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# TEACHING SUSTAINABLE BUSINESS LAW & THE ROLE OF ESG LAWYERS

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## INTRODUCTION

“Sustainable business law” has emerged as a distinct area of law and “ESG<sup>1</sup> lawyers” exist with increasing frequency in major firms.<sup>2</sup> Of the 2022 Am Law 50 law firms, forty-three firms have a practice group or area of focus on environmental, social, and governance (ESG); corporate social responsibility (CSR); or sustainable business.<sup>3</sup> An additional six firms highlight ESG on their websites as a key issue, current topic, or industry.<sup>4</sup> One law firm offers commentary on ESG topics on its website.<sup>5</sup> Thus, every law firm in

<sup>1</sup> ESG stands for “environmental, social, and governance.”

<sup>2</sup> The terms “sustainable business,” “ESG,” and others present a confusing array of nomenclature that we address further in Part I.

<sup>3</sup> The Am Law 50 firms with a practice area or focus on ESG, CSR, or sustainable business include: Kirkland & Ellis; Latham & Watkins; DLA Piper; Baker McKenzie; Skadden, Arps, Slate, Meagher & Flom; White & Case; Sidley Austin; Ropes and Gray; Hogan Lovells; Morgan, Lewis & Bockius; Gibson, Dunn & Crutcher; Jones Day; Simpson Thacher & Bartlett; Norton Rose Fulbright; Greenberg Traurig; Cooley; Goodwin Procter; Davis Polk & Wardell; Weil, Gotshal & Manges; Paul, Weiss, Rifkind, Wharton & Garrison; Mayer Brown; Sullivan & Cromwell; McDermott Will & Emery; Quinn Emanuel Urquhart & Sullivan; Paul Hastings; Reed Smith; Cleary Gottlieb Steen & Hamilton; Holland & Knight; Milbank; Dechert; Wilson Sonsini Goodrich & Rosati; Debevoise & Plimpton; Orrick, Herrington & Sutcliffe; Wilmer Cutler Pickering Hale and Dorr; Morrison & Foerster; Akin Gump Strauss Hauer & Feld; Willkie Farr & Gallagher; K&L Gates; Perkins Coie; Winston & Strawn; Troutman Pepper Hamilton Sanders; Foley & Lardner; and Alston & Bird. *See infra* Appendix A, tbl.8. This is revised data (as of May 19, 2023) since the publication of Colin Myers & Jason J. Czarnecki, *Sustainable Business Law? The Key Role of Corporate Governance and Finance*, 51 ENV’T L. 991, 993 (2021).

<sup>4</sup> The additional six firms that highlight ESG on their websites as a key issue, current topic, or industry include: King & Spalding; Covington & Burling; Squire Patton Boggs; Proskauer Rose; Arnold & Porter; and Shearman & Sterling. *See infra* Appendix A, tbl.9.

<sup>5</sup> Of the 2022 Am Law 50 Firms, only one firm, Wachtell, Lipton, Rosen & Katz, does not offer ESG, CSR, or sustainable business as an independent practice

the Am Law 50 recognizes the emergence of ESG and sustainable business in some form. Table 1 below identifies the firms with an ESG, CSR, or sustainability practice.

Table 1: Am Law 50 Firms with ESG, CSR, or Sustainability Practice Area<sup>6</sup>

Kirkland & Ellis	Latham & Watkins
DLA Piper	Baker McKenzie
Skadden, Arps, Slate, Meagher & Flom	White & Case
Sidley Austin	Ropes and Gray
Hogan Lovells	Morgan, Lewis & Bockius
Gibson, Dunn & Crutcher	Jones Day
Simpson Thacher & Bartlett	Norton Rose Fulbright
Greenberg Traurig	Cooley
Goodwin Procter	Davis Polk & Wardell
Weil, Gotshal & Manges	Paul, Weiss, Rifkind, Wharton & Garrison
Mayer Brown	Sullivan & Cromwell
McDermott Will & Emery	Quinn Emanuel Urquhart & Sullivan
Paul Hastings	Reed Smith
Cleary Gottlieb Steen & Hamilton	Holland & Knight
Milbank	Dechert
Wilson Sonsini Goodrich & Rosati	Debevoise & Plimpton
Orrick, Herrington & Sutcliffe	Wilmer Cutler Pickering Hale and Dorr
Morrison & Foerster	Akin Gump Strauss Hauer & Feld
Willkie Farr & Gallagher	K&L Gates
Perkins Coie	Winston & Strawn

group, area of focus, key issue, current topic, or industry. Nonetheless, the firm does briefly mention sustainability and ESG on its Corporate Practice page, and it has a page dedicated to “ESG Memos,” featuring short articles by Wachtell, Lipton, Rosen & Katz lawyers discussing ESG and sustainability topics.

<sup>6</sup> See *infra* Appendix A, tbl.8.

Troutman Pepper Hamilton Sanders	Foley & Lardner
Alston & Bird	

This emergence of sustainability practice at the intersection of business interests (outside of traditional environmental regulatory practice) has come about as private environmental governance (PEG), environmental law, and corporate law choices impacting the environment have combined to create “sustainable business law” as a distinct legal discipline.<sup>7</sup> Meanwhile, ESG “has gone from a ubiquitous corporate buzzword to a critical consideration for companies looking to remain competitive in a marketplace that is pushing for more social and ethical accountability.”<sup>8</sup> Thus, law firms are leveraging the increased need for ESG expertise to help corporate clients achieve sustainability goals and mitigate risk, as well as recruit top talent.<sup>9</sup>

<sup>7</sup> See Myers & Czarneski, *supra* note 3, at 993–94; see also Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137 (2019).

<sup>8</sup> Roger E. Barton, *As Corporate Clients Emphasize ESG, Law Firms Should Be Leading the Pack*, REUTERS (Dec. 10, 2021), <https://www.reuters.com/legal/legalindustry/corporate-clients-emphasize-esg-law-firms-should-be-leading-pack-2021-12-10/>.

<sup>9</sup> See Laura Pollard, *Green Hub: Navigating ESG Issues – The Ever-Increasing Need for ESG Expertise*, THE LEGAL 500, [https://www.legal500.com/global\\_green\\_guide/navigating-esg-issues-the-ever-increasing-need-for-esg-expertise/](https://www.legal500.com/global_green_guide/navigating-esg-issues-the-ever-increasing-need-for-esg-expertise/) (last visited Sept. 14, 2023); Maxwell Briskman Stanfield, *The Growing Importance of ESG for Corporate Clients*, LEGAL INTELLIGENCER (June 1, 2022), <https://www.law.com/thelegalintelligencer/2022/06/01/the-growing-importance-of-esg-for-corporate-clients/>. Although the growth in ESG and sustainability practice is unquestionable, it is not necessarily true that firm investment in ESG and sustainability practice means firms are not continuing to “fan the flames of climate chaos.” L. STUDENTS FOR CLIMATE ACCOUNTABILITY, 2022 LAW FIRM CLIMATE ACCOUNTABILITY SCORECARD 1 (2022) [hereinafter L. STUDENTS FOR CLIMATE ACCOUNTABILITY, 2022 SCORECARD], <https://static1.squarespace.com/static/646e3b899493ae261720e957/t/648bd9ed5d76e4002923806d/1686886902666/2022%2BLSCA%2BLaw%2BFirm%2BClimate%2BScorecard.pdf>. The Law Firm Climate Accountability Scorecard grades Vault 100 law firms on their “contributions to the climate crisis” by looking at their role in litigation and lobbying that advance greenhouse gas emissions. *Id.* at 1. On the 2023 Scorecard, of the Am Law 50 firms noted in footnotes 3 and 4, only two firms—Cooley and Wilson Sonsini Goodrich & Rosati—earned an A grade; one firm, Proskauer Rose, earned a B; and the remainder earned a D or F. L. STUDENTS FOR CLIMATE ACCOUNTABILITY, 2023 LAW FIRM CLIMATE ACCOUNTABILITY SCORECARD 20 (2023), <https://static1.squarespace.com/static/646e3b899493ae261720e957/t/64c98973e>

The legal market is experiencing a rise of sustainability and ESG practice groups in law firms, and lawyers are moving into executive-level sustainability positions in the private sector including at major corporations and consulting firms. Lawyers are also playing a significant role in the ascension of social impact startups (e.g., “cleantech” and “sustaintech”), social impact investing, and making sure private equity and venture capital investment targets conform with ESG values. As discussed in Part II below, the tasks of sustainable business lawyers include sustainability and ESG analysis internal to firms, as well as many “E,” “S,” and “G” products in the regulatory, compliance, financial transaction, and investor space. Law firms are acquiring ESG data, evaluating ESG risk, and seeking to mitigate ESG risks due to noncompliance, inaccuracy, lack of disclosure, or greenwashing.

This Article is the second paper in a series laying out the emergence of sustainable business law and the role of ESG lawyers. The first paper, *Sustainable Business Law? The Key Role of Corporate Governance and Finance*, argues “that ‘sustainable business law’ has emerged as a distinct area of law” and “serves as an introductory explanation to define and understand the growing subject matter at the intersection of sustainability, business, and the law.”<sup>10</sup> That paper also explores the key role that corporate governance and finance play in achieving sustainability, and suggests that “[a] future project for scholars . . . is to explore the organization and workload of corporate sustainability groups within law firms.”<sup>11</sup> This Article builds on that suggestion by considering what sustainable business and ESG lawyers do, and exploring how those details should interact with the law school curriculum.

Given this new work for lawyers at the intersection of sustainability, business, and the law, this Article addresses three questions:

- What are the theoretical underpinnings of sustainable business law of which law students (i.e., future lawyers), academics, and practicing lawyers should be aware to enable successful communication and collaboration in the field (Part I)?

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8d5b85caa58d71c/1690929539797/aug1-report-finalpreview\_compressed+%283%29.pdf. As the 2022 Scorecard notes, though firms “did increase their climate change-mitigating work, they increased their climate change-exacerbating work by a much wider margin.” L. STUDENTS FOR CLIMATE ACCOUNTABILITY, 2022 SCORECARD, *supra*, at 1.

<sup>10</sup> Myers & Czarnezki, *supra* note 3, at 993.

<sup>11</sup> *Id.* at 1000.

- What do sustainable business and ESG lawyers working for law firms, companies, and consulting firms actually do, and what “ESG products and services” do they deliver to clients (Part II)?
- In light of actual practice, what topics should current and future lawyers be exposed to in order to be successful sustainable business and ESG lawyers (Part III)?

This Article concludes by reiterating that sustainable business law and ESG lawyering (or whatever one might choose to call it) is on the rise, so careful attention to the new field is essential. That attention begins by investigating the underpinnings of sustainable business law, which we identify as the linkages between business operations and the rest of the world (e.g., the environment and social welfare). Sustainable business lawyers must identify, measure, and manage these linkages, setting goals, gathering data, and advising corporate decision-makers, while ensuring that clients are properly and accurately disclosing voluntary and required claims in the sustainability space. This breadth of practice is significant and lawyers are already stepping in to fill this important role but law schools have a great opportunity to train the next generation of leaders. That training can begin with existing expertise in areas like environmental law and business law but schools must pair it with classes like Sustainable Business Law that can synthesize the existing areas of expertise and fill curricular gaps for topics that are rarely addressed in existing classes, such as the role of directors in business sustainability, socially responsible investing and ESG ratings, voluntary and mandatory ESG and climate risk reporting, and other voluntary sustainability regimes.

#### I. ESG, PEG, CSR, TRIPLE BOTTOM LINE, SUSTAINABILITY: WHAT DOES IT ALL MEAN?

Academics and practitioners currently use three key terms when discussing sustainable business law: sustainability, PEG, and ESG. Sustainability, explored below, has become a buzzword in all sectors to describe environmental health, social welfare, and some form of economic viability. PEG has become the dominant term for how the environmental law academy describes private norms and practices that amount to private environmental regulation. ESG describes the values firms now incorporate into their decision-making and is the dominant acronym used by business schools, businesses

and financial institutions, corporate/business law professors, and the emerging “Sustainability & ESG Advisory Practice” groups at major law firms.<sup>12</sup> Although there is significant overlap in what people mean when using these terms, each does have a distinct meaning.

### A. Sustainability

The term “sustainability” has no precise, authoritative definition;<sup>13</sup> although, many refer to the United Nations (UN) Brundtland Commission meaning—meeting “the needs of the present without compromising the ability of future generations to meet their own needs”<sup>14</sup>—for guidance. Yet, others describe “sustainability” as a commitment that rests upon three pillars—environmental, economic, and social welfare.<sup>15</sup>

Regardless of the preferred definition, it is evident that from “sustainability,” “sustainable development” and “sustainable business” have emerged. The 1992 UN Conference on Environment and Development in Rio de Janeiro, Brazil was the first international attempt to strategize for moving towards sustainable development.<sup>16</sup> More recently in 2012, the UN created its Sustainable Development

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<sup>12</sup> For further discussion of these terms, see Myers and Czarnezki, *supra* note 3, at 994–98. See also Elizabeth Pollman, *The Making and Meaning of ESG 14* (Eur. Corp. Governance Inst., Working Paper No. 659/2022, Oct. 2022) [hereinafter Pollman, *The Making and Meaning of ESG*] (quoting Tim Koller et al., *Five Ways That ESG Creates Values*, MCKINSEY QUARTERLY (Nov. 14, 2019), <https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value>) (“An acronym that might have been viewed as nothing more than a defined term in a technocratic report has instead seen a ‘meteoric rise.’”).

<sup>13</sup> The use of the term began in the late 1980s after the release of the Brundtland Report. See Rep. of the World Comm’n on Env’t and Dev., *Our Common Future*, U.N. Doc. A/42/427 (Aug. 4, 1987). Today, an estimated three hundred definitions of “sustainability” and “sustainable development” exist. See Paul Johnston et al., *Reclaiming the Definition of Sustainability*, 14 ENV’T SCI. & POLLUTION RSCH. 60, 60 (2007).

<sup>14</sup> Rep. of the World Comm’n on Env’t and Dev., *supra* note 13, at 24.

<sup>15</sup> See, e.g., *Sustainability Primer*, EPA, [https://www.epa.gov/sites/default/files/2015-05/documents/sustainability\\_primer\\_v7.pdf](https://www.epa.gov/sites/default/files/2015-05/documents/sustainability_primer_v7.pdf) (last visited Sept. 25, 2023) (explaining the three pillars of sustainability); *Sustainable Development*, EUR. COMM’N, <https://perma.cc/ZX72-ZSTT> (explaining that “[s]ustainable development means meeting the needs of the present whilst ensuring future generations can meet their own needs.”).

<sup>16</sup> See *History of SD*, SUSTAINABLE DEV. COMM’N, [https://www.sd-commission.org.uk/pages/history\\_sd.html](https://www.sd-commission.org.uk/pages/history_sd.html) (last visited Sept. 25, 2023).

Goals. These 17 goals<sup>17</sup> are a set of universal goals created to address the “urgent environmental, political and economic challenges facing our world.”<sup>18</sup>

Despite many guiding principles and goals, the lack of a precise definition has led people to use “sustainability” interchangeably with the other sustainable business terms discussed below. Though each term considers environmental and social impacts, it must be stated that we understand the traditional business context to consider economic *viability*, while “sustainability” requires economic *welfare, justice, or equality*. “[B]usiness sustainability shifts the business’s focus to the future and can be described ‘as a business strategy that creates long-term stakeholder value by addressing social, economic, and environmental opportunities and risks material to a company.’”<sup>19</sup>

A related term is “triple bottom line,” which posits “firms should commit to measuring their social and environmental impact—in addition to their financial performance—rather than solely focusing on generating profit, or the standard ‘bottom line.’”<sup>20</sup>

### B. *Private Environmental Governance (PEG)*

Vandenbergh, in his formative and appropriately titled article *Private Environmental Governance*, asserts that environmental law has “transformed from a positive law field deeply rooted in administrative law to one that is also heavily rooted in private law and private governance.”<sup>21</sup> Vandenbergh defines PEGs as “actions taken by non-governmental entities that are designed to achieve traditionally governmental ends such as managing the exploitation of

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<sup>17</sup> See *The 17 Goals*, U.N. DEP’T OF ECON. & SOC. AFFAIRS, <https://sdgs.un.org/goals> (last visited Sept. 25, 2023).

<sup>18</sup> *Sustainable Development Goals: Background on the Goals*, U.N. DEV. PROGRAMME, <https://www.undp.org/sdg-accelerator/background-goals> (last visited Sept. 25, 2023).

<sup>19</sup> Myers & Czarnecki, *supra* note 3, at 997; see also, Joshua Cramer-Montes, *Sustainability: A New Path to Corporate and NGO Collaborations*, STAN. SOC. INNOVATION REV. (Mar. 24, 2017), <https://perma.cc/6Y2Q-W455>.

<sup>20</sup> Kelsey Miller, *The Triple Bottom Line: What It Is & Why It’s Important*, HARV. BUS. SCH. ONLINE (Dec. 8, 2020), <https://online.hbs.edu/blog/post/what-is-the-triple-bottom-line>.

<sup>21</sup> Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 129 (2013); see SARAH E. LIGHT & MICHAEL P. VANDENBERGH, ENCYCLOPEDIA OF ENVIRONMENTAL LAW: VOLUME II 254 (Lee Paddock et al. eds., 2016) (explaining that PEG is important to environmental law and policy).



common pool resources, increasing the provision of public goods, reducing environmental externalities, or more justly distributing environmental amenities.”<sup>22</sup> PEG mechanisms include things like eco-labels and third-party certification programs such as LEED building standards or Marine Stewardship Council certification, carbon disclosures, and provisions in supply chain agreements, just to name a few.<sup>23</sup>

Light, in *The Law of the Corporation as Environmental Law*, rejects any notion of “a division of labor between firms and markets on the one hand, and public environmental law and regulation on the other.”<sup>24</sup> “In light of the significant impact that firms can have on the environment . . . the law governing the corporation throughout its life cycle—corporate law, securities regulation, antitrust law, and bankruptcy law—should be understood as a fundamental part of environmental law.”<sup>25</sup> As noted in earlier work, “[r]ead together, private environmental governance and corporate law choices impacting the environment combine to create ‘sustainable business law’ as a distinct legal discipline.”<sup>26</sup>

In short, while “sustainability” describes a goal or value associated with how firms make environmental decisions, PEG describes the study of corporate decision-making and the broader impacts of that decision-making.

### C. Environmental, Social, Governance (ESG) and Corporate Social Responsibility (CSR)

The term ESG stands for environmental, social, and governance. The term is widely used but it lacks a clear meaning.<sup>27</sup> ESG is often followed by words like “factors,” “strategies,” or “standards.”<sup>28</sup> ESG is frequently used synonymously with related terms, such as “sustainability” and “corporate social responsibility

<sup>22</sup> Vandenberg, *supra* note 21, at 146.

<sup>23</sup> See Joshua Ulan Galperin, *Environmental Governance at the Edge of Democracy*, 39 VA. ENV. L. J. 70, 82–83 (2021); LIGHT & VANDENBERGH, *supra* note 21, at 255.

<sup>24</sup> Light, *supra* note 7, at 140.

<sup>25</sup> *Id.*

<sup>26</sup> Myers & Czarnecki, *supra* note 3, at 994.

<sup>27</sup> See Elizabeth Pollman, *Corporate Social Responsibility*, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE 662, 662 (Benjamin van Rooij & D. Daniel Sokol eds., 2021) [hereinafter Pollman, *Corporate Social Responsibility*].

<sup>28</sup> See *id.* at 663–67.

(CSR).”<sup>29</sup> “Although sustainability and CSR are often used synonymously,” some argue that “the two should not be confused.”<sup>30</sup> Some scholars suggest ESG grew from greater interest in a “business case” for CSR.<sup>31</sup> Regardless, before ESG there was CSR.

CSR is “[a] responsibility among firms to meet the needs of their stakeholders and a responsibility among stakeholders to hold firms to account for their actions.”<sup>32</sup> CSR focuses on the process a firm uses and the actions it takes to respond to its “stakeholders’ collective set of needs.”<sup>33</sup> Importantly, Berger-Walliser and Scott argue that CSR is seen through one of two lenses—the lens of shareholder primacy, in which firms adopt CSR practices in an effort to maximize financial returns, as corporate law often demands, or the lens of CSR as a voluntary effort above and beyond any legal requirements.<sup>34</sup> Thus, CSR focuses on the *actions* a firm chooses to take (or not to take) based on shareholder interests, as voluntary activities undertaken by firms in environmental or social areas, or “as an explicit moral, ethical, or social duty.”<sup>35</sup>

ESG, however, has overcome CSR in importance, and CSR has faded in the sustainable business discourse.

What is the difference between CSR and ESG to a company in regards to its environmental and social efforts? For example, in the interests of CSR, a company might announce an environmental initiative reducing its carbon footprint and increasing positive social impact. ESG would *measure* progress toward those goals. CSR is a form of self-regulation representing a company’s efforts to positively impact consumers, employees, the environment, etc.; whereas ESG focuses on metrics—assessing the company’s actions and providing a system to ensure accountability.<sup>36</sup>

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<sup>29</sup> See Jennifer O’Hare, *Don’t Forget the “G” in ESG: The SEC and Corporate Governance Disclosure*, 64 ARIZ. L. REV. 417, 421 (2022).

<sup>30</sup> Myers & Czarnecki, *supra* note 3, at 997.

<sup>31</sup> See Pollman, *Corporate Social Responsibility*, *supra* note 27, at 664.

<sup>32</sup> DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: SUSTAINABLE VALUE CREATION 4 (Laureen Gleason et al. eds., 5th ed. 2020).

<sup>33</sup> *Id.* at 7.

<sup>34</sup> See Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 169–70 (2018).

<sup>35</sup> *Id.* at 173–92.

<sup>36</sup> Myers & Czarnecki, *supra* note 3, at 997–98 (emphasis added). For example, Unilever publishes an annual Sustainable Living Report that shows their ESG goals and their progress toward those goals, both positive and negative. See

CSR has faced significant criticism for being merely a public relations tool<sup>37</sup> rather than addressing non-financial issues, and ESG has emerged as the main metrics-based approach intended to increase corporate accountability.<sup>38</sup>

According to O'Hare, when properly used, ESG refers to an investment and risk management strategy.<sup>39</sup> Thus, investors seeking to increase portfolio value have increasingly looked to ESG criteria to evaluate their investments.<sup>40</sup> This definition is echoed by others in the field. Attorneys at Paul, Weiss, Rifkin, Wharton & Garrison

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*Unilever Sustainable Living Plan: Progress in 2019*, UNILEVER, <https://assets.unilever.com/files/92ui5egz/production/452125018d106e2a8025c177f71d986c54b568d6.pdf/uslp-performance-summary-2019.pdf> (last visited Oct. 4, 2023); see also *What's the Difference Between CSR and ESG?*, ALVA (Oct. 27, 2020), <https://www.alva-group.com/blog/whats-the-difference-between-csr-and-esg/>; Peter Chadwick, *Understanding the ESG/CSR Value Chain*, INT'L EXEC. DEV. PROGRAM (Mar. 22, 2013), <https://www.iedp.com/articles/understanding-the-esgcsr-value-chain/>; *Why ESG Is Replacing CSR—and What This Means to Your Business*, NPOWER BUS. SOLUTIONS (Apr. 25, 2020), <https://npowerbusinesssolutions.com/resources/blogs/why-esg-is-replacing-csr-and-what-this-means-to-your-business>.

<sup>37</sup> See, e.g., CHRISTIAN AID, *BEHIND THE MASK: THE REAL FACE OF CORPORATE SOCIAL RESPONSIBILITY* 1–2 (2003), <https://baierle.files.wordpress.com/2007/11/behind-mask.pdf> (stating that CSR is “merely a branch of PR”); Angelica Petersson & Jasmin Dzafic, *Greenwashing in CSR Reports: A Case Study of Two Entities* 2–3 (2016) (M.A. thesis, Jonkoping University), <https://www.diva-portal.org/smash/get/diva2:932386/FULLTEXT01.pdf>; Privanka Aggarwal & Aarti Kadyan, *Greenwashing: The Darker Side of CSR*, 4 INDIAN J. APPLIED RSCH. 61, 63 (2014); Federica Balluchi et al., *CSR and Greenwashing: A Matter of Perception in the Search for Legitimacy*, in ACCOUNTING, ACCOUNTABILITY, AND SOCIETY: TRENDS AND PERSPECTIVES IN REPORTING, MANAGEMENT AND GOVERNANCE FOR SUSTAINABILITY 151, 152–53 (Mara Del Baldo et al. eds., 2020).

<sup>38</sup> See Marc S. Gerber et al., *ESG: Key Trends in 2020 and Expectations for 2021*, SKADDEN, ARPS, SLATE, MEAGHER, & FLOM (Feb. 1, 2021), <https://www.skadden.com/insights/publications/2021/02/esg-key-trends-in-2020-and-expectations-2021> (explaining that ESG metrics help companies maintain accountability particularly with investors).

<sup>39</sup> See O'Hare, *supra* note 29, at 421, 424; see also Pollman, *Corporate Social Responsibility*, *supra* note 27, at 666 (“[W]hereas CSR is often framed in terms of social obligations, rooted in ethical or moral concerns, ESG is generally discussed in terms of risk management for firms and investors, individually or systematically.”).

<sup>40</sup> See O'Hare, *supra* note 29, at 422 (providing a non-exhaustive list of criteria that potentially impact company performance, including climate change, carbon emissions, diversity and inclusion, workplace health and safety, director independence, and board diversity).

LLP state that, “ESG, at its core, is a means by which companies can be evaluated with respect to a broad range of socially desirable ends.”<sup>41</sup> This evaluation relies on a “set of factors used to measure the non-financial impacts of particular investments and companies.”<sup>42</sup> ESG lawyering includes managing both financial and reputational risk.

Alternatively, Harper Ho and Pollman suggest that ESG refers to both the nonfinancial fundamentals that can influence firms’ financial performance and, more traditionally, sustainability measures, and environmental, social, and governance practices.<sup>43</sup> Harper Ho further explains that ESG, especially for regulatory purposes, should broadly include “all environmental, social, or governance information that is or may become material to the reporting company or its investors.”<sup>44</sup> Notably, Pollman distinguishes ESG, which regards risk management, from CSR, which regards ethical and moral social obligations; although ESG sometimes refers to social benefits as well.<sup>45</sup>

More recently, Pollman writes that ESG “describe[s] a set of issues to be integrated into enhanced financial or investment analysis.”<sup>46</sup> But, she notes, this is not an exclusive definition; ESG is also a set of practices used to proactively manage risk.<sup>47</sup> Still, others say it is an expression of preference among certain companies and investors.<sup>48</sup> Under this view, corporations align their activities to match their values, illustrating consideration of issues that are not purely financial.<sup>49</sup>

Similarly, others define ESG as a “taxonomy that divides this universe of factors into environmental, social, and governance

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<sup>41</sup> Mark S. Bergman et al., *Introduction to ESG*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 1, 2020), <https://corpgov.law.harvard.edu/2020/08/01/introduction-to-esg/>.

<sup>42</sup> *Id.*

<sup>43</sup> See Pollman, *Corporate Social Responsibility*, *supra* note 27, at 664.

<sup>44</sup> Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 312 (2022).

<sup>45</sup> See Pollman, *Corporate Social Responsibility*, *supra* note 27, at 663–65.

<sup>46</sup> Pollman, *The Making and Meaning of ESG*, *supra* note 12, at 5.

<sup>47</sup> See *id.* at 22–24.

<sup>48</sup> See *id.* at 25.

<sup>49</sup> See *id.* at 26.

factors.”<sup>50</sup> The “universe of factors” that are material are grouped into categories identified as ESG standards.<sup>51</sup> Which factors are relevant to an investment decision can vary depending on company, industry, and region.<sup>52</sup> Nevertheless, there exists a set of factors common to most decisions within each of the “E,” “S,” and “G” categories.

The broad concept of ESG is about measuring and verifying corporate progress but each individual prong—the “E,” “S,” and “G”—stands for important aspects of corporate decision-making.<sup>53</sup> Generally, the “E” prong examines how a business “performs as a steward of the natural or physical environment.”<sup>54</sup> Environmental factors in this category consider a company’s use of natural resources and the effects that the company’s operation has on the environment,<sup>55</sup> with some believing that ESG reporting and investing is a key building block towards developing a circular economy.<sup>56</sup> Businesses pursuing ESG goals collect and benchmark performance against ESG indicators. ESG goals might include “Energy Efficiency” and “Waste Reduction,” which require KPIs (key performance indicators) that measure total energy consumption, waste production, and percentage of waste recycled.<sup>57</sup> For example, S&P

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<sup>50</sup> E. Christopher Johnson et al., *Profound Change: The Evolution of ESG*, 75 *BUS. LAW.* 2567, 2568 (2020).

<sup>51</sup> *See id.*

<sup>52</sup> *See* Pollman, *The Making and Meaning of ESG*, *supra* note 12, at 12; GLOB. COMPACT, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD 6 (2004), [https://www.unepfi.org/fileadmin/events/2004/stocks/who\\_cares\\_wins\\_global\\_compact\\_2004.pdf](https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf); BRANDON BOZE ET AL., *THE BUSINESS CASE FOR ESG 1–2* (Rock Ctr. for Corp. Governance, Stan. Closer Look Ser., 2019).

<sup>53</sup> *See What is ESG? Definition and Meaning*, *MKT. BUS. NEWS*, <https://marketbusinessnews.com/financial-glossary/esg-definition-meaning/> (last visited Sept. 24, 2022).

<sup>54</sup> *Understanding the “E” in ESG*, S&P GLOB. (Oct. 23, 2019), <https://www.spglobal.com/en/research-insights/articles/understanding-the-e-in-esg>; *see also What is ESG? Definition and Meaning*, *MKT. BUS. NEWS*, <https://marketbusinessnews.com/financial-glossary/esg-definition-meaning/> (last visited Sept. 24, 2022).

<sup>55</sup> *See Understanding the “E” in ESG*, *supra* note 54.

<sup>56</sup> *See* Craig Galli et al., *ESG Reporting and Investing: The “Nudge” Needed to Stumble Toward a Circular Economy*, 37 *A.B.A. NAT. RES. & ENV’T* 19, 19–23 (2022).

<sup>57</sup> *See* DEP’T OF ENV’T, FOOD & RURAL AFFS., *ENVIRONMENTAL KEY PERFORMANCE INDICATORS: REPORTING GUIDELINES FOR UK BUSINESSES* 12

Global, an independent benchmark and rating provider, “assess[es] four factors: greenhouse gas emissions, water use, waste and pollution, [and] land use and biodiversity” to determine a company’s environmental impact.<sup>58</sup> However, many other factors also fall within the “E” of ESG. A non-exhaustive list includes energy use, climate change risks, regulatory risks, supply chain sources, use of green bonds, and greenwashing tactics.<sup>59</sup>

The social category of ESG concerns how a company manages its relationships with its workforce, local communities, and the political environment.<sup>60</sup> “S” factors evaluate “how well positioned a company is for the long term, the reputational value it or its products gain from goodwill, the stability and long-term efficiency of its workforce, potential costs of labour conflicts, the political risk of conflicts with communities, [and] the legal and reputational risks that it runs from potential problems with its supply chain employment practices or community protests.”<sup>61</sup> Other social elements include diversity issues, human rights, union relationships, and traditional employer health and safety.<sup>62</sup>

The “G” stands for “governance” as in corporate governance, including factors of decision-making and responsiveness to shareholders.<sup>63</sup> It focuses on how the firm is run, such as the structure, diversity, and rules of the corporate board of directors, as well as executive compensation. Efforts to create more parity between executive and employee pay, or to assure gender, racial, and ethnic

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(2011), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69281/pb11321-envkpi-guidelines-060121.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69281/pb11321-envkpi-guidelines-060121.pdf).

<sup>58</sup> *Understanding the “E” in ESG*, *supra* note 54.

<sup>59</sup> See John G. Ruggie & Emily K. Middleton, *Money, Millennials and Human Rights: Sustaining ‘Sustainable Investing’ 2* (Harv. Kennedy Sch., Working Paper No. 2018-01, 2018), [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/FWP\\_2018-01.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/FWP_2018-01.pdf); see also Stephen Kim Park, *Green Bonds and Beyond: Debt Financing as a Sustainability Driver*, in *THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE & SUSTAINABILITY* 596, 596–97, 609 (Beate Sjaafjell & Christopher Bruner eds., 2019).

<sup>60</sup> See *What Is the “S” in ESG?*, S&P GLOB. (Feb. 24, 2020), <https://www.spglobal.com/en/research-insights/articles/what-is-the-s-in-esg>.

<sup>61</sup> Pollman, *The Making and Meaning of ESG*, *supra* note 12, at 21–22.

<sup>62</sup> See Ruggie & Middleton, *supra* note 59.

<sup>63</sup> See *What Is the “G” in ESG?*, S&P GLOB. (Feb. 24, 2020), <https://www.spglobal.com/en/research-insights/articles/what-is-the-g-in-esg>; see also Bradford Cornell & Aswath Damodaran, *Valuing ESG: Doing Good or Sounding Good?*, 2020 J. IMPACT & ESG INVESTING 76, 76, 78.

diversity on the board of directors all fall under this last component of ESG. Gender diversity, equality, and inclusion (DEI) are among the most important governance issues facing companies today, with some even proposing that these issues are “emerging as one of the most important principles of ESG.”<sup>64</sup> Bribery and corruption, shareholder and voter rights, accountability, and transparency are also important governance factors.<sup>65</sup>

In summary, ESG denotes the criteria a firm uses to measure progress towards its express goals regarding ESG performance. Sustainability is one possible goal that a firm may set for itself. PEG is the framework legal scholars have begun using to study how private companies are intentionally influencing or managing business partners, customers, communities, and the natural world. Read together, these concepts help define sustainable business law.<sup>66</sup>

## II. WHAT DO SUSTAINABLE BUSINESS LAWYERS DO?

As the first article in this series notes, “[a] future project for scholars . . . is to explore the organization and workload of corporate sustainability groups within law firms.”<sup>67</sup> What is the list of tasks for a sustainable business lawyer? Another way of stating this inquiry is: What are the “ESG products and services” that law firms deliver to their clients? It is well established that ESG stands for environmental, social, and (corporate) governance. However, what specific environment, social, and governance services and products ESG lawyers provide for clients remains relatively unclear.

At the outset of this discussion, it is worth taking note of what an attorney in the environmental enforcement and compliance group at an Am Law 50 firm stated in her keynote address at a recent symposium at the University of Virginia.<sup>68</sup> In response to a question about how firms balance the cost of compliance, enforcement risk,

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<sup>64</sup> Natalie Stafford, ‘Genderwashing’: An ESG Risk Year Round, Not Just on International Women’s Day, S-RM INTEL. & RISK CONSULTING (Mar. 8, 2023), <https://www.s-rminform.com/latest-insights/genderwashing-an-esg-risk-international-womens-day>; see also *What Is the “G” in ESG?*, *supra* note 63.

<sup>65</sup> See Ruggie & Middleton, *supra* note 59, at 2.

<sup>66</sup> See Myers & Czarnetzki, *supra* note 3, at 994.

<sup>67</sup> *Id.* at 1000.

<sup>68</sup> See Nicole E. Noelliste, Managing Assoc. Att’y, Sidley Austin, Keynote Address at the University of Virginia School of Law Environmental Law Journal Symposium (Nov. 16, 2022).

and public relations, this attorney indicated that, while she does not practice ESG in general, she does work with clients on environmental justice concerns, including enforcement risks and costs of regulatory compliance—she does not, however, consider herself and ESG lawyer.<sup>69</sup> The point is that ESG practice is not an exact overlap with environmental regulatory practice. Getting at that distinction is the goal of this Part.

In terms of categorization, the work of sustainable business includes managing internal and external ESG commitments, as well as “mitigating risk.”<sup>70</sup> Based on a review of law firm websites, statements at conferences and workshops by lawyers, legal scholarship, and articles written by lawyers, this Part lists and discusses the ESG products that firms offer and the tasks of ESG lawyers working for government entities, as corporate counsel, in law firms, and in consulting firms.

Some primary verbs that ESG and sustainability practice groups in law firms use to describe the role they play for clients are: “advises,” “navigates,” “evaluates,” and “assists.” While perhaps not unique to the ESG field as opposed to any other, the nature of these verbs reflects the changing landscape of requirements and expectations businesses face in the ESG space. Businesses are increasingly concerned with climate risk disclosure requirements, diversity and inclusion, developing carbon emissions targets, and greenwashing, just to name a few. Here are a few examples of how major law firms describe their ESG work:

- “We **advised** a leading financial institution in connection with the issuance of a \$2 billion bond designed to advance racial equality, economic opportunity and environmental sustainability.”<sup>71</sup>
- “Our team helps companies **evaluate** and develop their specific ESG targets, report on ESG issues responsibly and effectively, and create policies and procedures to integrate ESG into daily operations and long-term planning—all

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<sup>69</sup> *See id.*

<sup>70</sup> *See* Plenary Panel at the Westchester County Association Sustainable Business Conference: The Journey: Moving to the Sustainable Enterprise (July 14, 2022) [hereinafter Westchester County Association Sustainable Business Conference].

<sup>71</sup> *Environmental, Social & Governance (ESG)*, MCGUIREWOODS, <https://www.mcguirewoods.com/services/practices/esg> (last visited Dec. 30, 2022) (emphasis added).



while avoiding common pitfalls that can inadvertently lead to unwanted liability risk.”<sup>72</sup>

- “**Navigating** the various evolving industry guidelines, initiatives, methodologies, and measurement tools relating to ESG, climate risk and impact, including the UN Sustainable Development Goals (UN SDGs), UN Principles for Responsible Investment (UN PRI), UN Global Compact, Sustainable Accounting Standards Board (SASB), Global Reporting Initiative (GRI) and Task Force for Climate-related Financial Disclosures (TCFD).”<sup>73</sup>
- “**Assisting** clients with evaluating the sustainability and longevity of tax structures and investments, including advising companies on the OECD’s [Organisation for Economic Cooperation and Development] Base Erosion and Profit Shifting (BEPS) standards and initiatives.”<sup>74</sup>

Recently, there has been a shift in who conducts ESG due diligence from in-house counsel to external counsel or third-party consulting firms.<sup>75</sup> Even when companies use outside consultants rather than law firms, involving legal counsel is crucial to ensure efficiency, effective integration with other work streams, and to protect the clients’ legal interests.<sup>76</sup> A goal of an ESG lawyer is to advance the long-term goals and broad interests of clients while managing legal requirements, the norms of quasi-regulatory private regimes, human rights concerns, and environmental considerations.<sup>77</sup> In fact, lawyers are creating ESG teams and programs for businesses. ESG lawyers are assembling teams of lawyers and public affairs officers, developing environmental goals that match corporate missions, choosing metrics and collecting data, determining what to report

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<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> *ESG & Impact*, KIRKLAND & ELLIS, <https://www.kirkland.com/services/practices/transactional/esg-and-impact> (last visited Dec. 30, 2022) (emphasis added).

<sup>74</sup> *Environmental, Social and Governance (ESG)*, GIBSON DUNN, <https://www.gibsondunn.com/practice/environmental-social-and-governance-esg/> (last visited Dec. 30, 2022) (emphasis added).

<sup>75</sup> See Jennie Morawetz, *Managing ESG Consultants in Private Equity Transactions*, LAW360 (June 7, 2019), <https://www.law360.com/articles/1167046/managing-esg-consultants-in-private-equity-transactions>.

<sup>76</sup> *See id.*

<sup>77</sup> See Joe Pitts III, *Business, Human Rights, and the Environment: The Role of the Lawyer in CSR & Ethical Globalization*, 26 BERKELEY J. INT’L L. 479, 500 (2008).

and to whom, and deciding how such ESG data will impact company operations.<sup>78</sup>

Law firms offer several “ESG products.” Tables 2–5 below list these products independently and attempt to divide up these services and products according to each prong of “E,” “S,” and “G.” However, significant overlap exists between different ESG deliverables. For instance, ESG lawyers will help firms with sustainable sourcing, drafting contracts, and leading negotiations with suppliers, which may all fall naturally under “environmental” products. To the extent these negotiations or supply chain contracts involve health and labor standards, they may also fall under the “social” prong, and the ESG lawyer will also ensure compliance with such standards. Likewise, in many instances, firms must disclose financial risk, including environment-related risks. These disclosures are important for ESG reporting and overlap with corporate financing and mergers and acquisitions lawyering.

Lawyers may be asked to complete ESG work related to the internal working of their own and their clients’ firms. This includes evaluating ESG risk based on a numeric score and letter ranking.<sup>79</sup> A variety of data sources feed into these scores and ratings.<sup>80</sup> S&P Global Sustainable1 is one provider of this information; it houses over 700 billion ESG and climate data points that are used to evaluate ESG risk.<sup>81</sup> There is a wide diversity of ESG rating tools, and each uses a somewhat different set of metrics.<sup>82</sup> At a high level, most measure a firm’s resource use, waste, and pollution in the

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<sup>78</sup> See Jason Czarnecki, Notes on Panel at the Association of Corporate Counsel New Jersey Conference: Tracking and Reporting the “E” in “ESG”: SEC’s Proposed Climate-Disclosure Rules, Related Risks, and *West Virginia v. EPA* (Sept. 23, 2022); see also Dave Curran, *How to Conduct a Successful ESG Materiality Assessment*, LAW.COM (Nov. 2, 2022), <https://www.law.com/corpcounsel/2022/11/02/how-to-conduct-a-successful-esg-materiality-assessment/>.

<sup>79</sup> A higher ESG risk score translates into a better ESG rating. See Thierry Roncalli, *Course 2021–2022 in ESG and Climate Risks*, UNIV. OF PARIS-SACLAY, at 63 (February 2, 2022), <https://ssrn.com/abstract=4023934>.

<sup>80</sup> Data sources include corporate annual reports, corporate environmental and social reports, the U.S. Bureau of Labor Statistics, Carbon Disclosure Project (CDP) responses, and Thomson Financial. See *id.* at 69.

<sup>81</sup> See S&P Global Sustainable1, *Beyond ESG with Climate Risk in M&A*, S&P GLOB. (Aug. 17, 2022) (webinar transcript available at <https://on24static.aka-maized.net/event/38/84/22/8/rt/1/documents/resourceList1661183027525/webinartranscriptbeyondesgwithclimateriskinma1661183025481.pdf>).

<sup>82</sup> See Roncalli, *supra* note 79, at 79–82.

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environmental category.<sup>83</sup> The social and governance categories have much more dispersion. For instance, for social metrics, some measure employment conditions, diversity, and community relations while others measure employee-to-leadership pay ratios.<sup>84</sup> Measurements in the governance category may include board independence and shareholder rights.<sup>85</sup> Of course, ESG risk ratings are likely to value more easily quantifiable measures while devaluing others.

Internally, ESG lawyers also do work that is not specific to, or that only indirectly impacts, advising, completing, and assessing disclosures. For example, an ESG lawyer may help establish an ESG management committee and provide presentations to a client's management; or, within their own firm, an ESG lawyer may promote equal access to justice by undertaking additional pro bono work. A more complete, but certainly not exhaustive, list of internal ESG work done by ESG lawyers is found in Table 2 below.

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<sup>83</sup> *See id.* at 79–80.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

Table 2: Internal ESG Work<sup>86</sup>

		Disclosure-Related	Not Disclosure-Related
For Clients	Evaluation	<ul style="list-style-type: none"> <li>• Review voluntary disclosures and standards used (e.g., SASB, Global Reporting Initiative, World Economic Forum)</li> <li>• Request/review ESG scoring/ratings by advisory firms (e.g., Bloomberg ESG Disclosure Score, FTSE Russell ESG Rating, MSCI ESG Ratings, Refinitiv ESG Scores, EcoVadis CSR Rating, ISS-Oekem Corporate Rating, RobecoSAM Corporate Sustainability Assessment, Sustainalytics Company ESG Ratings, TruValue Labs Insights360 Scores)</li> </ul>	<ul style="list-style-type: none"> <li>• Evaluate current sustainability policies</li> <li>• Review client net-zero commitments/pledges/scorecards</li> <li>• Identify priority ESG factors</li> <li>• Collect all available public data and reports regarding internal sustainability, DEI, etc.</li> </ul>
	Development	<ul style="list-style-type: none"> <li>• Draft ESG action plans for addressing gaps</li> <li>• Draft ESG disclosures</li> <li>• Provide ESG presentations to management and board</li> </ul>	<ul style="list-style-type: none"> <li>• Establish ESG management committee and peer group</li> <li>• Provide ESG presentations to management and board</li> <li>• Amend Nominating/Governance Charter to include ESG oversight</li> <li>• Update risk policy manual</li> </ul>

<sup>86</sup> See *infra* Appendix A, tbl.8; S&P Global Sustainable1, *supra* note 81; Westchester County Association Sustainable Business Conference, *supra* note 70; Sharmila L. Murthy, Senior Couns., White House Council on Env't Quality, Lloyd K. Garrison Lecture on Environmental Law (Sept. 15, 2022), [https://www.youtube.com/watch?v=FI\\_RJkRRg](https://www.youtube.com/watch?v=FI_RJkRRg); materials cited within the Article.

Within the Law Firm	<ul style="list-style-type: none"> <li>• Oversee and review internal sustainability practices</li> <li>• Take on proactive roles in corporate compliance</li> <li>• Develop and implement ESG programs</li> <li>• Address risk management and reputation issues</li> <li>• Reduce firm’s environmental footprint</li> </ul>	<ul style="list-style-type: none"> <li>• Membership in the law firm sustainability and net-zero organizations and networks (e.g., Law Firm Sustainability Network; Net Zero Lawyers Alliance)</li> <li>• Promote equal access to justice and strong institutions through pro bono work addressing racial and social justice issues</li> <li>• Monitor political landscapes in the corporation’s operational jurisdictions</li> </ul>
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#### A. “Environmental” ESG Services

The environmental prong in ESG often focuses on transactional work related to sourcing and supply chains, risks to infrastructure, regulatory counseling, and advocacy, all in the context of greenhouse gas emissions and climate risk, energy efficiency, and waste management.<sup>87</sup> But, environmental concerns in business operations today far exceed just emissions and waste, or environmental compliance in the traditional sense. ESG products related to this prong are listed in Table 3 and discussed in the following paragraphs.

One example of a non-traditional environmental concern in business is greenwashing. Greenwashing, subject to many definitions,<sup>88</sup> is commonly defined as “activities by a company or an organization that are intended to make people think that it is concerned about the environment, even if its real business actually harms the environment.”<sup>89</sup> Greenwashing commonly occurs when a company publicly announces a promise to work towards an environmental

<sup>87</sup> See Carolyn Exarhakis, *Current Developments 2020–2021: Non-Legal Advice: How Attorneys Counsel Clients on Investors’ ESG Demands*, 34 GEO. J. LEGAL ETHICS 957, 958 (2021).

<sup>88</sup> See Sebastião Vieira de Freitas Netto et al., *Concepts and Forms of Greenwashing: A Systematic Review*, 32 ENV’T SCI. EUR., Feb. 11, 2020, at 1, 2.

<sup>89</sup> *Greenwash*, OXFORD LEARNER’S DICTIONARIES, <https://www.oxfordlearnersdictionaries.com/definition/english/greenwash> (last visited Nov. 18, 2023).

goal or more sustainable practices while simultaneously lobbying to avoid regulation.<sup>90</sup> Greenwashing can result in reputational damages as well as regulatory violations and litigation.<sup>91</sup>

Supply chain practices are another example of how ESG lawyering goes beyond traditional environmental law. Business supply chains not only implicate people who work in each operational phase but they also implicate environmental resources.<sup>92</sup> ESG lawyers may help companies assure that suppliers are environmentally sustainable and safe for all employees and nearby community members. Supply chain considerations in business operations are also important for evaluating the “S” category of ESG.

Traditional regulatory obligations, domestic and foreign, remain prominent in the “E” space of ESG. Of current interest, lawyers are in the process of determining the scope of potential new obligations in the Securities and Exchange Commission’s (SEC) proposed climate disclosure rule.<sup>93</sup> According to the SEC’s fact sheet, the proposed rule would require domestic or foreign companies to include climate-related information in its registration statements and periodic reports, including:

- Climate-related risks and their actual or likely material impacts on the [company’s] business, strategy, and outlook;

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<sup>90</sup> See *id.*

<sup>91</sup> See Peter Pears et al., *Greenwashing: Navigating the Risk*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 24, 2023), <https://corpgov.law.harvard.edu/2023/07/24/greenwashing-navigating-the-risk/>.

<sup>92</sup> See Pitts, *supra* note 77 (identifying need for good-faith dealing between lawyers, executives, and employees in regards to supply chain contracts and building new plants in the Amazon rainforest); Anne-Titia Bové & Steven Swartz, *Starting at the Source: Sustainability in Supply Chains*, MCKINSEY (Nov. 11, 2016), <https://www.mckinsey.com/capabilities/sustainability/our-insights/starting-at-the-source-sustainability-in-supply-chains> (discussing problems within the supply chains of two large corporations due to decreased availability of natural resources).

<sup>93</sup> See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249); see also Kenya Rothstein, *Regulating GHGs from the Business Perspective*, 54 A.B.A. SEC. ENV’T, ENERGY, NAT. RES. TRENDS, Sept./Oct. 2022, at 2, <https://www.americanbar.org/content/dam/aba/publications/trends/2022/trends-septoct-2022-full-issue.pdf>; Aaron Briggs et al., *Summary of and Considerations Regarding the SEC’s Proposed Rules on Climate Change Disclosure*, GIBSON DUNN (Apr. 15, 2022), <https://www.gibsondunn.com/summary-of-and-considerations-regarding-the-sec-proposed-rules-on-climate-change-disclosure/>.

- The [firm's] governance of climate-related risks and relevant risk management processes;
- The [company's] greenhouse gas emissions, which, for [some companies and types of emissions], would be subject to assurance;
- Certain climate-related financial statement metrics and related disclosures in a note to its audited financial statements; and
- Information about climate-related targets and goals, and transition plan, if any.<sup>94</sup>

The SEC fact sheet also notes that “[t]he proposed disclosures are similar to those that many companies already provide based on broadly accepted disclosure frameworks, such as the Task Force on Climate-Related Financial Disclosures and the Greenhouse Gas Protocol.”<sup>95</sup>

The proposed SEC rule would not apply to all businesses or all climate-related risks. Instead, the rule applies to certain companies with pre-existing reporting requirements under the Securities Exchange Act of 1934,<sup>96</sup> which is generally focused on companies that issue or propose to issue securities.<sup>97</sup> Additionally, the new disclosure requirement would only apply to so-called “material” risks.<sup>98</sup> Material risks are those with a “material impact on a registrant, including its business or consolidated financial statements, which may manifest over the short, medium, and long term.”<sup>99</sup> A matter is material, according to the SEC and Supreme Court, “if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how

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<sup>94</sup> See U.S. SEC. & EXCH. COMM’N, FACT SHEET: ENHANCEMENT AND STANDARDIZATION OF CLIMATE-RELATED DISCLOSURES 1 (2022), <https://www.sec.gov/files/33-11042-fact-sheet.pdf>.

<sup>95</sup> *Id.*

<sup>96</sup> “The proposed climate-related disclosure rules would apply to a registrant with Exchange Act reporting obligations pursuant to Exchange Act Section 13(a) or Section 15(d) and companies filing a Securities Act or Exchange Act registration statement.” The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21407–08 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249); see Securities and Exchange Act of 1934, 15 U.S.C. §§ 78m(a), 78o(d).

<sup>97</sup> See 15 U.S.C. § 78m(a).

<sup>98</sup> See 87 Fed. Reg. at 21334.

<sup>99</sup> *Id.* at 21,351.

to vote.”<sup>100</sup> It remains unclear whether the Supreme Court’s recent pronouncements about the “major questions doctrine” in *West Virginia v. EPA*<sup>101</sup> might undermine the SEC disclosure rule.<sup>102</sup>

The SEC originally set October 2022 as its self-imposed deadline for promulgating the final rule. However, the agency reopened the comment period due to a technical glitch preventing some feedback on the proposal.<sup>103</sup> The deadline for the reopened comment period was November 1, 2022, making the fall final rule deadline impossible to meet.<sup>104</sup> The SEC had indicated that it might promulgate a final rule by October 2023 but, as of late November 2023, it has not done so.<sup>105</sup> Current indications are that the rule may not be finalized until 2024 and may not be effective until 2026.<sup>106</sup>

Further, the SEC has “proposed amendments to rules and reporting forms to promote consistent, comparable, and reliable

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<sup>100</sup> *Id.* (citing 17 C.F.R. § 240.12b-2); see *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

<sup>101</sup> 142 S. Ct. 2587 (2022).

<sup>102</sup> See Jill E. Fisch et al., *Climate Change, West Virginia v. EPA, and the SEC’s Distinctive Statutory Mandate*, THE CLS BLUE SKY BLOG (Sept. 6, 2022), <https://clsbluesky.law.columbia.edu/2022/09/06/climate-change-west-virginia-v-epa-and-the-secs-distinctive-statutory-mandate/>; Todd Phillips, *Supreme Court’s EPA Ruling Does Not Doom the SEC’s Climate Disclosure Rule*, THE HILL (July 28, 2022), <https://thehill.com/opinion/energy-environment/3576879-supreme-courts-epa-ruling-does-not-boom-the-secs-climate-disclosure-rule/>; Taryn Zucker et al., *West Virginia v. EPA Casts a Shadow Over SEC’s Proposed Climate-Related Disclosure Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 3, 2022), <https://corpgov.law.harvard.edu/2022/08/03/west-virginia-v-epa-casts-a-shadow-over-secs-proposed-climate-related-disclosure-rule/>; Benjamin Zycher, *West Virginia v. EPA and the SEC Climate Risk Disclosure Rule*, THE HILL: OPINION (July 16, 2022), <https://thehill.com/opinion/energy-environment/3561944-west-virginia-v-epa-and-the-sec-climate-risk-disclosure-rule/>.

<sup>103</sup> See Andrew Ramonas & Amanda Iacone, *SEC Climate Rules Pushed Back Amid Bureaucratic, Legal Woes*, BLOOMBERG L. (Oct. 19, 2022), <https://news.bloomberglaw.com/securities-law/sec-climate-rules-pushed-back-amid-bureaucratic-legal-woes>.

<sup>104</sup> See *id.*

<sup>105</sup> See Jacob A. Hupart, *Energy & Sustainability Litigation Updates—June 2023*, NAT’L L. REV. (Jun. 29, 2023), <https://www.natlawreview.com/article/energy-sustainability-litigation-updates-june-2023>; *Rulemaking Activity*, SEC, <https://www.sec.gov/rules/rulemaking-activity> (last visited Nov. 4, 2023).

<sup>106</sup> See Jon McGowan, *SEC Climate Disclosure Rule Most Likely Not Final Until 2024, Effective 2026*, FORBES (Oct. 26, 2023), <https://www.forbes.com/sites/jonmcgowan/2023/10/26/sec-climate-disclosure-rule-most-likely-not-final-until-2024-effective-2026/?sh=740f1cda3434>.



information for investors concerning funds' and advisers' incorporation of environmental, social, and governance (ESG) factors."<sup>107</sup> Like the SEC disclosure rule, the proposed amendments were affected by the agency's technical glitch.<sup>108</sup> There has been no comment by the SEC on when the final amendments might be released.

The SEC is not alone in showing concern for climate and other ESG risks. The U.S. Department of Treasury's Financial Stability Oversight Council established the Climate-Related Financial Risk Advisory Committee to "identify[], assess[], and respond[] to the risks climate change poses to the financial system."<sup>109</sup>

Similarly, the U.S. Department of Labor (DOL) recently issued a final rule under the Employee Retirement Income Security Act (ERISA) regarding ESG considerations in retirement plans.<sup>110</sup> The DOL's new rule reverses two rules issued under the Trump Administration that prohibited retirement plan fiduciaries from investing in non-pecuniary factors or goals.<sup>111</sup> Under the new rule, fiduciaries may, but are not required to, "consider ESG factors when making an investment."<sup>112</sup> The DOL's new rule, along with the SEC's proposed rules and the U.S. Department of Treasury's establishment of the Climate-Related Financial Risk Advisory Committee, further illustrate the increasing relevance and importance of ESG in political discourse and federal regulatory frameworks in the United States.

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<sup>107</sup> Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices (May 25, 2022), <https://www.sec.gov/news/press-release/2022-92>.

<sup>108</sup> See Press Release, U.S. Sec. & Exch. Comm'n, SEC Reopens Comment Periods for Several Rulemaking Releases Due to Technological Error in Receiving Certain Comments (Oct. 7, 2022), <https://www.sec.gov/news/press-release/2022-186>.

<sup>109</sup> Press Release, U.S. Dep't of the Treas., Press Release: Financial Stability Oversight Council Establishes New Climate-related Financial Risk Advisory Committee (Oct. 3, 2022), <https://home.treasury.gov/news/press-releases/jy0987>.

<sup>110</sup> See 29 C.F.R. § 2550; Brian Croce, *DOL Finalizes Rule Permitting ESG Considerations in Retirement Plans*, PENSIONS & INVESTMENTS (Nov. 22, 2022), <https://www.pionline.com/regulation/dol-finalizes-rule-permitting-esg-considerations-retirement-plans>; Katie Dean, *DOL Issues Final Rule on Consideration of ESG Factors and Exercise of Shareholder Rights by Retirement Plan Fiduciaries*, SIDLEY AUSTIN (Dec. 1, 2022), <https://www.sidley.com/en/insights/new-updates/2022/12/dol-issues-final-rule-on-consideration-of-esg-factors-and-exercise-of-shareholder-rights>.

<sup>111</sup> See Croce, *supra* note 110.

<sup>112</sup> *Id.*

The European Union (EU) is moving forward with two similarly named directives—the Directive on Corporate Sustainability Due Diligence and the Corporate Sustainability Reporting Directive.

In February 2022, the European Commission adopted a proposal for an EU Directive on Corporate Sustainability Due Diligence.<sup>113</sup> This Directive “establishes a corporate due diligence duty” that includes “identifying, bringing to an end, preventing, mitigating, and accounting for negative human rights and environmental impacts in the company’s own operations, their subsidiaries, and their value chains” as well as introduces duties for the directors to act in the best interest of the company, taking into account “the human rights, climate change, and environmental consequences of their decisions.”<sup>114</sup>

In June 2022 the European Parliament and Council reached a political agreement on this Corporate Sustainability Reporting Directive.<sup>115</sup> The Directive seeks to modernize the rules about the type of social and environmental information that companies have to report, and a broad set of large companies, as well as listed small and medium-sized enterprises, will be required to report on sustainability<sup>116</sup>—approximately 50,000 European companies in total.<sup>117</sup>

Beyond traditional regulatory obligations, advising on green bonds and other means of sustainable financing also falls within the purview of ESG lawyers. This fits into the environmental prong of ESG, though it overlaps with governance as well. Green bonds are bonds for which the proceeds are applied to environmentally

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<sup>113</sup> See *Corporate Sustainability Due Diligence*, EUR. COMM’N, [https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en](https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en) (last visited Dec. 30, 2022).

<sup>114</sup> *Id.*

<sup>115</sup> See Press Release, Council of the Eur. Union, Council Gives Final Green Light to Corporate Sustainability Reporting Directive (Nov. 28, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/council-gives-final-green-light-to-corporate-sustainability-reporting-directive/>.

<sup>116</sup> See *Corporate Sustainability Reporting*, EUR. COMM’N, [https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting\\_en](https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en) (last visited Jan. 29, 2023).

<sup>117</sup> See Press Release, EY, How the EU’s New Sustainability Directive (“CSRD”) is Becoming a Game Changer (Nov. 18, 2022), [https://www.ey.com/en\\_ro/news/2022/11/how-the-eus-new-sustainability-directive-is-becoming-a-game-chan](https://www.ey.com/en_ro/news/2022/11/how-the-eus-new-sustainability-directive-is-becoming-a-game-chan).

friendly projects and activities.<sup>118</sup> Proceeds of these bonds can be used for any number of green initiatives including renewable energy, energy efficiency, pollution prevention and control, biodiversity conservation, clean transportation, sustainable water management, eco-efficient products, and climate change adaptation.<sup>119</sup> The creation of green bonds has also led to the creation of social and sustainability bonds, which are used to finance projects with defined social impacts and projects with both social and environmental objectives, respectively.<sup>120</sup>

“[S]ustainable finance involves the ‘selection [of investments] informed by opportunities created from ESG-optimized investments;’”<sup>121</sup> in other words, “doing well” by “doing good.”<sup>122</sup> The goal of sustainable financing is to achieve economic growth while simultaneously protecting the environment and maximizing social welfare.<sup>123</sup> It is often seen as a middle ground between traditional profit-driven investing and philanthropy based exclusively on social and environmental objectives.<sup>124</sup>

Like other ESG factors, sustainable investing can influence brand reputation and is consequently an area where lawyers can utilize their skills to help guide clients and reduce the chance of bad publicity.<sup>125</sup> Whether this impact is positive or negative is disputed. Many people are in favor of sustainable investing initiatives,<sup>126</sup> and some states have even passed laws promoting ESG investment.<sup>127</sup>

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<sup>118</sup> See Park, *supra* note 59, at 596; see also Roncalli, *supra* note 79, at 209.

<sup>119</sup> See Roncalli, *supra* note 79, at 211–12.

<sup>120</sup> See Park, *supra* note 59, at 596.

<sup>121</sup> *Id.* at 598 (quoting Othmar M. Lehner, *Preface: An Epiphany of Social and Sustainable Finance*, in ROUTLEDGE HANDBOOK OF SOCIAL AND SUSTAINABLE FINANCE xxxix (Othmar M. Lehner ed., 2017)).

<sup>122</sup> *Id.* (quoting DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* 21 (2006)).

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

<sup>125</sup> See *id.* at 603.

<sup>126</sup> A poll conducted by the Morgan Stanley Institute for Sustainable Investing found that 79 percent of the sampled population are interested in ESG investing. Additionally, 88 percent of Millennials are interested in investments that address climate change. See MORGAN STANLEY INST. FOR SUSTAINABLE INVESTING, *SUSTAINABLE SIGNALS* 2 (2021), [https://www.morganstanley.com/assets/pdfs/2021-Sustainable\\_Signals\\_Individual\\_Investor.pdf](https://www.morganstanley.com/assets/pdfs/2021-Sustainable_Signals_Individual_Investor.pdf).

<sup>127</sup> See Leah Malone et al., *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARV. L. SCH. F. ON CORP.

However, there has been significant political backlash against sustainable investing as well.<sup>128</sup> Thus far, most of the backlash has been observed at the state level, with some states passing anti-ESG bills<sup>129</sup> to stifle what some believe to be a forced liberal political agenda.<sup>130</sup> The contention over sustainable investing's impact and growing litigation in the area<sup>131</sup> further bolster the importance of lawyers being equipped to handle such matters.

Table 3: ESG Products Offered by Law Firms—Environmental<sup>132</sup>

Resource Conservation	<ul style="list-style-type: none"> <li>• Promote transition to clean energy and emissions reductions through innovative projects</li> <li>• Assist in the design of waste management facilities and control of waste streams</li> <li>• Reduce energy and water consumption</li> <li>• Advise on project siting and development to minimize waste and comply with legal requirements</li> <li>• Reduce air and water pollution by implementing new standards and addressing contamination from non-point sources</li> </ul>
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GOVERNANCE (Mar. 11, 2023), <https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/>; see also *Anti-ESG Legislation Standalone State Chart*, MORGAN LEWIS (Dec. 1, 2022), <https://www.morganlewis.com/-/media/files/document/2022/anti-esg-legislation-standalone-state-chart.pdf>.

<sup>128</sup> See Evie Liu, *ESG Supporters Demand Right to Invest How They Want*, BARRON'S (Mar. 23, 2023), <https://www.barrons.com/articles/esg-backlash-investing-climate-change-7061584e>; Christine Ro, *What's Behind the ESG Investment Backlash*, FORBES (Jan. 29, 2023), <https://www.forbes.com/sites/christinero/2023/01/29/whats-behind-the-esg-investment-backlash/?sh=1e7c3c8a3158>.

<sup>129</sup> Morgan Lewis created a chart detailing what ESG legislation is circulating in each state as of December 1, 2022. See *Anti-ESG Legislation Standalone State Chart*, *supra* note 127.

<sup>130</sup> See Liu, *supra* note 128.

<sup>131</sup> For instance, complaints can also refer to ESG litigation arising from retirement fund beneficiaries suing the fund provider for divesting funds in fossil fuel companies. See, e.g., *Complaint, Wong v. N.Y.C. Emps.' Ret. Sys.*, No. 652297/2023 (N.Y. Sup. Ct. May 11, 2023).

<sup>132</sup> See *infra* Appendix A, tbl.8; S&P Global Sustainable1, *supra* note 81; Westchester County Association Sustainable Business Conference, *supra* note 70; see also Murthy, *supra* note 86.

Climate Adaptation, Environmental Remediation & Resilience Infrastructure	<ul style="list-style-type: none"> <li>• Advise clients on disaster preparedness and impacts on the insurance sector</li> <li>• Provide guidance on environmental remediation and resilience projects</li> <li>• Create climate resilience and risk management plans</li> <li>• Support and educate clients on policy and regulatory changes related to climate change</li> <li>• Evaluate client’s environmental risks</li> </ul>
Sustainable Sourcing	<ul style="list-style-type: none"> <li>• Advise on supply chain management to comply with fair trade practices, human and labor rights, and environmental protection</li> <li>• Develop circular economic strategies</li> <li>• Assess product life-cycle management/costing</li> <li>• Implement green procurement and sustainability provisions in supply chain contracts</li> </ul>
Regulatory Counseling & Advocacy, Environmental Litigation	<ul style="list-style-type: none"> <li>• Consult “soft laws” and regulations to ensure client compliance</li> <li>• Provide guidance on pending litigation and potential impacts on business strategies</li> <li>• Counsel on developments that may affect fund investment strategies (SEC oversight, EU taxonomy), and specifically 2022 SEC proposed climate disclosure rules</li> <li>• Advise on how to avoid greenwashing liabilities (e.g., Federal Trade Commission Green Guides, state consumer protection and fraud statutes)</li> <li>• Advise on compliance with industry/non-governmental organization codes of conduct</li> <li>• Represent clients in carbon disputes and investigations, including challenging state and federal policies, advising on carbon-related commercial disputes and permitting of low-carbon projects</li> </ul>
Responsible Investing & Impact Financing	<ul style="list-style-type: none"> <li>• Work with clients to establish innovative financing structures</li> <li>• Connect with trade associations and organizations to develop market guidance</li> <li>• Advise on: <ul style="list-style-type: none"> <li>• Government incentives</li> <li>• Green financing and bonds</li> <li>• Mitigation credits</li> <li>• Green, social, and sustainable financing deals</li> </ul> </li> </ul>

	consistent with International Capital Market Association and Loan Syndications and Trading Association standards
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### B. “Social” ESG Services

Social impact in ESG refers to “how well a company manages risks to people connected with its core business.”<sup>133</sup> As previously mentioned, there are connections between ESG, specifically the social component “S,” and CSR which came before it. Business’s concern for society can be traced back several centuries but it was not until the 1930s and 1940s that literature began to document what companies were doing.<sup>134</sup> The idea that corporations should act with regard for their social impacts gained momentum through the 1960s’ protest culture and the 1970s’ antiwar sentiment and decreasing confidence in “business to fulfill the needs and wants of the public.”<sup>135</sup>

From the 1970s on, CSR continued to develop and spread across businesses as a result of action at the international level and societal pressure.<sup>136</sup> Although CSR has slowly faded in sustainable business discourse, its important objectives and goals for businesses to take social responsibility are visible in the “S” prong of ESG.

ESG products related to this social prong are seen in Table 4. Lawyers, especially when working in the social category of ESG, primarily serve as advisors to clients and regulate the connections between companies and the global populations they employ.<sup>137</sup> In 2011, the UN Human Rights Council unanimously endorsed the UN

<sup>133</sup> Ruggie & Middleton, *supra* note 59, at 1.

<sup>134</sup> See Mauricio Andrés Latapí Agudelo et al., *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INT’L J. CORP. SOC. RESP. 1, 1 (2019).

<sup>135</sup> See *id.* at 5.

<sup>136</sup> See *id.* at 7–8, 12–13.

<sup>137</sup> See David Nersessian, *Business Lawyers as Worldwide Moral Gatekeepers? Legal Ethics and Human Rights in Global Corporate Practice*, 28 GEO. J. LEGAL ETHICS 1135, 1138 (2015); see also Keith Corkan, *Employment and Diversity Lawyers and the ‘S’ in ESG*, INT’L BAR ASS’N (Apr. 20, 2023), <https://www.ibanet.org/employment-diversity-lawyers-esg> (stating that legal work in the ‘S’ category “includes matters such as diversity, equity, inclusion, employee treatment, job satisfaction and compensation, working conditions, human rights, health and safety, data protection, privacy, community relations and customer satisfaction”).

Guiding Principles on Business and Human Rights (UNGPs).<sup>138</sup> The UNGPs are comprised of three pillars: the “State duty to protect against human rights abuses,” the “corporate responsibility to respect human rights,” and the need for greater access to effective remedies for victims.<sup>139</sup> The second pillar is of significant concern for businesses—and, consequently, ESG lawyers—and requires a policy commitment, human rights due diligence, and tracking and communication.<sup>140</sup>

Human rights due diligence is unlike traditional due diligence, which is viewed in terms of harm to the business. Rather, human rights due diligence should be viewed in terms of harm to people, enabling businesses to identify what human rights they are impacting, attempt to prevent or mitigate negative impacts, and appropriately remedy remaining harms.<sup>141</sup> Social harms that business operations cause include, but are not limited to, forced labor and slavery; human trafficking; child labor (typically in supply chains); work-related disease and occupational incidents; and harms to communities, such as lost access to clean water, lost livelihoods, and violence, as a result of extracting natural resources for global supply chains.<sup>142</sup> Circumstances like these can not only create criminal and civil liabilities for the client but can also subject the lawyer to professional discipline.<sup>143</sup> Even without criminal or civil liability, violations of human rights can cause significant complications for lawyers in business dealings; thus, modern practitioners must be acutely aware of both the corporate risks and the ethical values inherent to the profession.<sup>144</sup> Transactional practitioners are more closely

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<sup>138</sup> See John Sherman III, *Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights*, in CORPORATE SOCIAL RESPONSIBILITY, SUSTAINABLE BUSINESS: ENVIRONMENTAL, SOCIAL AND GOVERNANCE FRAMEWORKS FOR THE 21<sup>ST</sup> CENTURY 473, 475 (Rae Lindsay & Roger Martella eds., 2020).

<sup>139</sup> *Id.* at 478.

<sup>140</sup> See *id.* at 479–81, 484.

<sup>141</sup> See *id.* at 481–83.

<sup>142</sup> See *id.* at 476; Nersessian, *supra* note 137, at 1143 (listing recent allegations of human rights violations including slavery in Latin America; funding terrorists through “protection payments” by agricultural businesses in South America; “security-related abuses by oil companies in Nigeria;” torture and massacres at gold mining operations in the Democratic Republic of Congo; and “providing eavesdropping technology to the Iranian government,” aiding in brutalizing journalists).

<sup>143</sup> See Nersessian, *supra* note 137, at 1135.

<sup>144</sup> See *id.* at 1136.

connected to overseas business conduct where human rights abuses arise and, therefore, are more likely to get tangled in the violations themselves.<sup>145</sup> Alternatively, lawyers who are dispute specialists are primarily tasked with representing their clients' interests after a violation has occurred. Sorting out the legal consequences makes these lawyers less likely to become complicit in the violations.<sup>146</sup> Many, but not all, international human rights crimes are also federally enforceable, and ESG practitioners must be cognizant of clients' liability for both.<sup>147</sup>

Environmental justice<sup>148</sup> is an area where legal professionals must also be attentive in advising their clients. President Bill Clinton first called for federal agencies to incorporate environmental justice into their work in 1994<sup>149</sup> but the Biden Administration has gone further through Executive Order No. 14008 and other mechanisms.<sup>150</sup> Therefore, now more than ever, ESG lawyers must consider environmental justice risks and opportunities to provide the best service for their clients. Environmental justice is comprised of two components: environments and people.<sup>151</sup>

There are many situations when attorneys should consider environmental justice consequences of their clients' actions, even when such impacts have not historically been considered. Examples include when clients are selecting infrastructure investments, project sites, and waste disposal locations. Often, lower-income communities are chosen due to lower cost, greater profit margins, and

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<sup>145</sup> See *id.* at 1146.

<sup>146</sup> See *id.*

<sup>147</sup> For example, torture is both an international and federal crime, whereas crimes against humanity are international crimes but not federal crimes. See *id.* at 1156.

<sup>148</sup> The EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last visited Jan. 2, 2023).

<sup>149</sup> See Exec. Order No. 12898, 3 C.F.R. 859 (1994).

<sup>150</sup> See Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021); Julius Redd et al., *Addressing Environmental Justice as Part of ESG Initiatives*, BEVERIDGE & DIAMOND (May 24, 2021), [https://www.bdlaw.com/publications/addressing-environmental-justice-as-part-of-esg-initiatives/#Law360\\_05/24/2021\\_1](https://www.bdlaw.com/publications/addressing-environmental-justice-as-part-of-esg-initiatives/#Law360_05/24/2021_1); Murthy, *supra* note 86.

<sup>151</sup> See Geoffrey R. Browne et al., *A Framework for Developing Environmental Justice Indicators*, 2 STANDARDS 90, 90 (2022).



political imbalances.<sup>152</sup> Consequently, these communities face greater health risks and complications as compared to wealthier communities, which are less likely to be subjected to deleterious effects.<sup>153</sup> As a result, disproportionately impacted communities can bring unwanted litigation against clients. This can be at least minimized, if not avoided altogether, if clients proactively address existing environmental justice risks and develop strategies to mitigate future risks.<sup>154</sup>

Accounting for existing legal requirements, lawyers should work with their clients to create plans to ensure the benefits of clients' operations and programs are distributed equitably.<sup>155</sup> Thus, law firms need and are developing frameworks for conducting environmental justice assessments of clients and their clients' activities. Additionally, ESG attorneys should stay abreast of existing and forthcoming environmental justice regulations in relevant jurisdictions to educate their clients and promote effective environmental justice strategies.<sup>156</sup> Moreover, within their own firms, attorneys can undertake pro bono cases from underserved groups and communities to promote environmental justice and combat inherent disparities (though this may be considered a form of CSR).

Another aspect of the social prong of ESG is companies acting as advocates outside the boundaries of the firm. Thus, beyond their traditional role in business dealings, lawyers may also undertake the role of advocates "in law-making and regulatory settings."<sup>157</sup>

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<sup>152</sup> See Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 ENV'T RSCH. LETTERS, Nov. 18, 2015, at 1, 10 n.6; see also Kirsten Williams, *The Impact of Foresight: Reframing Discriminatory Intent to Properly Remedy Environmental Racism*, 59 HOUS. L. REV. 1231 (2022) (discussing specific examples of minority communities that were chosen as industrial sites and now disproportionately suffer from negative health effects).

<sup>153</sup> See Mark Davis, *On the Horns of a Dilemma: Climate Adaptation and Legal Profession*, 25 RICH. PUB. INT. L. REV. 197, 204 (2022).

<sup>154</sup> See Redd et al., *supra* note 150; Colleen Callahan et al., *Pathways to Environmental Justice: Advancing a Framework for Evaluation*, UCLA LUSKIN SCH. OF PUB. AFFAIRS, LUSKIN CTR. FOR INNOVATION (2012), [https://innovation.luskin.ucla.edu/wp-content/uploads/2019/03/Pathways\\_to\\_Environmental\\_Justice.pdf](https://innovation.luskin.ucla.edu/wp-content/uploads/2019/03/Pathways_to_Environmental_Justice.pdf) (providing guidance for creating and implementing environmental justice strategies, as well as specific measurements to consider when evaluating strategy/program performance).

<sup>155</sup> See Redd et al., *supra* note 150.

<sup>156</sup> See *id.*

<sup>157</sup> See Nersessian, *supra* note 137, at 1145.

Accordingly, ESG attorneys should keep abreast of political developments and track how the public perceives company actions or how changing norms may affect that perception.<sup>158</sup> Client reputation also falls within the political scope of an ESG attorney's duties.

Table 4: ESG Products Offered by Law Firms—Social<sup>159</sup>

Labor Standards	<ul style="list-style-type: none"> <li>• Advise on worker protections and DOL regulations</li> <li>• Help clients comply with ERISA</li> <li>• Counsel on environmental health and safety matters</li> <li>• Analyze human capital and employee satisfaction</li> <li>• Assess employee work-life balance</li> </ul>
Human Rights	<ul style="list-style-type: none"> <li>• Counsel on human rights law such as UK Modern Slavery Act and U.S. Uighur (Uyghur) Act of 2019</li> <li>• Prevent human trafficking</li> </ul>
Environmental Justice Counseling & Compliance	<ul style="list-style-type: none"> <li>• Develop strategies to comply with new executive orders and regulations (including Executive Order 14008)</li> <li>• Draft, review, and implement policies on social and environmental justice</li> <li>• Facilitate communication with and address concerns from communities impacted by business</li> <li>• Create and analyze benchmarking information related to environmental justice principles</li> <li>• Navigate litigation claims that implicate environmental justice</li> </ul>
Diversity, Equity and Inclusion Initiatives	<p>Advise on:</p> <ul style="list-style-type: none"> <li>• Executive board diversity/general diversity</li> <li>• Board quotas</li> <li>• Executive compensation</li> <li>• Pay equity/gender pay-gap reporting</li> <li>• Corporate culture</li> </ul> <p>Review and design:</p> <ul style="list-style-type: none"> <li>• Anti-harassment and discrimination services and trainings</li> <li>• DEI programming</li> </ul>

<sup>158</sup> See Exarhakis, *supra* note 87, at 970–71.

<sup>159</sup> See *infra* Appendix A, tbl.8; S&P Global Sustainable1, *supra* note 81; Westchester County Association Sustainable Business Conference, *supra* note 70; Murthy, *supra* note 86; materials cited within the Article.

### C. “Governance” ESG Services

Traditional corporate lawyering is a significant part of what ESG lawyers do under the governance prong of ESG. Governance addresses corporate organization, decision-making, and leadership. To that end, ESG lawyers will need to be familiar with corporate bylaws, requirements or goals to increase board diversity, and rules around shareholder activism. The following paragraphs and Table 5 list and describe ESG products and services related to corporate governance.

Within the “governance” category, ESG lawyers must be cognizant of their clients’ shareholders’ actions. Shareholder action, sometimes referred to as corporate engagement, relates to “[t]he use of shareholder power to influence corporate behavior.”<sup>160</sup> Lawyers must clearly play a role when escalated engagement requires resolution, creates public concern, or develops into litigation. However, other aspects of shareholder action, such as establishing voting policy, public divestment, and engaging with target companies on specific topics, may also call for the advice of legal counsel.<sup>161</sup>

It is imperative that attorneys consider the moral and ethical dimensions of corporate ESG policies, especially those related to sustainability and diversity in all aspects of company operations. This includes social media, press releases, public filings, and other public-facing communications not only by the client, but also by the investment funds and portfolio companies with which it deals.<sup>162</sup>

An additional area of concern for ESG attorneys is bribery and corruption. The Foreign Corrupt Practices Act (FCPA)<sup>163</sup> “prohibits American companies from bribing foreign officials for business advantages” but makes an exception for “grease payments,” which enable companies to make payments to “facilitate routine government action.”<sup>164</sup> However, these expenditures may not be “made to influence a decision to create a new business or continue business with the paying company.”<sup>165</sup> Compliance with the FCPA is of utmost concern for “governance” attorneys, who advise clients and must

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<sup>160</sup> Roncalli, *supra* note 79, at 52.

<sup>161</sup> *See id.*

<sup>162</sup> *See* Exarhakis, *supra* note 87, at 971.

<sup>163</sup> Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1.

<sup>164</sup> *See* Exarhakis, *supra* note 87, at 969.

<sup>165</sup> *Id.*

consider the “moral, social, economic and political factors” of payments.<sup>166</sup> Morally, lawyers must consider how so-called grease payments are perceived and may reflect on the company’s ethical policies, and generally how bribery may be perceived within the culture of foreign countries.<sup>167</sup> In addition to identifying moral consequences, attorneys must also be cognizant of the potential economic consequences of grease payments. To combat these consequences, some scholars recommend that firms implement strict internal regulatory schemes and advise clients to take proactive measures, such as “agreeing [to] anti-bribery pacts with their peers and competitors stating that none of the companies will engage in grease payments.”<sup>168</sup> Further, lawyers must be attentive to the customs, norms, and laws of the foreign country.<sup>169</sup>

These considerations illustrate how ESG lawyers’ responsibilities may overlap under the three ESG prongs. While internal regulatory schemes and anti-bribery pacts fall within the governance prong, payments to host governments and communities and the way a company affects host firms and local governments may fit more precisely under the “social” prong. What is paramount here is not the exact categorization but the diversity of ESG lawyers’ responsibilities.

Although ESG due diligence has previously been considered a “check-the-box” exercise, today it “comprise[s] a forward-looking examination of [environmental, social, and corporate governance] criteria that goes beyond current and future legal compliance and liabilities, in order to identify opportunities to create value for clients.”<sup>170</sup> As previously stated, even when outside consultants are used for ESG reporting, counsel has an integral role in the process to manage the third-party and effectively integrate the analysis into existing work streams.<sup>171</sup> To successfully accomplish this, a lawyer should be familiar with and knowledgeable of the client’s ESG program and how they intend to use ESG reports.<sup>172</sup> Moreover, the attorney should assist in developing the ESG work product, facilitate

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<sup>166</sup> *Id.*

<sup>167</sup> *See id.*

<sup>168</sup> *Id.* at 970.

<sup>169</sup> *See id.*

<sup>170</sup> Morawetz, *supra* note 75.

<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

communications between the third-party consultant and other advisory teams, and review the consultant's report to ensure it meets the client's expectations.<sup>173</sup>

Throughout this process, lawyers should review any and all written materials, as well as communicate with the client's ESG team, or establish an ESG team if one does not already exist.<sup>174</sup> An established ESG team can be a resource for answering questions about the purpose of the ESG reports—whether there should be a focus on cost-benefit analysis to advance ESG initiatives, if the reports are being distributed to stakeholders, whether the reports should be framed in terms of issues and risks or opportunities, or whether there are specific legal requirements for such reports.<sup>175</sup>

Whether a company chooses an in-house or external lawyer to conduct an internal investigation may be dependent on considerations such as access to information, knowledge of the corporation's business operations, and attorney-client and work product protections.<sup>176</sup> Additionally, many lawyers undertake the role of compliance officer for their clients and are responsible for initiating compliance efforts, as well as aiding in the development and implementation of resources and programs.<sup>177</sup> Attorneys are also frequently tasked with resolving ethics issues related to corporate policies and business codes of conduct.<sup>178</sup> For instance, attorneys may be asked to advise on the rules governing the acceptance of gifts or the use of company vehicles and other resources.<sup>179</sup> Ethical issues can include standard requirements such as providing an employee notice of grievance procedures or span social and human rights violations.

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<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> See Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1008 (2007).

<sup>177</sup> See *id.* at 1011–12.

<sup>178</sup> See *id.* at 1012; Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1084 n.116 (1997) (citing *Business Ethics: Establishing a Corporate Code of Conduct*, 10 ACCA DOCKET 52, 59 (1992)) (stating that IBM's code of conduct encourages employees to “talk with [their] local IBM lawyer” before making business decisions that raise ethical issues).

<sup>179</sup> See Duggin, *supra* note 176, at 1012.

Lawyers are also engaged in transactional work at the intersection of sustainability and investment. Lawyers perform transactional due diligence looking for risk in ESG factors when dealing with mergers and acquisitions, responding to investor ESG questionnaires, advising venture capitalists and angel investors on impact investing<sup>180</sup> in emerging markets, and consulting with large endowments, asset managers, and philanthropic organizations and foundations about ESG, investments, and financial portfolios.<sup>181</sup>

Table 5: ESG Products Offered by Law Firms—Governance<sup>182</sup>

Politics & Public Affairs	<ul style="list-style-type: none"> <li>• Monitor political landscapes</li> <li>• Prepare rule making comments</li> <li>• Protect clients' reputation from defamation</li> <li>• Navigate public affairs</li> <li>• Advise on operational implementation and appropriate recordkeeping</li> </ul>
Investor Relations & Negotiations	<ul style="list-style-type: none"> <li>• Respond to investor ESG questionnaires</li> <li>• Provide shareholder activism defense</li> <li>• Assess conflict considerations</li> </ul>
Risk Mitigation	<ul style="list-style-type: none"> <li>• Mitigate reputational, investigatory, whistleblower risks</li> <li>• Counsel on corporate governance requirements</li> <li>• Mitigate social policy risks (including labor/employment rules) and risks posed by climate regulations</li> </ul>

<sup>180</sup> Forbes Advisor defines impact investing as “when investors pursue strategies that create positive environmental or social benefits, in addition to strong investment returns.” David Rodeck & John Schmidt, *An Introduction to Impact Investing*, FORBES ADVISOR (Oct. 28, 2021), <https://www.forbes.com/advisor/investing/impact-investing/>.

<sup>181</sup> See *Asset Management ESG*, ROPES & GRAY, <https://www.ropesgray.com/en/practices/asset-management-esg> (last visited July 7, 2023); Myron Mallia-Dare & Cindy Kim, *ESG: Creating Value and Mitigating Risk in Mergers & Acquisitions*, AM. BAR ASS'N BUS. L. TODAY (June 15, 2022), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2022-june/esg-creating-value-and-mitigating-risk/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-june/esg-creating-value-and-mitigating-risk/).

<sup>182</sup> See *infra* Appendix A, tbls.8–9; S&P Global Sustainable1, *supra* note 81; Westchester County Association Sustainable Business Conference, *supra* note 70; Murthy, *supra* note 86; materials cited within the Article.

Corporate Integrity & Compliance	<ul style="list-style-type: none"> <li>• Advise on bribery/corruption concerns</li> <li>• Oversee internal investigations</li> <li>• Oversee audits</li> <li>• Provide board counseling</li> </ul>
Transactions & Investments	<p>Due Diligence &amp; Sale Preparation</p> <ul style="list-style-type: none"> <li>• Integrate ESG due diligence into mergers and acquisitions, initial public offerings, real estate strategies, etc.</li> <li>• Oversee technical consultants</li> <li>• Assess environmental considerations in sale of real property and environmental commodities</li> <li>• Maximize opportunity by accurately reflecting ESG strengths</li> <li>• Tailor exit strategies to ESG sensitivities</li> </ul> <p>Portfolio Monitoring</p> <ul style="list-style-type: none"> <li>• Prepare portfolio company questionnaires</li> <li>• Monitor investments and ESG KPIs</li> <li>• Consult large endowments, asset managers, philanthropic organizations/foundations about financial portfolios</li> </ul>
Cybersecurity, Data Resilience & Ethics	<ul style="list-style-type: none"> <li>• Create data breach incident response plans</li> <li>• Conduct and support insurance evaluations</li> </ul>

#### D. *The Limits and Challenges of ESG*

The material in this section should make clear that ESG is a complex and growing field of legal practice. With that complexity and growth has come more criticism and more recognition of the challenges that face ESG criteria. On the one hand are the inherent limitations such as access to data. On the other hand are external challenges such as the dispersion of ESG metrics and political pushback. In the remainder of this section we briefly address, by way of example, two inherent limitations and two external challenges.

The first internal limitation is the lack of data available for measuring ESG performance. ESG is a metric-driven endeavor.<sup>183</sup> But data are not available for all aspects of a firm's ESG practices.

<sup>183</sup> See Myers & Czarnetzki, *supra* note 3, at 997–98.

In the case of ESG, it may be impossible to measure certain aspects, and ESG lawyers must advise clients on how to address the lack of data. Similarly, the second internal limitation is that ESG factors are both qualitative and quantitative, but it is sometimes hard to integrate qualitative and quantitative data. This can lead to overvaluing quantitative metrics and undervaluing qualitative metrics.<sup>184</sup> Thus, another consideration for ESG practitioners is to balance qualitative and quantitative measures and to find ways to focus clients on important qualitative information that may not aggregate as easily into numeric signals and scores but is still critical for client decision-making.<sup>185</sup>

As more and more firms engage ESG values, the demand for ESG products and services grows. This gives rise to the first external ESG complication. As this Article has already shown, there is an immense number of criteria that could be considered when it comes to third-party measurements of ESG.<sup>186</sup> For example, ESG lawyers have to consider the pros and cons, distinctions and differences between the Bloomberg ESG Disclosure Score, FTSE Russell ESG Rating, MSCI ESG Ratings, Refinitiv ESG Scores, EcoVadis CSR Rating, ISS-Oekom Corporate Rating, RobecoSAM Corporate Sustainability Assessment, Sustainalytics Company ESG Ratings, and TruValue Labs Insights360 Scores, even if only in the context of understanding the reports provided by consulting firms that their

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<sup>184</sup> See, e.g., Sarah Gelfand & Laura Budzyna, *Elevating Qualitative Data in Impact Performance Reporting*, HARV. ADVANCED LEADERSHIP INITIATIVE SOC. IMPACT REV. (Sept. 13, 2022), <https://www.sir.advancedleadership.harvard.edu/articles/elevating-qualitative-data-in-impact-performance-reporting>.

<sup>185</sup> Similar tensions exist in other areas of law. In environmental law more broadly there is significant discussion of the balance between the objective rules of administrative regulation and the subjective standards of common law claims. See, e.g., Joshua Ulan Galperin & Douglas A. Kysar, *Uncommon Law: Judging in the Anthropocene*, in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC 33–37 (Jolene Lin & Douglas A. Kysar eds., 2020). Rules make decision-making easy but their lack of flexibility can lead to unfair results while standards offer the flexibility to respond to unique circumstances but add discretion that burdens decision-making. Aggregating qualitative and quantitative ESG measures presents a similar, if not exact, tension. Because qualitative measures, like standards, allow more discretion and flexibility, it becomes more complicated to integrate them into the same decision-making paradigm as straightforward, if less complete, quantitative measures.

<sup>186</sup> See, e.g., Roncalli, *supra* note 79, at 79–82.



clients also employ.<sup>187</sup> As ESG continues to grow, so too will the options. ESG lawyers need to carefully consider whether a given dataset, metric, or other ESG product is trustworthy, high quality, and appropriate for their needs.

The second external limitation for ESG practice is the political context. In recent years, ESG has become more common as companies respond to growing demand.<sup>188</sup> That rise has led to some high-profile partisan pushback, including various states prohibiting state funds from ESG investing.<sup>189</sup> With the rise of the anti-ESG movement, lawyers need to advise clients on political risk and consider the moral dimensions of how or whether to advance ESG values in the face of partisan opposition.

The limitations are real, and important, but they are hardly a signal that ESG is impossible or politically doomed. To the contrary, these limitations help highlight the growth and long-term importance of ESG. Because ESG is here to stay, we next turn to strategies law schools should consider for training students to become the sustainable business lawyers of the future.

### III. TOPICS FOR THE SUSTAINABLE BUSINESS LAW CURRICULUM

With the rapid emergence and growth of ESG law practice, schools should prepare students to serve clients in this field and to understand the policy and theory that underpins the endeavor. Importantly, ESG curricula could attract what we might call “traditional” environmental students as well as business law students. Thus, it is important to design curricula without making assumptions about what students will already know about the field. The primary goal of this Part, therefore, is to identify topics for a sustainable business law curriculum. The first step is to review existing casebooks and textbooks that cover ESG and sustainable business law to identify the breadth of subjects that experts have already

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<sup>187</sup> See ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS 164–70 (Katayun Iris Jaffari & Stephen Pike eds., 2022).

<sup>188</sup> See, e.g., Redd et al., *supra* note 150.

<sup>189</sup> See Lance Dial et al., *The Challenge of Investing in the Face of State Anti-ESG Legislation*, REUTERS (Aug. 24, 2022), <https://www.reuters.com/legal/legal-industry/challenge-investing-face-state-anti-esg-legislation-2022-08-24/>.

identified as important to teaching this area of law.<sup>190</sup> The second step is to compare the subject areas in which ESG lawyers practice against the subjects that these books cover and other courses typically available in the law school curriculum. Finally, this Part will propose a general menu of courses and course sequencing for an effective sustainable business law curriculum that prepares students for ESG practice. The curriculum is both connected to and distinct from a standard business or environmental law program.

#### A. *The Breadth of ESG Teaching*

Existing resources for teaching ESG cover a huge breadth of material, often without sufficient focus on legal issues or the reality of ESG practice. This is not an indictment. Publishers released most of the ESG books in our sample in the years before ESG practice began to take hold as a distinct area. Thus, the coverage of ESG and sustainable business books is often much broader than ESG practice. In addition, most books on the subject are written for undergraduate and business students rather than law students.<sup>191</sup> We identified 28 existing and forthcoming textbooks on sustainable business and ESG. The full list of books is presented in Table 6. Of these, only six are specifically focused on sustainable business law. Four of the six are practice books, leaving only two textbooks specifically for law students.

Table 6: Existing Sustainable Business and ESG Law Teaching Resources<sup>192</sup>

Title	ISBN
CRITICAL STUDIES ON CORPORATE RESPONSIBILITY, GOVERNANCE AND	

<sup>190</sup> There is real value in this exercise. *See generally* Michael C. Blumm & David H. Becker, *From Martz to the Twenty-First Century: A Half-Century of Natural Resources Law Casebooks and Pedagogy*, 78 U. COLO. L. REV. 647 (2006).

<sup>191</sup> We are aware that Michael Vandenberg, Sarah Light, and James Salzman are in the process of developing a law school casebook on PEG, but that book is too early in the publication process to warrant inclusion. No doubt it will make important contributions specifically to teaching these issues in law school.

<sup>192</sup> Table 6 is organized in chronological order by publication date from earliest publication to most recent and forthcoming publications.

Title	ISBN
SUSTAINABILITY Series (Emerald Grp. Publ'g) <sup>193</sup>	
PETER A. SOYKA, CREATING A SUSTAINABLE ORGANIZATION: APPROACHES FOR ENHANCING CORPORATE VALUE THROUGH SUSTAINABILITY (2012) <sup>*194</sup>	9780133886573
SCOTT T. YOUNG & KANWALROOP KATHY DHANDA, SUSTAINABILITY: ESSENTIALS FOR BUSINESS (2012) <sup>*</sup>	9781412982849
MICHAEL BLOWFIELD, BUSINESS AND SUSTAINABILITY (2012)	9780199642984
CORPORATE SOCIAL RESPONSIBILITY: READINGS AND CASES IN A GLOBAL CONTEXT (Andrew Crane et al. eds., 2d ed. 2013)	9780415683258
CORPORATE SOCIAL RESPONSIBILITY: A RESEARCH HANDBOOK (Kathryn Haynes et al. eds., 2014)	9780415783125
CORPORATE SOCIAL RESPONSIBILITY (Esben Rahbek Gjerdrum Pedersen ed., 2015)	9780857022455
CSR AND SUSTAINABILITY FROM THE MARGINS TO THE MAINSTREAM: A TEXTBOOK (Michael Hopkins ed., 2016)	9781783534463
SCOTT R. HERRIOTT, METRICS FOR SUSTAINABLE BUSINESS (2016)	9781138901728
SUSTAINABILITY & BUSINESS LAW (Judd F. Sneirson & Nancy E. Shurtz eds., 2017) <sup>+195</sup>	9781611639193
HELEN KOPNINA & JOHN BLEWITT, SUSTAINABLE BUSINESS: KEY ISSUES (2d ed. 2018)	9781138087903

<sup>193</sup> This is a sixteen-volume series that covers many ESG, CSR, and sustainable business topics. The first volume was published in 2010, and the most recent volume was published in 2023. *See, e.g.*, 1 REFRAMING CORPORATE SOCIAL RESPONSIBILITY: LESSONS FROM THE GLOBAL FINANCIAL CRISIS (William Sun et al. eds., 2010).

<sup>194</sup> Books identified with an asterisk (\*) feature ESG and/or CSR as a chapter or section but ESG and CSR are not the primary focus.

<sup>195</sup> Books identified with a plus sign (+) have a focus on sustainable business law.

Title	ISBN
MICHAEL BLOWFIELD & ALAN MURRAY, CORPORATE SOCIAL RESPONSIBILITY (4th ed. 2019)	9780198797753
ANDREW CRANE ET AL., BUSINESS ETHICS: MANAGING CORPORATE CITIZENSHIP AND SUSTAINABILITY IN THE AGE OF GLOBALIZATION (5th ed. 2019)*	9780198810070
THE LAWYER'S CORPORATE SOCIAL RESPONSIBILITY DESKBOOK: PRACTICAL GUIDANCE FOR CORPORATE COUNSEL AND LAW FIRMS (Alan S. Gutterman et al. eds., 2019) <sup>+</sup>	9781641055000
NADA R. SANDERS & JOHN D. WOOD, FOUNDATIONS OF SUSTAINABLE BUSINESS: THEORY, FUNCTION, AND STRATEGY (2d ed. 2020)	9781119577508
ANITA INDIRA ANAND, SHAREHOLDER-DRIVEN CORPORATE GOVERNANCE (2020)*	9780190096533
LAURA HARTMAN ET AL., BUSINESS ETHICS: DECISION MAKING FOR PERSONAL INTEGRITY & SOCIAL RESPONSIBILITY (5th ed. 2021)*	9781260260496
ERIKA GEORGE, INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY (2021)	9780199941483
ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS (Katayun Iris Jaffari & Stephen Pike eds., 2022) <sup>+</sup>	9781639050512
ALAN R. PALMITER, SUSTAINABLE CORPORATIONS (2022) <sup>+</sup>	9781543849004
SUSTAINABILITY, TECHNOLOGY, AND FINANCE: RETHINKING HOW MARKETS INTEGRATE ESG (Herman Bril et al. eds., 2022)	9781032200545
ANNE LAWRENCE ET AL., BUSINESS AND SOCIETY: STAKEHOLDERS, ETHICS, PUBLIC POLICY (17th ed. 2023)*	9781264080915
DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY (6th ed. 2023)	9781071852965
ARCHIE B. CARROLL & JILL BROWN, BUSINESS & SOCIETY: ETHICS, SUSTAINABILITY & STAKEHOLDER MANAGEMENT (11th ed. 2023)	9780357718629

Title	ISBN
PAUL C. GODFREY, CLEAN: LESSONS FROM ECOLAB'S CENTURY OF POSITIVE IMPACT (2023)*	9781394153367
THE SUSTAINABLE CORPORATION: A LEGAL AND BUSINESS CENTRIC APPROACH TO ESG (Travis Miller & Todd L. Cort eds., 2023) <sup>+</sup>	9781639053186
ENVIRONMENTAL, SOCIAL, GOVERNANCE: THE PROFESSIONAL'S GUIDE TO THE LAW AND PRACTICE OF ESG (Brian D. Israel et al. eds., 2023) <sup>+</sup>	9781639053292
CATHERINE ROBERTS, SHAREHOLDER ACTIVISM (forthcoming October 2023)*	9780198754374

Across the entire set of books, there is significant diversity in the details of coverage but, at a higher level of generalization, there is a standard set of subjects that appear consistently. Table 7 catalogues the coverage of these books from the highest level of generality to the most specific. The first column of the table lists the major subjects that appeared consistently in all books. Some books further divided the major subjects into smaller chapters, as illustrated by the second column in the table. The last column lists the most prevalent questions and topics addressed within each subdivision.

Overall, a number of general categories appear. First, there is introductory material that lays out vocabulary and a general background of the challenges that businesses face today. Second, books include coverage of management and implementation issues, such as entrepreneurship; ethics; measurement, reporting, and verification; and marketing. Corporate governance is a third bucket, addressing the role of corporate boards. Fourth, the books discuss stakeholder issues from local communities to consumers, shareholders, and employees. Fifth is material on operations including supply chain management and technology. A deeper dive into environmental issues is the sixth area of coverage. Seventh, most authors broadly address regulation and government relations. Finally, some books identify pushback and criticism against ESG or CSR practices.

Table 7: Compilation of Common Sections/Chapters in Books Listed in Table 6

Introduction	Business & Sustainability Overview	<ul style="list-style-type: none"> <li>• Definitions (CSR, business, society)</li> <li>• Origins and evolution of CSR</li> <li>• Driving forces</li> </ul>
	Challenges Confronting Business	<ul style="list-style-type: none"> <li>• Environmental</li> <li>• Social</li> <li>• Economic</li> </ul>
Managing & Implementing CSR	Leadership & Entrepreneurship	<ul style="list-style-type: none"> <li>• What is sustainable business leadership?</li> <li>• Changing management</li> <li>• Hiring strategies and employee engagement</li> <li>• Integrating sustainability into corporate government</li> </ul>
	Business Ethics	<ul style="list-style-type: none"> <li>• Management ethics models: immoral, moral, amoral</li> <li>• Ethical and moral judgements</li> <li>• Best practices</li> <li>• Ethical issues in the business environment and global arena</li> </ul>
	Socially Responsible Investment	<ul style="list-style-type: none"> <li>• Fiduciary duties</li> <li>• ESG investing</li> <li>• Tax subsidies</li> </ul>
	Measuring & Reporting	<ul style="list-style-type: none"> <li>• Why measure/report and the benefits?</li> <li>• Metrics and tools</li> <li>• Triple Bottom Line</li> <li>• Reporting and materiality</li> <li>• Standards by the International Organization for Standards</li> <li>• Sharing information with stakeholders</li> <li>• Global reporting initiatives</li> <li>• Environmental footprint</li> </ul>
	Marketing	<ul style="list-style-type: none"> <li>• Avoiding greenwashing</li> <li>• Trends</li> <li>• Strategies</li> <li>• Brand development</li> <li>• Certification programs, designs, and challenges to certification</li> </ul>

	Risk & Crisis Management	<ul style="list-style-type: none"> <li>• Risk identification and assessment</li> <li>• Preventable versus uncontrollable risk</li> <li>• Climate change-related business risks</li> <li>• Measuring materiality of risks</li> <li>• Bearing, avoiding, mitigating risk and risk response</li> <li>• Insurance (sharing risk)</li> <li>• Continuity planning and risk management</li> </ul>	
Corporate Governance	Board Issues	<ul style="list-style-type: none"> <li>• Importance of board independence</li> <li>• Diversity</li> <li>• Relationship with the CEO</li> <li>• Member liabilities</li> <li>• Executive compensation</li> <li>• Use of committees</li> </ul>	
Stakeholders & Shareholders	Internal Stakeholders	<ul style="list-style-type: none"> <li>• Stakeholder models</li> <li>• Management and engagement</li> <li>• Primary versus secondary stakeholders</li> <li>• Important stakeholder attributes (legitimacy, power, urgency)</li> </ul>	
	External Stakeholders	Consumers	<ul style="list-style-type: none"> <li>• Warranties and guarantees</li> <li>• Packaging and labeling</li> <li>• Advertising issues</li> <li>• Product liability</li> <li>• Safety issues (especially food safety)</li> <li>• Government agencies (Food &amp; Drug Administration, Consumer Product Safety Commission, Consumer Financial Protection Bureau)</li> <li>• Customer service programs and business's response to consumers</li> </ul>
		Community Stakeholders	<ul style="list-style-type: none"> <li>• Community engagement</li> <li>• Philanthropy</li> <li>• Volunteer programs</li> <li>• Harmful impacts on communities</li> </ul>
	Employees	<ul style="list-style-type: none"> <li>• Right to be fired without cause</li> <li>• Freedom of speech</li> </ul>	

		<ul style="list-style-type: none"> <li>• Privacy in the workplace</li> <li>• Work-life balance and creating a family-friendly workplace</li> <li>• Workplace safety problems and workplace violence</li> <li>• Employment discrimination</li> <li>• Diversity and inclusion</li> </ul>
	Shareholders	<ul style="list-style-type: none"> <li>• Lawsuits</li> <li>• Shareholder activism</li> <li>• Shareholder democracy</li> <li>• Investor relations</li> </ul>
Operations Management	Supply Chain Management	<ul style="list-style-type: none"> <li>• Managing risks</li> <li>• Human rights, child labor, occupational safety, sweatshops</li> <li>• Traceability and transparency</li> <li>• Benefits of sustainable supply chain management</li> <li>• Managing the entire product life cycle/cradle-to-cradle design</li> <li>• Inventory management (including during environmental crises)</li> </ul>
	Technology	<ul style="list-style-type: none"> <li>• History of technology and its context in human development</li> <li>• Technology-supported investment management</li> <li>• Artificial intelligence supporting implementation of ESG</li> <li>• Resilience as an analytical factor</li> <li>• Current practices and trends for corporations to leverage technology</li> <li>• Benefits and costs of technology</li> <li>• Information technology consumer privacy</li> <li>• Biotechnology</li> </ul>
Environmental Sustainability	Key Issues	<ul style="list-style-type: none"> <li>• Climate change and global warming</li> <li>• Air pollution and toxins</li> <li>• Energy and fossil fuels</li> <li>• Waste management</li> <li>• Deforestation, habitat destruction, biodiversity</li> <li>• Land use planning</li> <li>• Agricultural production</li> </ul>



	Environmental Stakeholders	<ul style="list-style-type: none"> <li>• Government (U.S. and international)</li> <li>• Environmental interest groups, activists, non-governmental organizations</li> </ul>	
	Criminal Enforcement	<ul style="list-style-type: none"> <li>• Compliance with regulations involving criminal sanctions</li> <li>• Representing clients in criminal regulatory enforcement actions</li> </ul>	
Business, Government & Legal Relations	Government's Impact on Business	Nonregulatory Impacts	<ul style="list-style-type: none"> <li>• Industrial policy</li> <li>• Privatization</li> </ul>
		Regulation	<ul style="list-style-type: none"> <li>• Reasons for regulation</li> <li>• Types of regulation</li> <li>• Issues related to regulation</li> </ul>
		Deregulation	<ul style="list-style-type: none"> <li>• Purposes</li> <li>• Current trends</li> </ul>
	Business's Impact on Government	<ul style="list-style-type: none"> <li>• Corporate political participation</li> <li>• Political spending</li> </ul>	
	Legal Frameworks	<ul style="list-style-type: none"> <li>• Hard versus soft law</li> <li>• International law</li> <li>• Legal compliance and incentives</li> <li>• Underenforcement</li> <li>• Limits of the law</li> </ul>	
Criticisms of CSR	Use and Abuse of Power	<ul style="list-style-type: none"> <li>• CSR as "pro-business"</li> <li>• Dominance of corporate system over society due to sheer size and resources</li> <li>• Ability of corporations to act together toward a desired effect</li> </ul>	
	Balancing Power and Responsibilities	<ul style="list-style-type: none"> <li>• Iron Law of Responsibility</li> <li>• Regulatory authorities to protect consumers</li> </ul>	

The six books written for lawyers and law students provide a more tailored example of how we might teach ESG in law school. THE LAWYER'S CORPORATE SOCIAL RESPONSIBILITY DESKBOOK: PRACTICAL GUIDANCE FOR CORPORATE COUNSEL AND LAW FIRMS

provides an overview for practitioners.<sup>196</sup> After background material on why ESG is important and the role of the board in overseeing ESG, the book turns to different substantive subjects and presents the legal underpinnings of each. For instance, Chapter 6 covers “Labor and Supply Chain Practices.” It begins with legal and regulatory requirements, discussing labor and employment laws, human trafficking and labor exploitation laws, and voluntary standards.<sup>197</sup> Chapter 7 follows a similar framework. The chapter addresses product and customer “responsibility” and teaches about the Consumer Product Safety Commission, Food and Drug Administration National Highway Traffic Safety Administration, Federal Communications Commission, and Federal Trade Commission.<sup>198</sup> The chapter on community engagement and investment discusses the law around corporate philanthropy, and the chapter on “Alternative Legal Entities” dives into traditional corporate formation, describing benefit corporations and similar hybrid for-profit and for-purpose corporate forms.<sup>199</sup>

This deskbook also covers subjects including marketing, technology, and the details of various federal regimes of environmental regulation. These are all important topics that highlight the breadth of overlap between private firms and environmental protection. However, much of this also extends beyond the scope of what ESG lawyers do on a regular basis.<sup>200</sup> A book of this breadth thus provides a survey of environmental and business law overlap rather than a close look at the work of ESG lawyers in practice.

ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS takes a similar approach, which is understandable given that the book is written for directors, with their broad range of oversight responsibilities.<sup>201</sup> However, the book is a relatively newer publication, giving its authors the benefit of seeing ESG practice in action. Like others, the book sets the stage by explaining what sustainability is

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<sup>196</sup> See THE LAWYER’S CORPORATE SOCIAL RESPONSIBILITY DESKBOOK: PRACTICAL GUIDANCE FOR CORPORATE COUNSEL AND LAW FIRMS (Alan S. Guterman et al. eds., 2019).

<sup>197</sup> See *id.* at 97–119.

<sup>198</sup> See *id.* at 123–38.

<sup>199</sup> See *id.* at 151–62, 249–52.

<sup>200</sup> See *supra* Part II.

<sup>201</sup> See ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS, *supra* note 187.

and the role of corporations in environmental protection.<sup>202</sup> It next summarizes the role of directors in ESG, ranging from their fiduciary duty to the role of specific board committees.<sup>203</sup> The final two sections of the book address discrete lawyerly tasks more directly, including mandatory and voluntary reporting, sustainability/ESG ratings, and supply chain contracting.<sup>204</sup> Although the book does cover topics like environmental regulation and litigation, it shows, compared to other books, a clearer emphasis on the tasks that ESG lawyers perform on a regular basis.

SUSTAINABILITY & BUSINESS LAW by Sneirson & Shurtz and SUSTAINABLE CORPORATIONS by Palmiter are more traditional law school texts.<sup>205</sup> SUSTAINABLE CORPORATIONS is one of the newest books in the field, with a Fall 2022 publication date.<sup>206</sup> The book has enormous breadth, including more underlying theory about subjects like the nature of democracy and capitalism and the meaning of integrity.<sup>207</sup> But it addresses core ESG subjects like ESG disclosures, corporate forms, and socially responsible investing—and due to its publication date, a timely discussion of the proposed SEC climate disclosure rules. Although the book addresses subjects like environmental regulation, which fall outside the ambit of ESG practice groups, it has a much clearer focus on core ESG subjects.<sup>208</sup>

Like others, the SUSTAINABILITY & BUSINESS LAW book begins with significant background on the intersection of business and the environment, the meaning of sustainability, the role of corporations, and general issues of corporate compliance. It then organizes the key issues in doctrinal categories, in a similar fashion to how sustainable business courses had been taught and syllabi organized in

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<sup>202</sup> See *id.* at 1–22.

<sup>203</sup> See *id.* at 23–124.

<sup>204</sup> See *id.* at 125–260.

<sup>205</sup> See SUSTAINABILITY & BUSINESS LAW (Judd F. Sneirson & Nancy E. Shurtz eds., 2017); ALAN R. PALMITER, SUSTAINABLE CORPORATIONS (2022).

<sup>206</sup> See PALMITER, *supra* note 206; see also *Sustainable Corporations*, ASPEN PUBL’G, <https://www.aspenpublishing.com/PalmiterSustainableCorporations1e> (last visited Jan. 1, 2023) (stating book’s publication date as September 15, 2022).

<sup>207</sup> See PALMITER, *supra* note 206, at 16–17, 23–27, 467–94 (discussing the “Nature (and Legitimacy) of US Democracy,” the nature of US corporations and capitalism, and various theories underlying “Personal Integrity,” respectively).

<sup>208</sup> Palmiter addresses core ESG subjects including, but not limited to, human capital management, greenwashing, shareholder activism, and disclosures as a corporate governance tool. See *id.*

the past. Chapter 5 focuses on corporate forms for sustainable businesses and discusses the law of corporate formation.<sup>209</sup> Chapter 6 addresses securities law as source of transparency and reporting requirements.<sup>210</sup> Chapter 7 explains the law surrounding investing and fiduciary duties.<sup>211</sup> As the text continues it adds contract law, tax, subsidies, torts, employment, international law, bankruptcy, and intellectual property studies as well.<sup>212</sup>

The areas of coverage in *SUSTAINABILITY & BUSINESS LAW* are indicative of the very broad scope that some books offer. These books, like *ESG IN THE BOARDROOM*, attempt to help readers understand the extensive overlap between business practice and environmental sustainability, including all the areas that we may traditionally consider business law that, in fact, have an important impact on environmental and social goals. Other books, such as *THE LAWYER'S CORPORATE SOCIAL RESPONSIBILITY DESKBOOK* and the American Bar Association's *PROFESSIONAL'S GUIDE TO THE LAW AND PRACTICE OF ESG*, eschew the 30,000-foot view in favor of a narrower set of topics that reflect the daily work of ESG lawyers. In general, these books have the benefit of being much newer releases and therefore, presumably, having a better picture of what the new ESG practice looks like.

For example, tax law and toxic torts plainly have an impact on business decision-making and can have significant environmental implications. However, within a general counsel's office or law firm, the lawyers who handle tax law are likely in the tax group and those who handle toxic torts are likely in the litigation group. In both cases, the subjects are closely related to ESG but lawyers in ESG groups are likely not the ones handling such matters.

In thinking about how to teach ESG to law students, the full breadth of material is important. Law students need to understand the general environmental factors that weigh on both business decisions and the future of life on Earth, as well as the general roles and responsibilities within business decision-making. These big-picture factors bookend the study of sustainable business and it almost goes

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<sup>209</sup> See *SUSTAINABILITY & BUSINESS LAW* 87–126 (Judd F. Sneirson & Nancy E. Shurtz eds., 2017).

<sup>210</sup> See *id.* at 129–56.

<sup>211</sup> See *id.* at 159–90.

<sup>212</sup> The book addresses these topics in Chapters 8–14, respectively. Chapter 9 discusses taxation in Part I and tax subsidies in Part II. See *id.* at 191–426.

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without saying that any curriculum must include basic classes like Environmental Law and Business Organizations. The more difficult task is settling on some consistent material between these bookends.

### *B. Narrowing Down ESG Teaching for Law School*

Existing casebooks provide a rich menu of options for teaching ESG law but, with hundreds of subjects, the curriculum could fill well more than three years of full-time studies. However, Part II of this Article provided an overview of the daily work of ESG law practitioners. Thus, perhaps the most effective way to narrow down to an effective, practical, and manageable curriculum is to overlay the breadth of the book subjects with the real experience of practitioners and to focus teaching on that overlap.

What our data in Part II make clear is that while we might think of ESG as simply the synthesis of environmental and business law practice, the work of ESG lawyers is not so broad. Yes, tax law, tort law, and even environmental regulation are important factors in how corporations interact with stakeholders and the environment. But these are typically the purview of other lawyers within a general counsel's office or of other practice groups within a firm. ESG lawyers are not likely to handle employment disputes or tort litigation, for instance, where other experts are readily available. With respect to environmental regulation, the compliance or government relations groups are likely to deal with different aspects of this rather than the ESG practitioner. Of course, there will be conferencing and collaboration but these subjects have homes elsewhere in daily practice.

It is newer tasks that occupy ESG lawyers. Our research shows that ESG lawyers tend to focus on things like data-gathering for both voluntary and mandatory ESG reporting, interfacing with external stakeholders, and advising on sustainable investing. This does not imply that ESG lawyers can be ignorant of, for instance, tax, intellectual property, environmental, or labor law. Indeed, these provide an important context for their work. What it does mean is that ESG teachers and students would be smart to focus on subjects like securities, corporate finance, climate law, and newly fashioned courses that cover emerging ESG practice.

In some cases, there are instances where ESG practitioners work on subjects that the textbooks overlook. Although these holes are limited, it is also important to identify areas where existing

resources for teaching ESG law may not be available. For instance, our research, as presented in Part II, shows that ESG practitioners spend time on subjects like disaster preparedness and insurance, sustainable financing, DEI reporting, internal investigation and auditing, and portfolio monitoring. These subjects, and others, are not well covered in the ESG books in our study. Additional subjects that are important to ESG practice but are not well-covered in the books include infrastructure and resilience, ERISA, and environmental health and safety concerns. When designing an ESG law curriculum, it will be particularly important to include classes that touch on these subjects.

### C. A Proposed Curriculum

An ESG curriculum can draw on a number of business law and environmental law courses that are typically found in the course catalogs at most law schools; but, as the analysis in the last part shows, there are certain synthetic subjects that may require new course development.

Any curriculum will need to begin with the essential background from the core subjects of business and environmental law. An Environmental Law survey course and a course such as Business Law, Business Organizations, or Corporations are indispensable to provide the basic framework for students. In addition, a synthetic course like Sustainable Business Law, ESG Law, Private Environmental Governance, or Corporate Environmental Governance is critical to making sure all students have a basic understanding of the core issues and vocabulary.<sup>213</sup> A specialized professional responsibility course may also be warranted. For instance, New York University School of Law offers a course on Professional Responsibility in the Corporate Context<sup>214</sup> and Illinois College of Law offers a course on Compliance, Ethics, and Professional Responsibility.<sup>215</sup> Vermont Law and Graduate School has offered a specialized

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<sup>213</sup> Teachers may additionally consider integrating more cross-cutting lessons in existing courses. For instance, Environmental Law could include more discussion of private governance and business law more coverage of ESG lawyering.

<sup>214</sup> See David B. Harms, N.Y.U., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.courses&personid=41850> (last visited Dec. 30, 2022).

<sup>215</sup> See *Law 792: Compliance, Ethics, and Professional Responsibility*, ILL. COLLEGE OF L., <https://law.illinois.edu/academics/courses/compliance-ethics-and-professional-responsibility/> (last visited Dec. 30, 2022).

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professional responsibility course focused on environmental ethics,<sup>216</sup> and a class of this nature, in the alternative to a business-focused professional responsibility course, may also be an important component of an ESG curriculum.

The synthetic “Sustainable Business Law” or ESG course might contain the following four topics, with subtopics listed:

- An introduction to corporations and sustainability by defining and describing the evolution of CSR, the Triple Bottom Line, and ESG.
- The role of the corporate board and the corporation in achieving sustainability, including benefit corporations and corporate purpose, directors’ fiduciary duties and duties related to ESG/sustainability, and stakeholder and shareholder interests.
- ESG, social impact and socially responsible investing, and ESG/sustainability ratings.
- ESG and climate disclosures, voluntary ESG reporting and risk management, including new SEC proposed regulations and greenwashing.

In addition to the core required courses, an ESG law curriculum should include a variety of elective courses that allow students to dig deeper into the subjects that make up ESG practice. Because there are gaps between the areas in which ESG lawyers actually practice and the coverage in the ESG books, a core synthetic course—which would most likely rely on the existing texts—may not fill the gaps but pre-existing courses could help. Courses covering issues like Insurance Law, Mergers and Acquisitions, and Commercial Transactions, can help address topics like disaster insurance, due diligence, or internal audits that might otherwise fall through the cracks.

Sustainable investing, reporting, and multi-lateral, inter-firm collaborative governance initiatives make up key components of ESG practice. Thus, students may choose to take courses like Securities Law and Private Equity to cover investment and reporting, as well as Antitrust to understand the law that regulates how firms can make multi-lateral governance decisions; though making sure students understand the links to sustainability are why the synthetic Sustainable Business Law course will be necessary.

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<sup>216</sup> See *Environmental Ethics*, VT. L. & GRADUATE SCH., <https://www.vermont-law.edu/academics/classes/2017-spring/env5305> (last visited Dec. 30, 2022).

A key missing piece here, however, is the significant role of voluntary sustainability reporting, which ESG lawyers may be tasked with (or be responsible for reviewing if created internally by the client or by the client's hired consulting firm).<sup>217</sup> While Securities Law covers federal reporting requirements for publicly-traded corporations—and, in fact, one of the books we surveyed specifically covered the SEC's 2022 proposal to require climate change risk reporting<sup>218</sup>—a securities law class is unlikely to cover voluntary reporting. Voluntary reporting and sustainability guidance frameworks include reporting to non-profit organizations like SASB and the Carbon Disclosure Project as well as developing public- and investor-facing sustainability reports.<sup>219</sup> All facets of reporting often also include data gathering and analysis. Most law schools do not offer courses that cover this material which would also be covered in the synthetic Sustainable Business Law course.

Other doctrinal areas are less central to daily ESG practice but nevertheless may make useful elective courses. International Trade, Consumer Protection, or Products Liability may clarify the marketing and branding of sustainable products and related consumer protection issues like greenwashing. Tax can help students understand the external incentives and rewards for certain sustainable practices. Sales, Commercial Transactions, Labor Law, and Human Rights will get at issues in supply chain governance and sustainability.

Other subjects that books cover and that sometimes make their way to actual ESG practice are also important, though many are included in courses that may be part of the core ESG curriculum. For instance, understanding how to advise directors on fiduciary duties and shareholder engagement or selecting the proper corporate form are important subjects that Corporations or Business Organizations may cover.

In short, the ESG curriculum is not a steep mountain to climb. Existing courses like Environmental Law and Corporations

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<sup>217</sup> See Jennie Morawetz, *Managing ESG Consultants in Private Equity Transactions*, LAW360 (June 7, 2019), <https://www.law360.com/articles/1167046/managing-esg-consultants-in-private-equity-transactions>.

<sup>218</sup> See PALMITER, *supra* note 206, at 349–72.

<sup>219</sup> See *Who We Are*, CDP, <https://www.cdp.net/en/info/about-us> (last visited Sept. 26, 2023); *About Us*, SASB, <https://sasb.org/about/> (last visited Sept. 26, 2023); see also Jane Courtneil, *ESG Reporting Frameworks, Standards, and Requirements*, GREEN BUS. BUREAU (July 12, 2022), <https://greenbusinessbureau.com/esg/esg-reporting-esg-frameworks/>.



establish most of the likely mandatory courses. Securities Regulation and Corporate Finance, among other existing courses, provide a significant starting point for electives. While schools may need to launch new synthetic courses such as Sustainable Business Law, Sustainable Business Ethics, and something along the lines of Sustainability Reporting, an effective ESG law curriculum is well within reach.

#### CONCLUSION

Sometimes, a new field emerges and because it is so new, it is simple, if not easy, to define. Other times, a new field emerges and grows so quickly that scholars can struggle to keep up. The latter is the case with sustainable business law and the role of the ESG lawyer. Indeed, one of the challenges is simply selecting the proper name for this field. The umbrella term “sustainable business law” competes with many others such as PEG, CSR, and ESG. PEG seems to be the term that legal academics prefer in their study of the role businesses play in generating new environmental commitments beyond government regulation. CSR, a term that may be fading in the business discourse, generally refers to goals, describing the normative case for businesses taking responsibility for their various social and environmental impacts, as well as taking on voluntary activities in their communities. ESG—environment, social, and governance—has risen to take the place of CSR, and is generally a more quantitative and metrics-based approach to corporate governance, denoting *how* the firm should behave.

Regardless of the proper vocabulary, the rise in this practice area is dramatic. All 50 of the Am Law 50 top-grossing law firms address sustainability in one way or another. Eighty-six percent of the Am Law 50 have specialized practice groups in this area. Thus, a more important question than vocabulary is what lawyers in the sustainable business law field actually do. That question is perhaps best answered in the negative. ESG lawyers are not just environmental lawyers, corporate lawyers, contract specialists, or lobbyists. By and large, corporations have long had in-house lawyers who excel in these areas, or they turn to firms with the same. Although both in-house and outside ESG lawyers certainly do cover some of these subjects, the core of their work is more focused on newly emerging responsibilities such as gathering sustainability data, establishing goals, writing and/or reviewing sustainability and DEI reports, and

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overseeing the various impacts of corporate supply chains. But again, as Part II of this Article makes clear, the day-to-day of ESG lawyering is diverse and complex.

To prepare lawyers for this complexity, law schools should offer a curriculum that teaches the key aspects of sustainable business law. This is not an especially heavy lift—but it does require traditional environmental law courses to engage business law courses and vice versa. While two or three new courses may be necessary, much of the introductory knowledge a sustainable business lawyer needs is available in existing classes like Environmental Law, Corporate Law, Natural Resources Law, and Securities Regulation. These will help students understand natural constraints and regulatory burdens as well as corporate structure, director fiduciary duties, and various financial disclosures. However, a course like Sustainable Business Law should also be part of the equation. Such a course would need to cover topics that are not found elsewhere in the curriculum but are found everywhere in the daily practice of sustainable business law. For example, the course should explain the lexicon of this field, the role of corporate directors regarding sustainability and the options for alternative corporate forms as they relate to sustainability goals, various sustainability metrics (particularly regarding socially responsible investing), voluntary disclosures that are not likely covered in a securities law course (such as climate disclosures), quasi-regulatory private governance regimes that are not often taught in environmental law, and risk management generally.

The rapid growth of ESG law is an important step for private firms and a good opportunity for law schools. The growth also bodes well for environmental protection because it more broadly embeds environmental protection in all facets of business decision-making. Private sustainability initiatives are no substitute for public environmental lawmaking; both must progress in tandem. How to make sure that happens is yet another task that sustainable business lawyers should take seriously.

APPENDIX A  
REVIEW OF AM LAW 50 FIRMS' WEBSITES

Table 8: Am Law 50 Firms with ESG, CSR, or Sustainability  
Practice Area

1	Kirkland & Ellis <sup>220</sup>
2	Latham & Watkins <sup>221</sup>
3	DLA Piper <sup>222</sup>
4	Baker McKenzie <sup>223</sup>
5	Skadden, Arps, Slate, Meagher & Flom <sup>224</sup>
6	White & Case <sup>225</sup>
7	Sidley Austin <sup>226</sup>
8	Ropes and Gray <sup>227</sup>
9	Hogan Lovells <sup>228</sup>
10	Morgan, Lewis & Bockius <sup>229</sup>

<sup>220</sup> See *ESG & Impact*, KIRKLAND & ELLIS, <https://www.kirkland.com/services/practices/transactional/esg-and-impact> (last visited Sept. 14, 2023).

<sup>221</sup> See *Environmental, Social & Governance (ESG)*, LATHAM & WATKINS, <https://www.lw.com/en/practices/environmental-social-and-governance> (last visited Sept. 14, 2023).

<sup>222</sup> See *ESG*, DLA PIPER, <https://www.dlapiper.com/en-us/capabilities/practice-area/esg> (last visited Sept. 14, 2023).

<sup>223</sup> See *Sustainability*, BAKER MCKENZIE, <https://www.bakermckenzie.com/en/expertise/solutions/sustainability> (last visited Sept. 14, 2023).

<sup>224</sup> See *Environmental, Social and Governance (ESG)*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, <https://www.skadden.com/capabilities/practices/environmental-social-and-governance/cc/environmental-social-and-governance> (last visited Sept. 14, 2023).

<sup>225</sup> See *ESG and Sustainability*, WHITE & CASE, <https://www.whitecase.com/law/practices/esg-sustainability> (last visited Sept. 14, 2023).

<sup>226</sup> See *Environmental, Social and Governance (ESG)*, SIDLEY AUSTIN, <https://www.sidley.com/en/services/environmental-social-and-governance> (last visited Sept. 14, 2023).

<sup>227</sup> See *ESG, CSR and Business and Human Rights*, ROPES & GRAY, <https://www.ropesgray.com/en/practices/supply-chain-compliance-corporate-social-responsibility> (last visited Sept. 14, 2023).

<sup>228</sup> See *Environmental, Social and Governance (ESG)*, HOGAN LOVELLS, <https://www.hoganlovells.com/en/knowledge/topic-centers/environmental-social-and-governance> (last visited Sept. 14, 2023).

<sup>229</sup> See *ESG & Sustainability Advisory*, MORGAN LEWIS, <https://www.morganlewis.com/services/esg-sustainability-advisory> (last visited Sept. 14, 2023).

11	Gibson, Dunn & Crutcher <sup>230</sup>
12	Jones Day <sup>231</sup>
13	Simpson Thacher & Bartlett <sup>232</sup>
14	Norton Rose Fulbright <sup>233</sup>
15	Greenberg Traurig <sup>234</sup>
16	Cooley <sup>235</sup>
17	Goodwin Procter <sup>236</sup>
18	Davis Polk & Wardell <sup>237</sup>
19	Weil, Gotshal & Manges <sup>238</sup>
20	Paul, Weiss, Rifkind, Wharton & Garrison <sup>239</sup>
21	Mayer Brown <sup>240</sup>

<sup>230</sup> See *Environmental, Social and Governance (ESG)*, GIBSON DUNN, <https://www.gibsondunn.com/practice/environmental-social-and-governance-esg/> (last visited Sept. 14, 2023).

<sup>231</sup> See *ESG (Environmental, Social & Governance)*, JONES DAY, <https://www.jonesday.com/en/practices/esg?tab=overview> (last visited Sept. 14, 2023).

<sup>232</sup> See *Environmental, Social and Governance (ESG) and Sustainability*, SIMPSON THACHER, [https://www.stblaw.com/client-services/practices/corporate/environmental-social-and-governance-\(esg\)-and-sustainability](https://www.stblaw.com/client-services/practices/corporate/environmental-social-and-governance-(esg)-and-sustainability) (last visited Sept. 14, 2023).

<sup>233</sup> See *Environmental, social and governance (ESG)*, NORTON ROSE FULBRIGHT, <https://www.nortonrosefulbright.com/en-us/services/203f40d1/environmental-social-and-governance-esg> (last visited Sept. 14, 2023).

<sup>234</sup> See *Environmental, Social & Governance (ESG)*, GREENBERG TRAUIG, <https://www.gtlaw.com/en/capabilities/environmental/environmental-social-and-governance> (last visited Sept. 14, 2023).

<sup>235</sup> See *ESG & Sustainability Advisory*, COOLEY, <https://www.cooley.com/services/practice/esg-and-sustainability-advisory> (last visited Sept. 14, 2023).

<sup>236</sup> See *ESG & Impact*, GOODWIN PROCTER, <https://www.goodwinlaw.com/en/expertise/practices/esg-and-impact> (last visited Sept. 14, 2023).

<sup>237</sup> See *ESG*, DAVIS POLK, <https://www.davispolk.com/esg/overview> (last visited Sept. 14, 2023).

<sup>238</sup> See *Sustainability & Environmental, Social and Governance (ESG) Advisory*, WEIL, GOTSHAL & MANGES, <https://www.weil.com/experience/practices/sustainability-and-environmental-social-and-governance-advisory> (last visited Sept. 14, 2023).

<sup>239</sup> See *Sustainability & Environmental, Social and Governance (ESG) Advisory Practice*, PAUL WEISS, <https://www.paulweiss.com/practices/sustainability-esg> (last visited Sept. 14, 2023).

<sup>240</sup> See *Environmental, Social & Governance (ESG)*, MAYER BROWN, <https://www.mayerbrown.com/en/capabilities/industries/environmental-social-governance-esg?tab=overview> (last visited Sept. 14, 2023).

22	Sullivan & Cromwell <sup>241</sup>
23	McDermott Will & Emery <sup>242</sup>
24	Quinn Emanuel Urquhart & Sullivan <sup>243</sup>
25	Paul Hastings <sup>244</sup>
26	Reed Smith <sup>245</sup>
27	Cleary Gottlieb Steen & Hamilton <sup>246</sup>
28	Holland & Knight <sup>247</sup>
29	Milbank <sup>248</sup>
30	Dechert <sup>249</sup>
31	Wilson Sonsini Goodrich & Rosati <sup>250</sup>
32	Debevoise & Plimpton <sup>251</sup>

<sup>241</sup> See *Environmental, Social and Governance (ESG)*, SULLIVAN & CROMWELL, <https://www.sullcrom.com/Practices/General-Practice/Environmental-Social-and-Governance-ESG/> (last visited Sept. 14, 2023).

<sup>242</sup> See *ESG, Impact & Sustainability*, MCDERMOTT WILL & EMERY, <https://www.mwe.com/services/esg-impact-sustainability/> (last visited Sept. 14, 2023).

<sup>243</sup> See *Environmental, Social and Governance (“ESG”) Practice*, QUINN EMANUEL, <https://www.quinnemanuel.com/practice-areas/environmental-social-and-governance-esg-practice/> (last visited Sept. 14, 2023).

<sup>244</sup> See *ESG & Impact*, PAUL HASTINGS, <https://www.paulhastings.com/practice-areas/impact-and-sustainability> (last visited Sept. 14, 2023).

<sup>245</sup> See *Environmental, Social & Governance (ESG)*, REED SMITH, <https://www.reedsmith.com/en/capabilities/services/environmental-social-governance> (last visited Sept. 14, 2023).

<sup>246</sup> See *ESG – Our Environmental, Social & Governance Practice*, CLEARY GOTTLIEB, <https://www.clearygottlieb.com/practice-landing/environmental-social-governance-esg> (last visited Sept. 14, 2023).

<sup>247</sup> See *Environmental, Social and Governance (ESG)*, HOLLAND & KNIGHT, <https://www.hklaw.com/en/services/practices/corporate-transactions-and-finance/environmental-social-and-governance-esg> (last visited Sept. 14, 2023).

<sup>248</sup> See *ESG & Sustainability*, MILBANK, <https://www.milbank.com/en/practices/areas/Corporate/ESG-and-Sustainability.html> (last visited Sept. 14, 2023).

<sup>249</sup> See *Environmental, Social and Governance (ESG)*, DECHERT, <https://www.dechert.com/services/practice-areas/environmental—social-and-governance—esg.html> (last visited Sept. 14, 2023).

<sup>250</sup> See *Environmental, Social, and Governance*, WILSON SONSINI, <https://www.wsgr.com/en/services/practice-areas/corporate/corporate-governance-environmental-social-and-governance.html> (last visited Sept. 14, 2023).

<sup>251</sup> See *ESG Resource Center*, DEBEVOISE & PLIMPTON, <https://www.debevoise.com/topics/environment-social-and-governance> (last visited Sept. 14, 2023).

33	Orrick, Herrington & Sutcliffe <sup>252</sup>
34	Wilmer Cutler Pickering Hale and Dorr <sup>253</sup>
35	Morrison & Foerster <sup>254</sup>
36	Akin Gump Strauss Hauer & Feld <sup>255</sup>
37	Willkie Farr & Gallagher <sup>256</sup>
38	K&L Gates <sup>257</sup>
39	Perkins Coie <sup>258</sup>
40	Winston & Strawn <sup>259</sup>
41	Troutman Pepper Hamilton Sanders <sup>260</sup>
42	Foley & Lardner <sup>261</sup>
43	Alston & Bird <sup>262</sup>

<sup>252</sup> See *ESG*, ORRICK, <https://www.orrick.com/en/Practices/Environmental-Social-and-Corporate-Governance-ESG-Resource-Center> (last visited Sept. 14, 2023).

<sup>253</sup> See *Environmental, Social and Corporate Governance (ESG)*, WILMERHALE, <https://www.wilmerhale.com/en/solutions/energy-environment-and-natural-resources/environmental-social-and-corporate-governance> (last visited Sept. 14, 2023).

<sup>254</sup> See *Environmental, Social, and Governance (ESG)*, MORRISON & FOERSTER, <https://www.mofo.com/capabilities/environmental-social-governance> (last visited Sept. 14, 2023).

<sup>255</sup> See *Environmental, Social & Governance (ESG)*, AKIN GUMP, <https://www.akingump.com/en/services/corporate/environmental-social-and-governance> (last visited Sept. 14, 2023).

<sup>256</sup> See *Environmental, Social & Governance*, WILLKIE FARR & GALLAGHER, <https://www.willkie.com/capabilities/practices/environmental-social-governance> (last visited Sept. 14, 2023).

<sup>257</sup> See *Emerging Issue: Environmental Social Governance (ESG)*, K&L GATES, <https://www.klgates.com/ESG> (last visited Sept. 14, 2023).

<sup>258</sup> See *Environmental, Social & Governance (ESG)*, PERKINS COIE, <https://www.perkinscoie.com/en/practices/environmental-social-and-governance-esg.html> (last visited Sept. 14, 2023).

<sup>259</sup> See *Environmental, Social & Governance (ESG)*, WINSTON & STRAWN, <https://www.winston.com/en/capabilities/services/environmental-social-and-governance-esg> (last visited Sept. 14, 2023).

<sup>260</sup> See *Environmental, Social + Governance (ESG)*, TROUTMAN PEPPER, <https://www.troutman.com/services/practices/capital-projects-and-infrastructure/environmental-social-and-governance.html> (last visited Sept. 14, 2023).

<sup>261</sup> See *Environmental, Social, and Governance (ESG)*, FOLEY & LARDNER, <https://www.foley.com/en/services/practice-areas/corporate/environmental-social-and-governance-esg> (last visited Sept. 14, 2023).

<sup>262</sup> See *Corporate Social Responsibility & Sustainability*, ALSTON & BIRD, <https://www.alston.com/en/services/practices/regulatory-specialty/environmental-land-use-natural-resources/environmental-compliance-permitting-transactions/corporate-social-responsibility-sustainability> (last visited Sept. 14, 2023).

Table 9: Am Law 50 Firms that Highlight ESG as a Key Issue, Current Topic, or Industry

1	King & Spalding <sup>263</sup>
2	Covington & Burling <sup>264</sup>
3	Squire Patton Boggs <sup>265</sup>
4	Proskauer Rose <sup>266</sup>
5	Arnold & Porter <sup>267</sup>
6	Shearman & Sterling <sup>268</sup>

<sup>263</sup> See *Environmental, Social and Governance (ESG)*, KING & SPALDING, <https://www.kslaw.com/capabilities/environmental-social-and-governance-esg> (last visited Sept. 14, 2023).

<sup>264</sup> See *ESG: Environmental, Social, and Governance Practice*, COVINGTON & BURLING, <https://www.cov.com/en/practices-and-industries/industries/esg-environmental-social-and-governance> (last visited Sept. 14, 2023).

<sup>265</sup> See *Environmental, Social & Governance (ESG)*, SQUIRE PATTON BOGGS, <https://www.squirepattonboggs.com/en/services/key-issues/esg> (last visited Sept. 14, 2023).

<sup>266</sup> See *Environmental, Social and Corporate Governance (ESG)*, PROSKAUER ROSE, <https://www.proskauer.com/market-solutions/environmental-social-and-corporate-governance> (last visited Sept. 14, 2023).

<sup>267</sup> See *Environmental, Social and Corporate Governance (ESG)*, ARNOLD & PORTER, <https://www.arnoldporter.com/en/perspectives/topics/esg> (last visited Sept. 14, 2023).

<sup>268</sup> See *Environmental, Social and Governance (ESG)*, SHEARMAN & STERLING, <https://www.shearman.com/en/key-issues/environmental-social-and-governance> (last visited Sept. 14, 2023).

