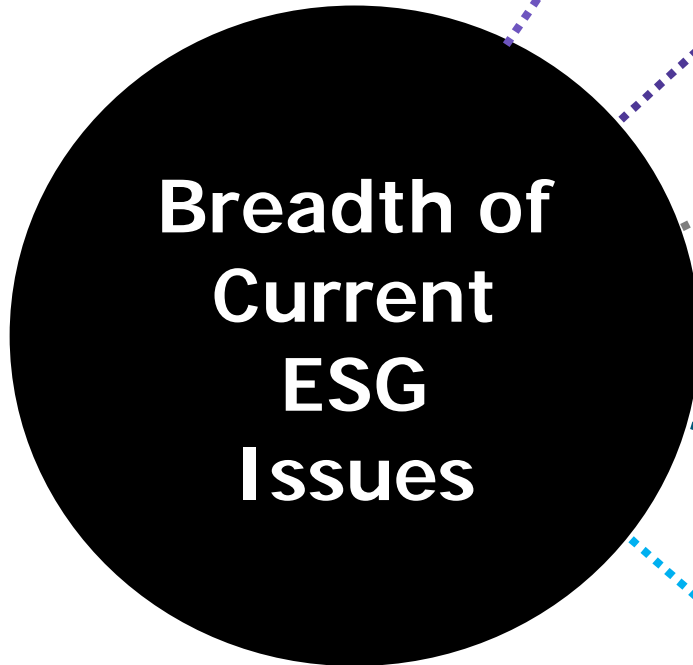
- "The biggest economic trend of 2021 is that we are now in a full blown ESG-driven economy" – *Forbes*, December 2021
 - Director and executive recruitment is focused on ESG expertise like never before
 - Exponential rise in the number of Chief Sustainability Officers and Chief Diversity Officers
 - Companies are now at an inflection point and the overwhelming majority of public companies issue Sustainability/ESG reports
 - Stockholder Capitalism versus Stakeholder Capitalism

But ESG has its critics:

- "ESG investing is a woke scam. It restricts the free flow of capital, undermines U.S. energy freedom ... and advances woke racial and gender ideologie." – Congressman Chip Roy (R-TX) advocating for no ESG in legislation relating to federal employee and retiree investment (HR 7896)
- Elon Musk tweeted that "ESG is an outrageous scam!" after Tesla lost its spot on an S&P Global index that tracks companies on their environmental, social, and governance standards

What is ESG?

E is for "Environment"	S is for "Social"	G is for "Governance"
<ul style="list-style-type: none">• Climate change• Greenhouse gas emissions (GHG)• Energy use• Water use• Pollution• Hazardous waste• Recycling• Sustainability	<ul style="list-style-type: none">• Diversity and inclusion• 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• Supplier practices	<ul style="list-style-type: none">• Board structure and composition (including tenure and diversity)• Executive compensation• Shareholder rights• Enterprise risk management• Audit oversight• Disclosure and reporting• Ethics and compliance• Privacy and cybersecurity



Breadth of Current ESG Issues

CORPORATE, INVESTMENT, & FINANCE

Fund Formation, Investment, Transactional, and Public and Private Company Issues

ENERGY & CLIMATE CHANGE

Clean Energy Technologies, Emissions Reduction and Energy Efficiency, and Regulations Related to the Same

DISCLOSURE & ENFORCEMENT

Regulatory and Disclosure Rules for Investment Advisers, Asset Managers, and Public and Private Companies

ERISA & RETIREMENT PLANS

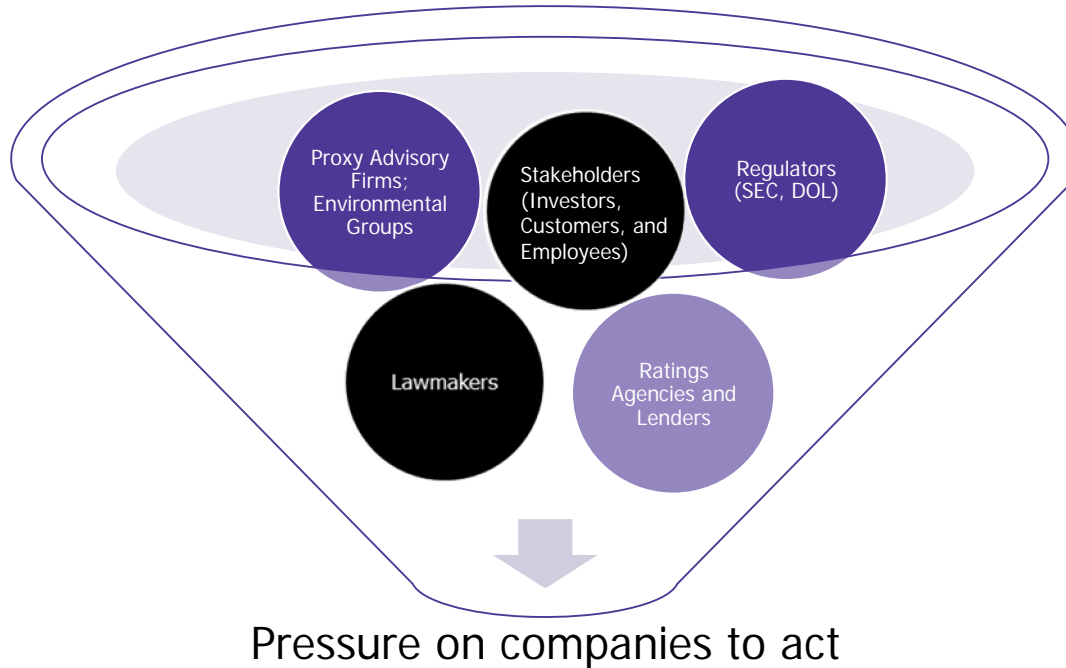
SOCIAL ISSUES

Advancing Diverse, Inclusive, and Harassment-free Workplaces and Ethical Supply Chains

SECURING ESG-RELATED TAX ADVANTAGES

Optimizing Tax Advantages in Transactions Achieving ESG, Sustainable Investing, and Impact Investing Goals

Who Is Paying Attention to ESG



US ESG Regulatory Landscape

SEC – Issuers

- What is “material” and does it even have to be? What data is available and possible?
- Immediate focus on climate risk and carbon sensitivities
- **SEC Proposal (3/21/22): Proposes to require enhanced and standardized disclosures regarding GHG emissions and climate change risks, management, and impacts**

SEC – Funds/Advisers

- Disclosures regarding investments and investment strategies; funds and advisers
- Fund names, compliance issues, reliance on third parties; funds as consumers of issuer data
- **Prediction: Enhanced “names rule” for US - registered funds; ESG disclosure requirements in registration statements; investment adviser disclosures (Form ADV)**

DOL

- ERISA creates challenges for ESG investing–“solely in the interests of the [plan] ... and for the exclusive purpose of ... providing benefits ... and defraying reasonable expenses”
- New proposed rule intended to smooth these challenges
- **Prediction: Proposed Rule passes with ESG examples, but risks another reversal; limited practical impact**

SEC – Examinations/ Enforcement

- Issuers and managers asked to “show their work”; scrutiny of ESG-branded funds and strategies
- Even generic statements can be a trigger for inquiries–many access points to start an examination or investigation that can become an enforcement
- **Prediction: More inquiries; more examinations; more enforcement**

ESG Standards and Frameworks

Standards

Sets forth detailed criteria of “what” should be reported on a specific topic



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Frameworks

Sets forth guidance and provides the contextual frame for the information



ESG Ratings and Scores



S&P CSA



Sample of ESG Key Players

Key players in the ESG ecosystem

Publish guidance for voluntary disclosures

- ▶ Sustainability Accounting Standards Board (SASB)
- ▶ Global Reporting Initiative (GRI)
- ▶ Task Force on Climate-related Financial Disclosures (TCFD)
- ▶ United Nations Sustainable Development Goals (SDGs)
- ▶ Integrated Reporting (IR)
- ▶ Climate Change Disclosure Standards Board (CDSB)
- ▶ World Economic Forum's International Business Council (WEF IBC)

Request data from companies via questionnaires

- ▶ CDP
- ▶ Dow Jones Sustainability Indexes
- ▶ Rating agencies

Aggregate publicly available data from companies

- ▶ Refinitiv
- ▶ Bloomberg

Create assessments of companies based on public and/or private information to sell to investors

- ▶ FTSE4Good
- ▶ MSCI
- ▶ RepRisk
- ▶ Truvalue Labs
- ▶ Sustainalytics
- ▶ S&P, Moody's

Source: https://www.ey.com/en_us/board-matters/five-ways-boards-can-unlock-esg-s-strategic-value

ESG and Technology Companies



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Tech Companies: Thinking Vs. Doing



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Source: KPMG ESG Imperative for Tech Companies (April 2020)

Why Tech Companies Need to Think About ESG

- Perception of profitability correlation
- Differentiation from, or keeping up with, peers
- Aligning with stakeholders (customers, investors, and employees)
- Proxy for preparedness
- Reputational risk
- Access to growing investment capital earmarked for ESG
- Future positioning for enhanced global regulations and policy

Benefitting Stakeholders and Stockholders

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

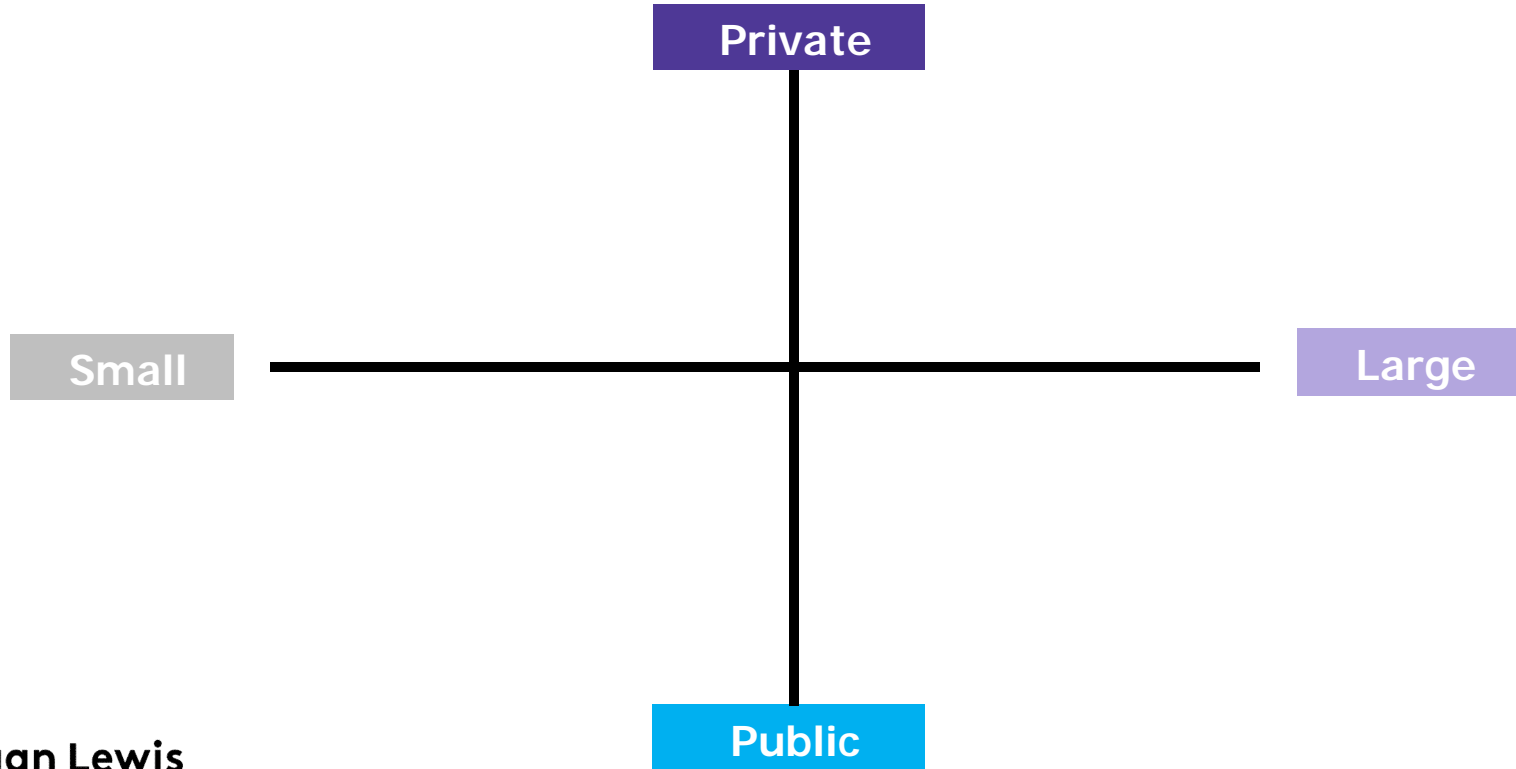
- Increasing employee wages
- Allocating resources to diversity and inclusion initiatives
- Offering fair terms to small, local suppliers and ensuring supply chain integrity
- Giving back to, and conscientiously engaging with, local communities
- Adopting environmentally sustainable measures

Challenges for Tech Companies

- Upfront costs
- Green versus gold
- No national/global standardization
- Need to measure and track related metrics to avoid claims of “greenwashing”
- Linking growth strategy with wider societal purpose
- Lack of in-house expertise

ESG - Not One Size Fits All

Larger Cap Public Companies Lead the Way Because of Greater Resources and Reporting Obligations



Why ESG Needs Tech Companies

- Driver of local and global economies
- Fulfillment of many ESG objectives requires digital transformation and IT innovations
 - Datacenter sustainable energy
 - Robust cybersecurity
 - Leadership spotlight
 - Technology will underpin processes and products to improve ESG commitments

Organizing for ESG



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Best Practices for Implementing an ESG Program

- Define ESG goals, KPIs, and rating systems/metrics (including measurement and tracking), looking at peers/competitors
- Identify key areas for impact; Examples:
 - Responsible supply chain management
 - Diversity commitments
 - Transparency in corporate governance
- 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
- Adjust regularly

Board of Directors and 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 and 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. Stockholder primacy does not 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 Inc. S’holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013)).
- 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 shareholder value.

Advising Boards on ESG

- 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

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

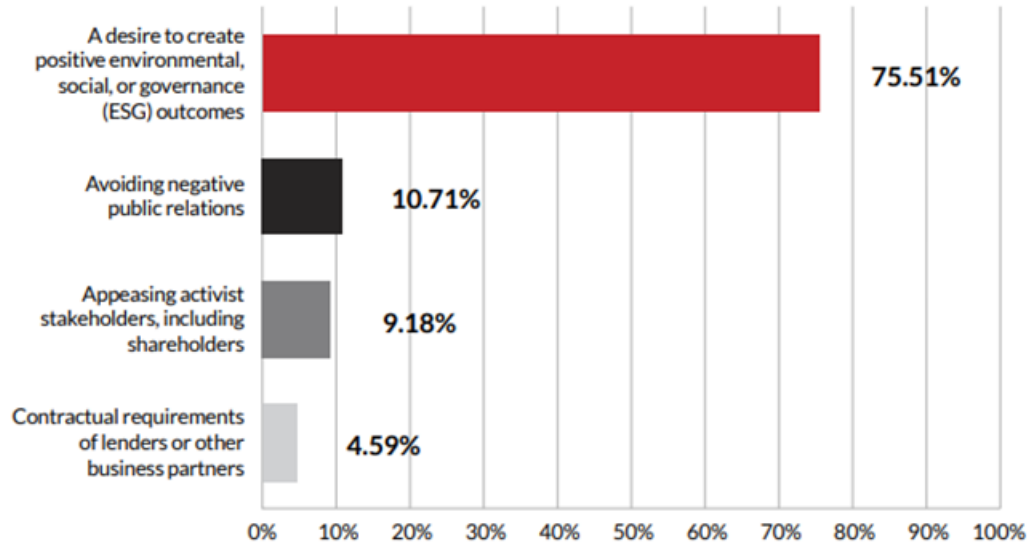
Publicizing ESG



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What Drives ESG Disclosures?

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



Source: *Intelligize Survey (August 2021)*

US ESG Reporting

- In the United States, there are **currently no federal requirements for mandatory ESG disclosures** but the SEC under Chairman Gensler is moving quickly to increase prescriptive disclosure requirements. Current politics in the Congress do not support further ESG disclosure legislation (e.g., removal of SEC reporting requirements from Uyghar Forced Labor Prevention Act). Litigation likely over SEC climate change proposal on Constitutional grounds (“compelled speech”) among others.
- Push for greater transparency; nowhere to hide in the digital age.
- Only 18% of directors say they support mandatory reporting or disclosure, while 67% support the current, voluntary approach. 94% said they are offering some voluntary disclosure already. Latest PWC Board Survey (2021).

Global Trends in ESG Reporting for 2022

- 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 July 2021, the Global Reporting Initiative announced that it was working with the EU on sustainability standards
- 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

Global Trends in ESG Reporting for 2022

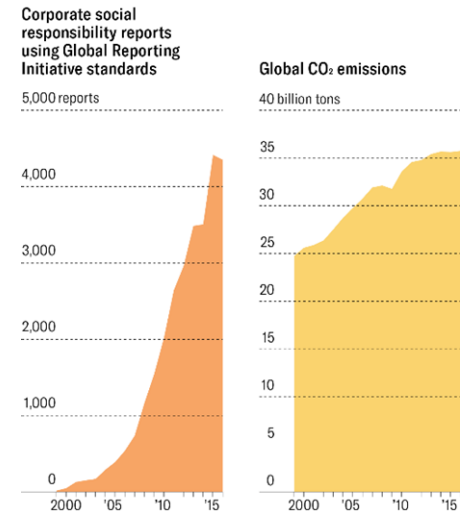
- Effective June 1, 2022 China published its first ESG disclosure standard, the “Guidance for Enterprise ESG Disclosure”
 - Developed with strong focus on Chinese laws, regulations, and policies
 - 3 secondary indicators for environmental, 4 indicators for social and 3 indicators for governance, with 35 tertiary indicators 118 metrics (including one for the disclosure of Scope 3 greenhouse gas emissions)
- April 20, 2022, the FCA published final revisions to the UK Listing Rules and Disclosure Guidance and Transparency Rules to improve transparency on the diversity of boards of directors and executive management of UK-listed issuers
- 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

Sustainability Reports

- Key instrument for disclosure and communication of ESG goals for a company and the company's progress toward them
- Benefits:
 - Helps an organization set goals and measure performance
 - Accountability
 - Positive press
- Downsides
 - Lack of clear impact
 - Greenwashing
 - Confusion and inattention
 - SEC enforcement and private litigation risk

Growing CO₂ Levels Despite Heightened Attention

The dramatic increase in corporate reporting on social and environmental performance hasn't curbed carbon emissions.



Source: Global Reporting Initiative; Worldometer

HBR

Sustainability Reports Example

About this report

The scope of this 2021 sustainability report is Nokia Group. In our reporting, we are committed to expanding our transparency and our coverage. Our report is prepared in accordance with the GRI Standards: Core option. As part of our reporting, we also take into account other sustainability reporting frameworks, such as SASB Standards and the UN Global Compact. Our selected key sustainability indicators have been assured by Nokia's independent auditor, Deloitte.

This report was published in March 2022 and it is only available in digital format. The report can be found online at www.nokia.com/about-us/sustainability. We have published annual corporate responsibility reports since 1999 and the reports are available in digital format from as far back as 2003 in our report archive.

Sustainability highlights and challenges in 2021

What we did well...

- ✓ By the end of 2021, we had secured 214 commercial 5G deals and launched 74 live 5G networks with our customers.
- ✓ We continued to invest in innovation to drive down energy consumption of our products. Our product portfolio innovations included our next-generation AirScale 5G portfolio with new ReefShark powered plug-in cards and FP5, our fifth generation of high-performance IP routing silicon.
- ✓ The customer base station sites we modernized used on average 46% less energy than those where our customers did not modernize.
- ✓ We joined the RE100 initiative and accelerated our climate ambition by setting a new 100% renewable electricity target across Nokia facilities, including offices, R&D labs and factories.
- ✓ We received the COP26 Compass award for capacity-building in our supply chain.
- ✓ We were again acknowledged as one of the World's Most Ethical companies by the Ethisphere Institute in early 2022.
- ✓ We announced a new flexible work approach giving employees more choice regarding their working hours and location, as part of our future at work development.
- ✓ We connected 90 schools to the internet in Kenya together with UNICEF and Safaricom. Our long-term cooperation with UNICEF Finland was further strengthened as we finalized our four-year program in Indonesia and launched a new program in Morocco to empower youth with digital, entrepreneurial and environmental skills.

What we need to do better...

- ✓ We deeply regret the four fatal incidents involving people working on our behalf. Of these incidents, none involved our own employees and four involved our contractors or subcontractors.
- ✓ Despite our efforts, we missed our target to reach a minimum of 26% female hires in all global external recruits. Instead, the share of women was 25%. Although we did not meet our target, the focused actions by all our business groups resulted in an increased share of women hired in nearly every quarter compared to the previous quarter. In 2022, our business groups will continue with strengthened campus hiring and focused efforts in their key hiring locations, and we aim to increase our outreach and talent attraction activities.

US Chamber of Commerce Best Practices for ESG Reporting

- 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 its ability, between the ESG topics on which it reports 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

- 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

- 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

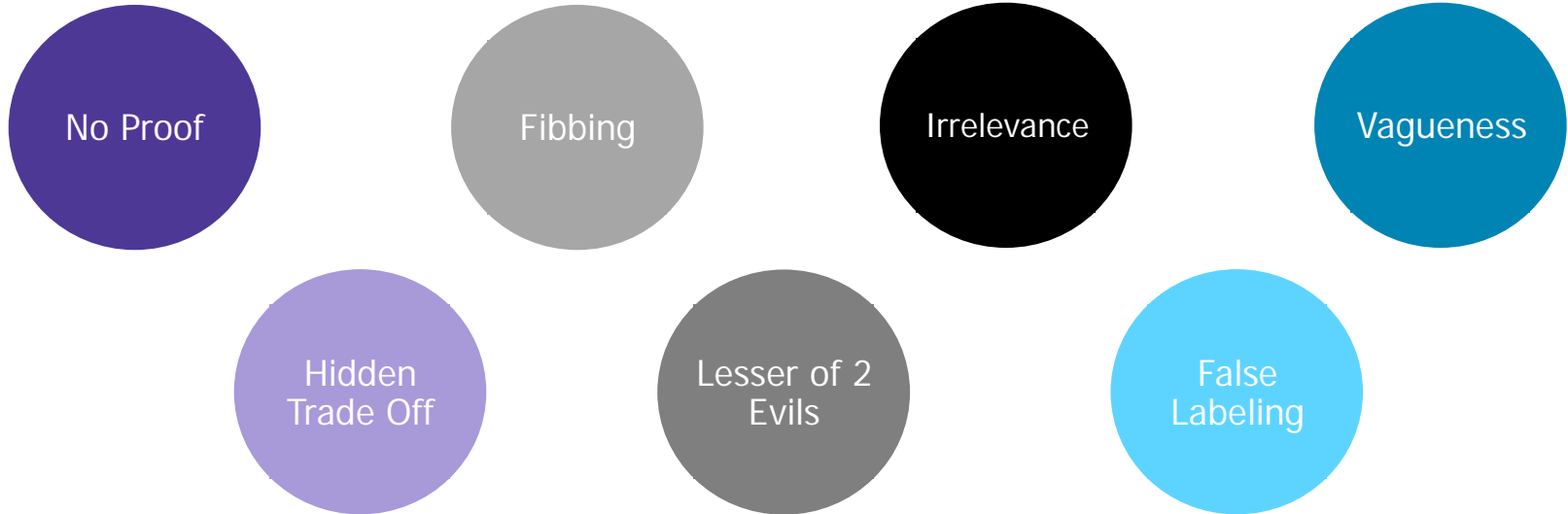
Greenwashing and Trends of Note



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Greenwashing

- Creating false or misleading information to persuade the public that an organization's policies, goals, products, supply chain, etc. are environmentally friendly



Greenwashing

- 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
- March 30, 2022, European Commission proposed a series of changes to existing EU consumer rules aiming to address greenwashing of consumer products
- Consequences
 - Significant erosion of stakeholder trust, high turnover rate and loss of profits
 - Damage to brand
 - SEC enforcement and private lawsuits

Trends in ESG

- Net Zero/Scope 3 Emissions
 - According to *Harvard Business Review*, more than 2,000 companies have set a science-based carbon target
 - Extensive comments and opposition to SEC's proposed climate change regulations; concern particularly with reporting on Scope 3 emissions
- Forced Labor
 - Effective June 21, 2022, the Uygher Forced Labor Prevention Act will create a reputable presumption that imports of products from China's Xinjiang Uyghur Autonomous Region are made from forced labor and should be excluded from importation into the United States

Trends in ESG



NEW YORK (June 13, 2022) – ISS ESG, the responsible investment arm of Institutional Shareholder Services Inc. (ISS), today announced the launch of its [Modern Slavery Scorecard](#), which enables investors to identify, evaluate and prioritize modern slavery risks in their global portfolios and supports their modern slavery and supply chain related reporting. The scorecard provides a holistic assessment of modern slavery risks in operations and supply chains, preparedness to address those risks, and links to modern slavery controversies.

Trends in ESG

- DE&I
 - Companies continue to expand diversity and inclusion efforts, including by establishing Chief Diversity Officer positions
 - PWC Board Survey 2021
 - Only 33% of directors believe that board diversity can “happen naturally,” compared to 71% last year. “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.
 - While in the last 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.
 - 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%, compared to 26% last year). In addition, 27% say that the push for diversity can result in boards nominating unqualified candidates to address these issues.

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 more than 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 TCFD
- Perception of lack of alignment between aspirations of net zero versus concrete plans to actually achieve these goals

Takeaways



ESG is here to stay



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 continued increase in ratings and guidance on ESG

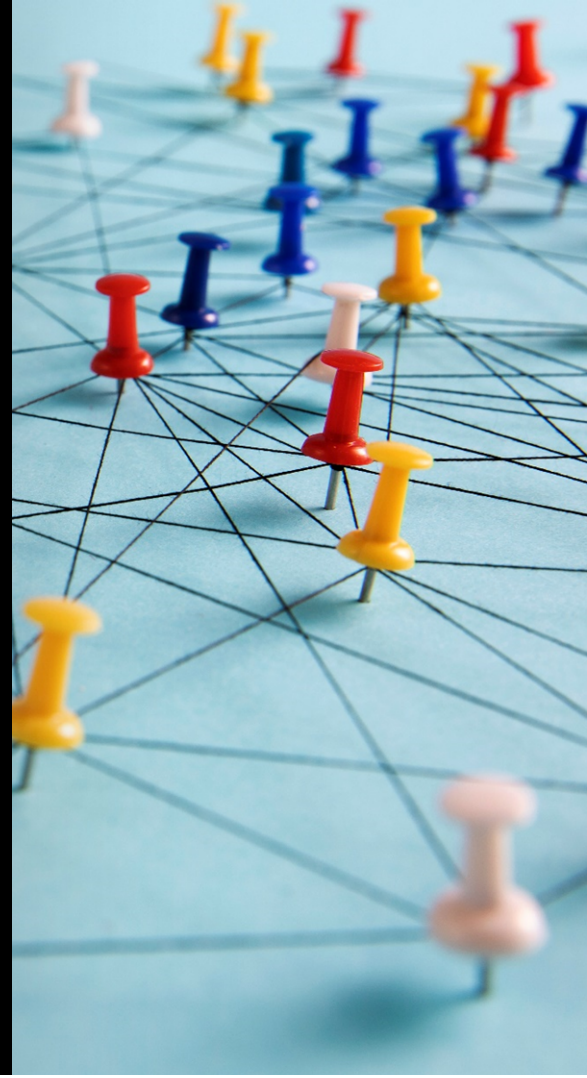
Ukraine Conflict Resources

Our lawyers have long been trusted advisers to clients navigating the complex and quickly changing global framework of international sanctions. Because companies must closely monitor evolving government guidance to understand what changes need to be made to their global operations to maintain business continuity, we offer a centralized portal to share our insights and analyses.

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To help keep you on top of developments as they unfold, visit the website at www.morganlewis.com/topics/ukraine-conflict

To receive a daily digest of all updates, please visit the resource page to **subscribe** using the “Stay Up to Date” button.



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Karen A. Abesamis focuses her practice on mergers and acquisitions, strategic and venture capital investments, and technology transactions. She advises on general corporate matters, including securities compliance and corporate governance. Karen also advises social impact investors and private foundations on a range of impact investments and environmental, social, and governance (ESG) matters. Her clients include public and private companies, financial institutions, venture capital funds and corporate investors.

Having practiced in the Bay Area for more than a decade, Karen has significant experience working with technology companies and non-technology companies that are finding opportunities to grow through the use of technology.

Prior to joining Morgan Lewis, Karen interned with the Securities and Exchange Commission's Enforcement Division, and worked in-house at Sun Microsystems, Dodge & Cox Mutual Fund, and Visa International. She has also worked in-house through secondment with a firm client.

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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 initiative. He is also an active member of the Ukraine Conflicts Task Force, CFIUS Working Group, Renewable Energy Working Group and Cuba Initiative. Carl is the leader of the Boston office corporate and business transactions practice.

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.

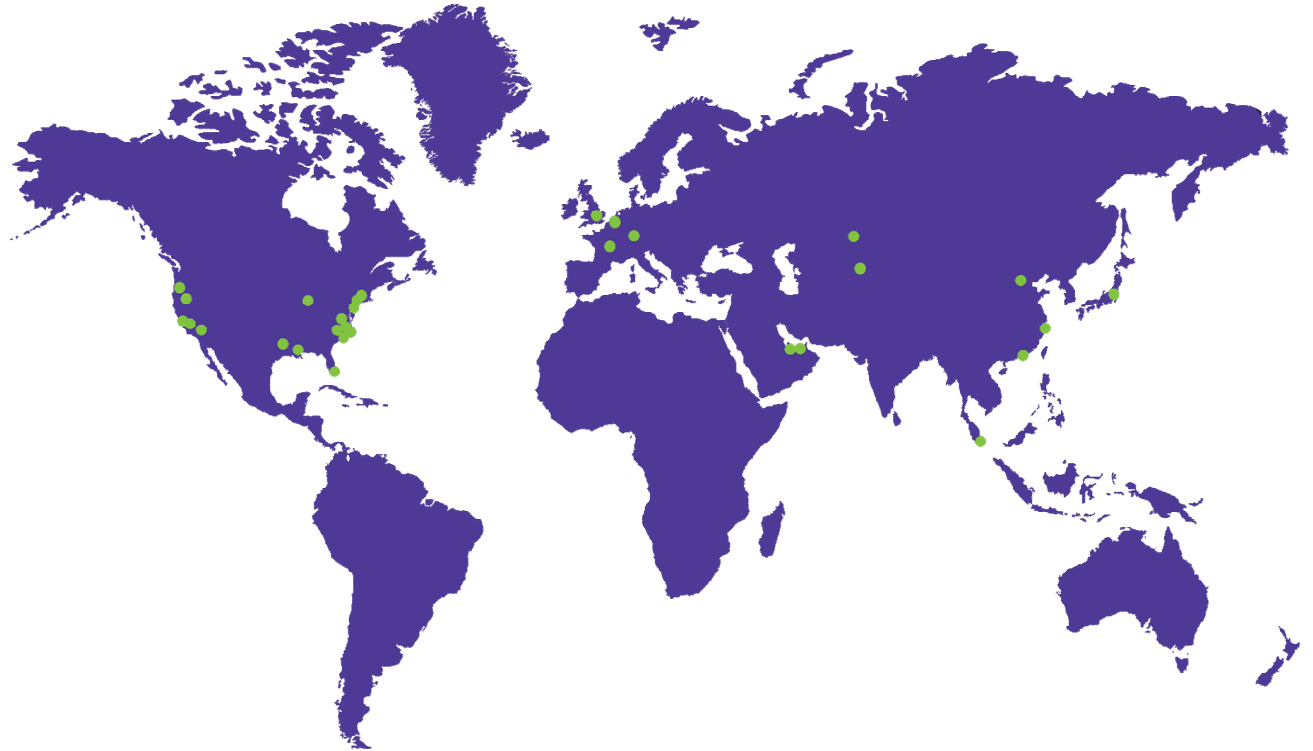
Carl has worked over 30 years in the field of socially responsible and impact investing. He is an adjunct professor at the University of Michigan and New York University Law Schools' International Transactions Clinics, focusing on impact investing. He also serves on the board of advisors of the Michigan Social Venture Fund, the first student-led impact investment fund, and the NU Impact fund. He is a founding member of the Impact Investing Legal Work Group.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

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Frankfurt
Hartford
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Houston
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