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Corporate ESG: From Policy to Action

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The new EU Taxonomy Regulation, 2020 O.J. (L 198) 13, mandates what financial market participants and operating companies must address if they wish to make claims of taxonomy compliance, with a scheme largely focused on disclosure, standardized subtopics within ESG, and alignment of practices with claims. Meanwhile, the global movement toward a uniform reporting framework remains uncertain despite the December 2020 merger of the Sustainability Accounting Standards Board (SASB) and the International Integrated Reporting Council (IIRC), and recent powerful endorsements of standards published by the Task Force on Climate-Related Financial Disclosures (TCFD) and the Global Reporting Initiative (GRI). In particular, the U.K. has announced its plans to adopt its own taxonomy and disclosure regulations, albeit also based on recommendations of the TCFD and the EU Taxonomy Regulation. In the United States, the SEC continues to prioritize prosecuting unsupported ESG claims, while also promising to update its 2010 guidance to provide a more coherent framework for ESG disclosures.

Much has been published to aid companies with reporting and other aspects of ESG integration, including industry-specific guides and roadmaps for establishing appropriate policies. Still, stakeholders and scientists remain concerned that touting advancement of the process may obscure the fact that little actual progress is being made toward net zero greenhouse gas (GHG) emissions and other urgent ESG goals. Therefore, the next questions are what have companies actually done to achieve these objectives, and how to monitor progress.

E/ Net Zero GHG Emissions. The big "next" for environmental impact is moving from policy to action. An excellent report on the current state of play found that progression from policy-setting to achieving actionable, science-aligned targets has taken six of the 25 largest emitters about six years, while the less focused lag moderately or severely behind. "[T]here has been a proliferation of companies setting net-zero targets with little grounding in science and a reliance on offsetting rather than cutting emissions … [resulting in] a 'major chasm' between net-zero ambition and concrete action." Terry Slavin & Tim Nixon, "**Where is Big Carbon in the Race to Net Zero?**" in Sustainable Business Review at 24 (Jan. 2021). The new Business Ambition for 1.5°C Coalition has launched **www.sciencebasedtargets.org** to report momentum in moving from words to action. Companies can find appropriate climate targets for multiple industries and numerous case studies there.

The path here is to adopt targets, then classify a company's emissions consistent with the Greenhouse Gas Protocol, and act to reduce each class. Scope 1 emissions are direct emissions from owned or controlled sources. Scope 2 emissions are indirect emissions from the generation of purchased energy. Scope 3 emissions are indirect emissions (not included in Scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions. Engaged shareholders are pushing companies to accelerate this work.

S/ Pandemic Response: On Aug. 19, 2019, CEOs of 181 publicly-traded companies signed on to new Principles of Corporate Governance to redefine the purpose of a corporation, elevating corporate concern for all stakeholders—including employees, customers and communities—rather than just shareholders alone. Business Roundtable, **Statement on the Purpose of a Corporation** (Aug. 19, 2019). The advent of COVID-19 swiftly presented opportunities to express the new ethos in action. A September 2020 report found that signatories underperformed on pandemic response, and only slightly outperformed on income inequality. KKS Advisors & Test of Corporate Purpose Initiative, **COVID-19 and Inequality: A Test of Corporate Purpose** (September 2020) Companies with a positive ESG track record pre-pandemic, substantially outperformed new signatories on both measures. The criteria evaluated included actions around healthcare access and affordability, data protection, employee health and safety management, and product management. Negative actions included furloughs, layoffs, adding workforce on contracts that exacerbate income insecurity, and price gouging; positive actions included adding tech resources to enable work from home, adding permanent staff in essential businesses, enforcing anti-gouging policies along the supply chain, and adding technology and safety measures for eventual reopening.

G/ Board Diversity. Board diversity expectations are ramping up. Nasdaq proposed a new rule to require listed company boards to have at least one woman and one other director who is a member of an underrepresented minority or identifies as LGBTQ+. Press Release, **Nasdaq, Nasdaq to Advance Diversity Through New Proposed Listing Requirements** (Dec. 1, 2020, 7:15 a.m.). California's newest law also expands required diversity beyond gender, A.B. 979, 2019-20 Sess. (Cal. 2020) (amending Cal. Corp. Code Sections 301.3, 301.4, 2115.6), and Goldman Sachs is upping its requirement for IPO candidates from one diverse board member to two. In meetings on this topic, Goldman Sachs has stated that this is not just a "nice-to-have"; its stable of IPO'd companies with diverse boards have reportedly outperformed those with non-diverse boards by 43%. These moves will put much more pressure on US company boards to create seats for diverse candidates. A thorough study of current public company policies can be found in OUTLeadership's just-published report Visibility Counts: The LGBTQ+ Board Leadership Opportunity (Feb. 2, 2021), summarizing progress across all diversity categories, as disclosed by Fortune 500 companies in their 2020 proxy statements.

Regulation in these areas is rapidly evolving. As companies advance from education to policy to action, counsel will play a key role in bringing about change in compliance with applicable governance, disclosure and other regulatory requirements.

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