ESG, MeToo, and Black Lives Matter: Key Corporate Governance and Workplace Issues

A Practical Guidance® Practice Note by
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This practice note provides guidance on the recent trends in Environmental, Social, and Governance (ESG), the #MeToo movement (#MeToo), and Black Lives Matter (BLM) impacting corporate governance and the workplace. In the aftermath of the recent police killings of George Floyd, Breonna Taylor, Jacob Blake as well as many others, there has been increasing pressure on corporations to take tangible action to address racial injustice in America.

Numerous companies and organizations have responded to these pressures by publicly denouncing racism and discrimination, supporting Black-owned businesses, and donating to causes devoted to combating racial injustice. For example, in June 2020, Bank of America pledged $1 billion to help communities address economic and racial inequality. Similarly, Goldman Sachs launched a $10 million Fund for Racial Equity to support the vital work of leading organizations addressing racial injustice, structural inequity, and economic disparity. While the novel coronavirus (COVID-19) pandemic and the events surrounding the BLM movement have intensified discussions about the importance of addressing social injustice, corporate America already was at an inflection point with respect to its role in society, facing pressures from investors, consumers, and regulators to consider a broader range of stakeholders.

This practice note discusses the following issues regarding the impact of ESG, #MeToo, and BLM on corporate governance and the workplace:

- What Is ESG?
- Board, Management, and Workforce Diversity
- Corporate Culture
- Corporate Compliance
- Data Privacy and Cybersecurity
- Environmental Sustainability
- ESG Best Practices

For more guidance on ESG, see Environmental, Social, and Governance (ESG) Resource Kit. For more guidance on workplace diversity and social and racial justice, see Workplace Diversity, LGBTQ, and Racial and Social Justice Resource Kit.

What Is ESG?

ESG refers to a broad set of considerations that may impact a company's performance, and its ability to execute its business strategy and create long-term value. Socially conscious stakeholders use ESG to measure the sustainability and societal impact of a company and its business activities. While ESG factors can affect a company's bottom line directly, they can also affect a company's reputation, and investors and business leaders are increasingly applying these nonfinancial factors in

their analysis to identify the material risks and growth opportunities of a company.

Companies' ESG Efforts

Industry leaders have pushed hard to advance ESG initiatives. For example, in his 2019 Letter to CEOs, BlackRock, Inc.'s Chairman and Chief Executive Officer Larry Fink encouraged companies to develop "a clear embedment of your company's purpose in your business model and corporate strategy." According to Fink, "Purpose is not the sole pursuit of profits but the animating force for achieving them" and that "profits and purpose are inextricably linked." Thus, companies that fulfill their purpose and responsibilities to stakeholders—including prioritizing board diversity, compensation that promotes stability, and environmental sustainability—reap rewards over the long term.

Likewise, in August 2019, the Business Roundtable issued a statement signed by 181 CEOs on "the Purpose of a Corporation," expressing "a fundamental commitment to all of our stakeholders," including employees, suppliers, and customers, and not just shareholders (emphasis included). Specifically, the Statement on the Purpose of Corporation expressed commitment to delivering value to customers, investing in employees, dealing fairly and ethically with suppliers, and supporting the communities by embracing sustainable practices across businesses.

In line with these goals, following an overwhelming majority vote of 99% of voting shareholders, on February 1, 2021, Veeva Systems, a computer software company, became the first publicly traded company and largest-ever to convert to a public benefit corporation (i.e., a for-profit corporation that must consider the interests of various stakeholders, including employees, partners, customers, and shareholders). The company is also revising its certificate of incorporation to include a public benefit purpose.

In response to increasing pressure from different stakeholder groups—including investors, consumers, and governments—for more transparency about their environmental, economic, and social impacts, more companies are also making disclosures in their annual report or in a standalone sustainability report (also referred to as an ESG or corporate social responsibility report).

Nasdaq's ESG Standards for Companies

Moreover, various institutions are creating standards and metrics to help integrate ESG into the investment process. For example, in May 2019, Nasdaq launched its new ESG reporting guide for public and private companies. Although Nasdaq does not require its listed companies to issue ESG reporting, it may track the participation of listed companies to better support their efforts. Nasdaq's ESG Reporting Guide includes 10 metrics for each of environmental, social, and corporate governance:

Nasdaq's ESG Metrics for Companies

ENVIRONMENTAL (E)	SOCIAL (S)	CORPORATE GOVERNANCE (G)
E1. GHG EMISSIONS	S1. CEO PAY RATIO	G1. BOARD DIVERSITY
E2. EMISSIONS INTENSITY	S2. GENDER PAY RATIO	G2. BOARD INDEPENDENCE
E3. ENERGY USAGE	S3. EMPLOYEE TURNOVER	G3. INCENTIVIZED PAY
E4. ENERGY INTENSITY	S4. GENDER DIVERSITY	G4. COLLECTIVE BARGAINING
E5. ENERGY MIX	S5. TEMPORARY WORKER RATIO	G5. SUPPLIER CODE OF CONDUCT
E6. WATER USAGE	S6. NON-DISCRIMINATION	G6. ETHICS & ANTI-CORRUPTION
E7. ENVIRONMENTAL OPERATIONS	S7. INJURY RATE	G7. DATA PRIVACY
E8. CLIMATE OVERSIGHT/BOARD	S8. GLOBAL HEALTH & SAFETY	G8. ESG REPORTING
E9. CLIMATE OVERSIGHT/MANAGEMENT	S9. CHILD & FORCED LABOR	G9. DISCLOSURE PRACTICES
E10. CLIMATE RISK MITIGATION	S10. HUMAN RIGHTS	G10. EXTERNAL ASSURANCE

Visualization of Nasdaq's ESG Reporting Guide Metrics at 13.

Biden Administration ESG Efforts

The demand for consideration of ESG is not limited to the private sector. As part of his campaign, then-presidential candidate Joseph R. Biden set forth "The Biden Agenda for Women," which promised to pursue "an aggressive and comprehensive plan to further women's economic and physical security and ensure that women can fully exercise their civil rights."

As part of this Agenda, the Biden campaign promised to:

- Improve economic security by fighting for equal pay and expanding access to education and training
- Expand access to high-quality, affordable healthcare for all women
- Expand access to important workplace benefits and protections –and–
- End violence against women

Shortly after President Biden took office in January 2021, he announced the creation of a new Gender Policy Council within the White House—a reformulation of the Obama administration's White House Council on Women and Girls, which the Trump administration had dismantled. The Gender Policy Council intends to have high-level representation in all offices in the federal government and to collaborate directly with every agency to address issues impacting the lives of Americans, and particularly the lives of women.

Entities' and Individuals' Opposition to ESG Efforts

Not everyone has been supportive of these ESG efforts. In response to the Business Roundtable's Statement, the Council of Institutional Investors, which represents many of the same companies as the Business Roundtable and many of the nation's largest pension funds, issued a response stating that "[a]ccountability to everyone means accountability to no one" and that "[i]t is government, not companies, that should shoulder the responsibility of defining and addressing societal objectives with limited or no connection to long-term shareholder value."

Similarly, in a letter dated February 12, 2021, a group of Senate Republicans on the Senate Banking Committee called on the Securities and Exchange Commission (SEC) to reject Nasdaq's recent proposal to require the companies listed on its stock exchange to include women, racial minorities, and LGBT individuals on their boards or explain in a public disclosure why they are not doing so. The letter, written by Senator Pat Toomey of Pennsylvania, expressed that while "[w]e commend individual firms for the proactive efforts they have already made in recruiting, promoting, and maintaining diverse talent . . . it is not the role of Nasdaq . . . to act as an arbiter of social policy or force a prescriptive one-size-fits-all solution upon markets and investors."

Notwithstanding the opposition and resistance to the consideration of environmental, social, and corporate governance factors by some stakeholders, recent events and industry practices indicate a trend toward greater focus on ESG as factors that different stakeholders will consider in evaluating the effectiveness, profitability, and sustainability of a company's corporate governance framework.

Board, Management, and Workforce Diversity

In the aftermath of #MeToo and the BLM movement, there has been a greater push toward gender and racial diversity, not just at the board and management levels, but also in the workforce. Further, where companies fail to meet the expectations set by their stakeholders, they may face serious repercussions.

Investment Firms' Diversity Initiatives

In September 2020, BlackRock Inc., the world's largest asset manager, revealed in its Investment Stewardship Annual Report that it had voted against board directors more than 1,500 times for insufficient diversity. While observing that there has been "significant improvements in gender diversity in the Russell 1000 and the STOXX 600," BlackRock expressed that it is "increasingly looking to companies to consider the ethnic diversity of their boards, as we are convinced tone from the top matters as companies seek to become more diverse and inclusive."

As a follow up, in December 2020, BlackRock announced in its 2021 Stewardship Expectations plans to push companies for greater ethnic and gender diversity for their boards and workforces, and reiterated that it will vote against directors who fail to act. In addition, the asset manager asked U.S. companies to disclose the racial, ethnic, and gender makeup of their employees—known as EEO-1 data—as well as measures they are taking to advance diversity and inclusion.

In January 2021, State Street Global Advisors expressed that its "main stewardship priorities for 2021 will be systemic risks associated with climate change and a lack of racial and ethnic diversity." In a letter to board members,

the president and CEO of State Street Global Advisors, observed that "[r]esearch has shown the positive impacts diverse groups can have on improved decision making, risk oversight, and innovation, as well as how management teams with a critical mass of racial, ethnic, and gender diversity are more likely to generate above-average profitability."

Building on the firm's previous guidance from August 2020, State Street announced in a letter to board members in early 2021 the following proxy voting practices to ensure companies are forthcoming about the racial and ethnic composition of their boards and workforces:

- **Racial and ethnic composition of boards.** State Street intends to vote in 2021 "against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not disclose the racial and ethnic composition of their boards."
- **EEO-1 Survey.** State Street intends to vote in 2022 "against the Chair of the Compensation Committee at companies in the S&P 500 that do not disclose their EEO-1 Survey responses."
- **Underrepresented community on the board.** State Street intends to vote in 2022 "against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not have at least one director from an underrepresented community on their boards."

Following a similar approach, Goldman Sachs' CEO David Solomon announced that Goldman Sachs will help take public only those companies in the United States and Europe that have at least one diverse board member. In 2021, Goldman Sachs raised this target to two diverse candidates for each IPO client. According to Solomon, this decision "is rooted first and foremost in our conviction that companies with diverse leadership perform better," including as evidenced by the fact that since 2016, U.S. companies that have gone public with at least one female board director outperformed companies that do not, one year post-IPO.

On February 17, 2021, global investment firm The Carlyle Group announced that it secured the largest ESG-linked private equity credit facility in the United States and the first to focus exclusively on advancing board diversity. The revolving credit facility directly ties the price of debt to the firm's previously set goal of having 30% diverse directors on the boards of Carlyle controlled companies within two years of ownership. This effort was driven by Carlyle's research, which showed that "the average earnings growth of Carlyle portfolio companies with two or more diverse board members has been approximately 12% greater per year than companies that lack diversity, underscoring the correlation of board diversity with strong financial decisions and performance."

EEO-1 Reports

While the diversity of management and the board is more readily visible to the public, the diversity of a company's workforce often is less evident. The most common method by which companies report and disclose racial and gender diversity in the workforce is through the employment information report, also known as EEO-1 or Standard Form 100, that is filed annually with the Equal Employment Opportunity Commission. Covered federal contractors as well as any employer with 100 or more employees must file the EEO-1. While a company is not required to publicly disclose its EEO-1 data, as discussed above, institutional investors are increasingly demanding disclosure of this data in companies' ESG reporting.

For guidance on EEO-1 self-identification requirements, see EEO-1 Self-Identification Requirement: Key Compliance Guidance. For information on filing the EEO-1 Report, see EEO-1 Survey. For additional coverage of EEO-1 requirements, see Title VII Compliance Issues — Title VII's Reporting Requirement and EEOC Recordkeeping Schedule Chart.

Corporate Culture

CEO Afsaneh Beschloss of The Rock Creek Group expressed at an industry conference in September 2019 that shareholders "are important and will always be incredibly important, but their highest returns will come if a company is good in its management, if a company is sustainable and has good governance." In the post-#MeToo era, corporate culture, or the set of values and behaviors that help define a company, are more important now than ever.

Companies are facing challenges over how to recruit and retain a talented workforce, and having an appealing culture is one way to do both. The subject of corporate culture is equally important to stakeholders, who are starting to look closely at what companies preach in their corporate cultures, including their commitments to ethics and sustainability. As studies have shown, companies with strong corporate cultures tend to perform better than those without. According to industry leaders, one of the biggest challenges in establishing and maintaining a positive corporate culture is when leadership does not have an interest in culture as an asset and does not understand that a company's culture is set from the top.

In 2018, BlackRock highlighted human capital as an investment issue in its Investment Stewardship Annual Report. The report provided that for a majority of companies today, "value is driven by employees, collectively known as human capital, rather than physical capital such as machinery," and that companies ultimately depend on their employees to effectively execute the corporate strategy and operate at high standards.

That same year, pension fund giant CalPERS revised its Corporate Governance & Sustainability Principles, adding a policy highlighting the board's role "in setting a high-performance corporate culture," which includes:

- Having a respectful treatment of employees
- Providing a workplace free from sexual harassment and other forms of harassment
- Fostering trust between employees and management –and–
- Promoting ownership and accountability for an ethical corporation

In addition, CalPERS urged every public company board to "develop and disclose its efforts toward establishing effective corporate culture, including its anti-harassment policy, and the mechanisms through which the board learns about employee complaints, how the claims are addressed, and the actions taken." Among other things, CalPERS's revised corporate governance principles include disclosing sexual harassment (and other) settlements involving executives or board members and clawback of executive compensation as a result of sexual misconduct.

In September 2020, CalPERS issued its Executive Compensation Analysis Framework, providing that companies should develop and disclose policies to recoup compensation made to executives during periods of fraudulent activity, inadequate oversight, misconduct including harassment of any kind such as sexual harassment, or gross negligence, which impacted or is reasonably expected to impact financial results or cause reputational harm.

For state laws on harassment (including sexual harassment) and discrimination protections in non-disclosure (i.e., confidentiality), settlement, arbitration, and no-rehire agreements that have arisen out #MeToo, see Sexual Harassment and Discrimination Protections in Employment-Related Agreements State Law Survey. For model state settlement agreements, arbitration agreements, and other employment-related agreements, see Employment Contracts State Expert Forms Chart.

For information on compensation clawbacks, see Clawbacks of Bonuses and Commissions: Wage and Hour Considerations, Clawback Policy Design and Tax Issues, Compensation Clawback Policy, and Incentive Compensation: Clawback Provisions.

Corporate Compliance

ESG disclosures, like other corporate disclosures, are subject to regulatory compliance. As such, companies must be careful to ensure their disclosures are accurate and complete. In addition, companies are struggling to deal with multiple reporting frameworks and inconsistencies across each regulation. Indeed, there are numerous ESG indexes (1,000+) that investors can use to assess how a company has addressed ESG. As discussed above in Board, Management, and Workforce Diversity, companies can be held to any number of these indexes depending on the preferences and standards established by different stakeholders, prompting many companies to comply with multiple ESG regulations.

Assessing ESG Risks

Companies should create or implement a set of standards to properly assess their ESG risks.

For example, the Organization for Economic Co-operation and Development has published the Due Diligence Guidance for Responsible Business Conduct, which provides a framework for companies and stakeholders to understand and implement due diligence for responsible business conduct. Similarly, the Corporate Human Rights Benchmark ranks large companies based on their sustainability disclosures, and provides a list of what those disclosures are. In addition, the Sustainability Accounting Standards Board (SASB) provides industry-specific sustainability standards for 77 different industries.

Disclosure of ESG Reporting

In addition to assessing ESG risks, companies must also ensure they fully and accurately disclose information in their ESG reporting and that such disclosures are consistent with information disclosed in other non-ESG-related disclosures. Companies that fail to do so may face potential liability for making misleading or deceptive statements. Indeed, the Federal Trade Commission (FTC) has been active in assessing ESG-related disclosures issued by companies for any discrepancies that may be viewed as "deceptive acts or practices" in violation of Section 5 of the Federal Trade Commission Act. In addition, companies may also be subject to liability under state consumer protection statutes for making misleading statements.

Climate and ESG Task Force

On March 4, 2021, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement. Per the SEC's announcement, "the Climate and ESG Task Force will develop initiatives to proactively identify ESG-related misconduct," "identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules," "analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies," "evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues," and "provide expertise and insight to teams working on ESG-related matters."

Data Privacy and Cybersecurity

The focus on ESG also includes corporations being held accountable for how they handle sensitive data. Across the board, companies are considering data protection as a strategic initiative and are investing in expanding their technology to stay competitive. Moreover, as interest in ESG investing continues to grow, more companies are amassing new types of personal information from employees and consumers, and adherence to cybersecurity and data privacy best practices to protect sensitive and private information is more vital than ever.

Facebook and Cambridge Analytica

A good example of the importance of maintaining good cybersecurity and data privacy practices is the 2018 scandal involving Facebook Inc. after it acknowledged that Cambridge Analytica LLC, a British consulting firm, improperly obtained the personal data of approximately 87 million Facebook users. In response to this scandal, Facebook spent billions of dollars on its technical infrastructure to improve data handling and safety.

Moreover, in 2019, Facebook entered into a settlement agreement with the Federal Trade Commission, under which Facebook agreed to pay $5 billion in penalties and submit to new restrictions to its business practices to improve the company's consumer data protection and privacy practices.

Building on Facebook's 2012 settlement with the FTC, which prohibited the company from making misrepresentations about the privacy or security of consumers' personal information and the extent to which Facebook shares personal information with third parties, the 2019 settlement requires Facebook to establish "a comprehensive data security program" and exercise more oversight over third-party applications and developers. Aside from the monetary repercussions, Facebook sustained significant reputational damage among consumers and investors who expressed serious concerns regarding the report. Moreover, in response to the scandal, Facebook was removed from the S&P 500 ESG Index after the index providers deemed the company had fallen short of meeting their criteria.

Global Reporting Initiative (GRI)

There has been a rise of privacy-related disclosures in sustainability reporting by companies. In 2000, the Global Reporting Initiative (GRI) launched the first global standards for sustainability reporting. Today, GRI's sustainability reporting framework is the most widely used by for-profit and not-for-profit companies as well as governments throughout the world.

Under the GRI's October 2016 reporting frameworks, known as the GRI Standards, Standard 418 sets out reporting requirements on the topic of customer privacy, including losses of customer data and breaches of customer privacy. While privacy-related disclosures are intended to provide an evaluation of the success of data privacy policy and protection measures, such disclosures may also expose companies to potential liability under state and federal laws. As discussed above in Corporate Compliance, companies should ensure that what they disclose in ESG reporting is not different from what they have disclosed in other privacy-related documents.

For comprehensive guidance on data security and privacy, see the Data Security and Privacy practice area.

Environmental Sustainability

Issues impacting climate change, including water scarcity, extreme temperatures, and carbon emissions, have elevated environmental considerations as a core component of ESG. According to S&P Global, while ESG factors are the fundamental framework for measuring a company's sustainability, the environmental portion of ESG considers the company's use of natural resources and the effect of its operations on the environment, both in its direct operations and across its supply chains. Climate change is expected to increase the frequency of climatic events like hurricanes, floods, heat waves, and wildfires, which can impose significant financial implications, especially for those companies that fail to take appropriate action to mitigate its contribution to climate change and to adequately plan for the likely impacts of climate change by investing in more sustainable business practices.

For guidance on corporate sustainability, see Corporate Sustainability.

Taxonomy Regulation

In June 2020, the European Union became the first supranational regulator to establish a common set of standards for determining whether an economic activity is environmentally sustainable or not. The so-called Taxonomy Regulation provides that certain environmental objectives should be considered when evaluating the sustainability of an economic activity, including:

- Climate change mitigation
- Climate change adaptation
- Sustainable use and protection of water and marine resources
- Transition to a circular economy, including waste prevention, and increasing the update of secondary raw materials
- Pollution prevention and control –and–
- Protection and restoration of biodiversity and ecosystems

The agreement provides that an economic activity should contribute toward one or more of the objectives and not significantly harm any of them. It is important to note that the Taxonomy Regulation does not require stakeholders to invest in taxonomy-eligible activities; instead, it provides the toolkit for assessing whether a financial product or business is environmentally sustainable.

In his 2021 letter to CEOs, BlackRock's Chairman and CEO Larry Fink asked companies to "disclose a plan for how their business model will be compatible with a net zero economy—that is, one where global warming is limited to well below 2°C, consistent with a global aspiration of net zero greenhouse gas emissions by 2050" and to disclose how this plan is incorporated into the company's long-term strategy and reviewed by its board of directors. This was building on a previous ask by BlackRock in 2020 that all companies report in alignment with the recommendations of the Task Force on Climate-related Financial Disclosures and the Sustainability Accounting Standards Board, which covers a broader set of material sustainability factors.

ESG Best Practices

Companies should follow best practices outlined below for ESG compliance.

Implement Policies and Training Procedures

It is important for the board and management to set a tone from the top that any form of discrimination or harassment is not acceptable, and that the company will investigate promptly, and take appropriate actions, with respect to inappropriate behavior.

Companies need to reassess whether the legal and HR personnel are properly equipped to handle and track incoming complaints and sufficiently empowered to investigate.

For more information on workplace harassment and discrimination prevention and investigations, see Workplace Harassment Resource Kit and Workplace Investigation Resource Kit.

Enforce Compliance with Policies and Procedures

Companies should provide mechanisms by which employees can report instances of discrimination or harassment in the workplace. See Complaint Procedure. Certain companies have created confidential reporting channels to the board of directors for allegations against senior management. See Whistleblowing Hotline Creation and Administration Checklist. For a training presentation on whistleblower reporting, see Whistleblower Reporting: Training Presentation.

Companies may also consider revising their clawback policies to include reputational and economic harm that might arise from violations of company policies concerning workplace conduct. For a discussion of clawback policies, see Clawback Policy Design and Tax Issues and Clawback Policy Considerations Checklist. Also see Clawbacks of Bonuses and Commissions: Wage and Hour Considerations and Incentive Compensation: Clawback Provisions. For a sample clawback policy, see Compensation Clawback Policy.

Refresh Board Membership

Companies should consider refreshing their board membership every few years.

Ensure Compliance with Reporting and Disclosure Obligations

To help encourage corporations to share relevant details about their environmental and social efforts, the Center for Capital Markets Competitiveness at the U.S. Chamber of

Commerce released a report in 2019 on best practices for corporations to use as a guide when compiling their ESG disclosures. The following briefly summarizes those eight best practices:

- **Risk and opportunities.** The company's ESG disclosure should address the company's risks, opportunities, and approach to risk management that may affect the company's long-term operational and financial performance and discuss how the company plans to create value using the ESG matters contained in the report.
- **Audience.** The company should customize the content and tone of its reports for the intended audience, whether they are investors or other stakeholders.
- **Communication with relevant departments.** Company departments should coordinate to ensure they collect all "relevant" information (a determination ultimately made by the legal department) and provide diverse perspectives.
- **Clearly define terms.** The company should make sure its ESG reports are written clearly and plainly, with defined terms.
- **Discretion in how to report and discuss ESG information.** Notwithstanding the need for standards (as discussed above), the company should maintain the discretion to determine what factors and metrics make sense for their ESG reports based on their industry, operations, and needs of their stakeholders.
- **Explain metrics and topics.** The company should explain the basis for, and importance of, the metrics and topics disclosed.
- **Easy to find ESG information.** The company should make sure that its ESG information is easy to find, via the web or otherwise.
- **Internal review and audit process.** Consistent with the goal of transparency, the company should consider describing external verification and/or its internal review and audit process regarding the ESG information.

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