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Environmental, Social, and Governance Considerations in M&A: Mitigating ESG Risks, Maximizing ESG Benefits

Due Diligence, Reps and Warranties, Preserving ESG Attributes Post-Closing

THURSDAY, DECEMBER 17, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Richard P. Massony, Jr., Attorney, **Hunton Andrews Kurth**, Richmond, VA

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Seyfarth

Environmental, Social, and Governance Considerations in M&A: Mitigating ESG Risks, Maximizing ESG Benefits

Strafford Webinar

December 17, 2020

1:00 PM – 2:30 PM

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Mr. Sherman is a Partner and Chair of the Corporate Department in the Washington, D.C. office of Seyfarth Shaw with over 900 lawyers worldwide.

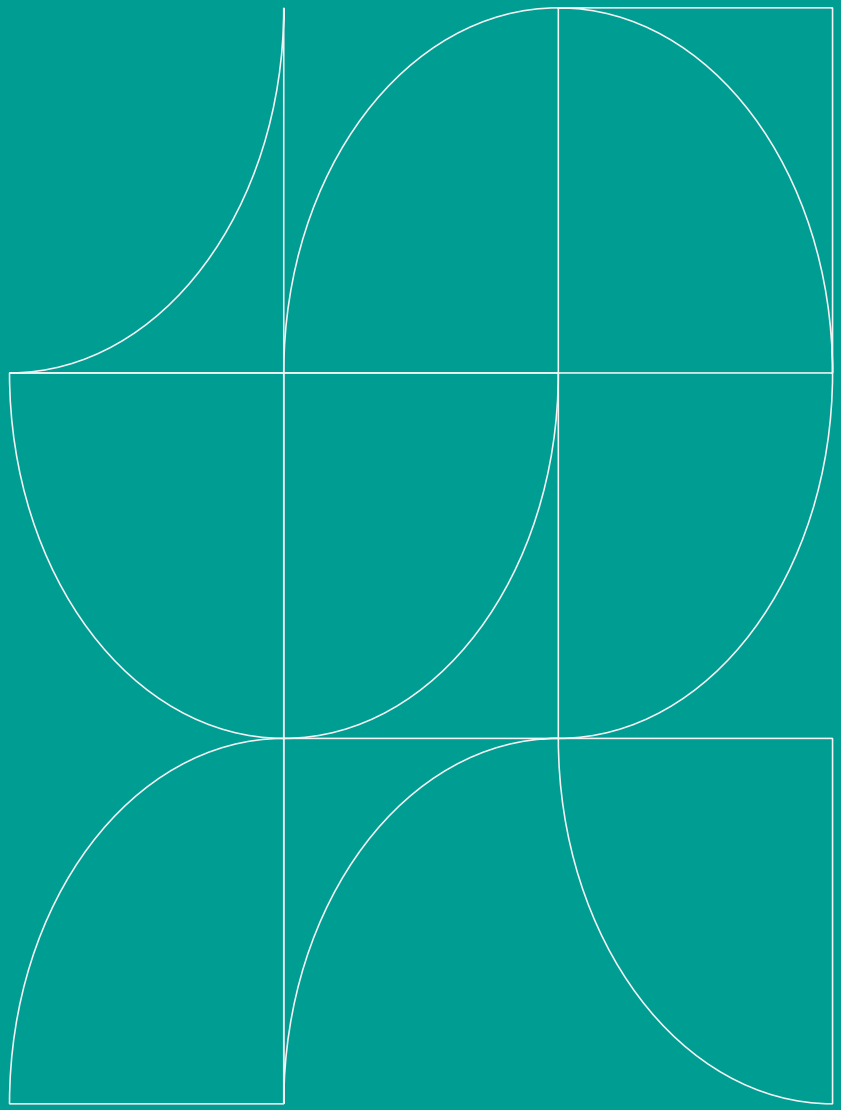
He is the author of 26 books on business growth, capital formation and the leveraging of intellectual property, including his twenty-second (22nd) book, Harvesting Intangible Assets, Uncover Hidden Revenue in Your Company's Intellectual Property, (AMACOM) which was published in October of 2011. His *latest book* The Crisis of Disengagement was published in early 2017. Other recent titles include the best-selling Mergers and Acquisitions from A to Z, fourth edition was published by AMACOM in 201. He is also the author of the 2nd edition of the Due Diligence Strategies and Tactics, which was published in the Spring of 2010. His twenty-third book Essays on Governance, was published June of 2012 and in 2013, he was named by NACD as one of the Top 100 Leaders in Governance. In 2014, he was included in the global IAM 300, recognizing the world's thought leaders in managing intangible assets.

He has appeared as a guest and a commentator on all of the major television networks as well as CNBC's "Power Lunch," CNN's "Day Watch," CNNfn's "For Entrepreneurs Only," USA Network's "First Business," and Bloomberg's "Small Business Weekly." He has appeared on numerous regional and local television broadcasts as well as national and local radio interviews for National Public Radio (NPR), Business News Network (BNN), Bloomberg Radio, AP Radio Network, Voice of America, Talk America Radio Network and the USA Radio Network, as a resource on capital formation, entrepreneurship and technology development.

He has served as a top-rated Adjunct Professor in the Masters of Business Administration (MBA) programs at the University of Maryland for 26 years and at Georgetown University for 17 years in both the business school and the law school where he teaches courses on business growth strategy.

He has served as General Counsel to the Entrepreneurs' Organization (YEO) since 1987. In 2003, *Fortune* magazine named him one of the Top Ten Minds in Entrepreneurship and in February of 2006, *Inc.* magazine named him one of the all-time champions and supporters of entrepreneurship and business growth.

Taking the Current Pulse of the M&A Marketplace and Capital Markets



2021 M&A Preview: The only thing that is certain is uncertainty

- COVID-19 impact on M&A and the capital markets lack of clarity around vaccine/logistics/timetable
- WFH shifting work places and work spaces and impact on culture, leadership and productivity (short term vs. long term)
- Phase out and impact of government stimulus programs
- Declining physical infrastructure
- Recent 2020 election and its impact on tax policy, immigration, health care/ economy, job creation and capital markets under a Biden administration
- Record levels of bankruptcies and failures (especially in the travel/tourism/retail/hospitality/restaurant verticles)

2021 M&A Preview: The only thing that is certain is uncertainty (Cont'd)

- Racial/Gender/Social tensions, protests and civil unrest/divisiveness driving ESG/CSR agendas
- Uncertainty as to liability limits on COVID-19 and statutory protections
- Lack of trust in leaders/institutions/markets/government/law enforcement
- Shifts in employee expectations and compensation models/levels of loyalty and fidelity/shifts in career and life plans/early retirement
- Rapidly changing technology and impact of automation/robotics/transformation on the workforce
- Growing gaps between the "haves" and the "have not's" (corporate/individual levels)
- Our carbon footprint/global warming/uptick in natural disasters
- Disturbing declines in levels of employee engagement and commitment

****

*ALL OF THESE VARIABLES HAVE DIRECTLY OR INDIRECTLY IMPACTED ESG AND CSR/IMPACT INVESTING AGENDAS!!!

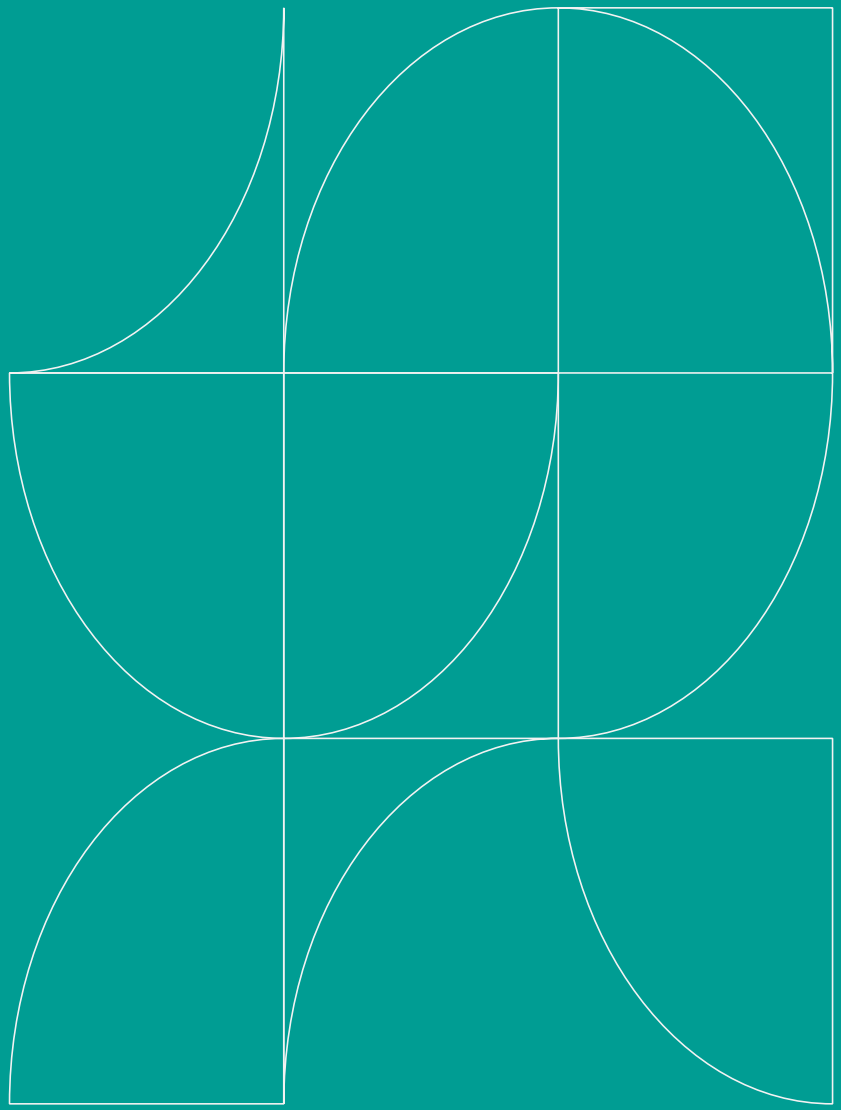
ESG and CSR Considerations Have Worked Their Way Into:

SO…WHY NOT M&A?

The trickle effect of the ramifications of ESG policies will work their way into M&A due diligence best practices, allocation of risk, definitive document covenants, representation and warranties and post-closing conditions.

OR, Could the 2nd Half of 2021 be the Perfect Storm?

ESG Considerations in M&A: An Overview

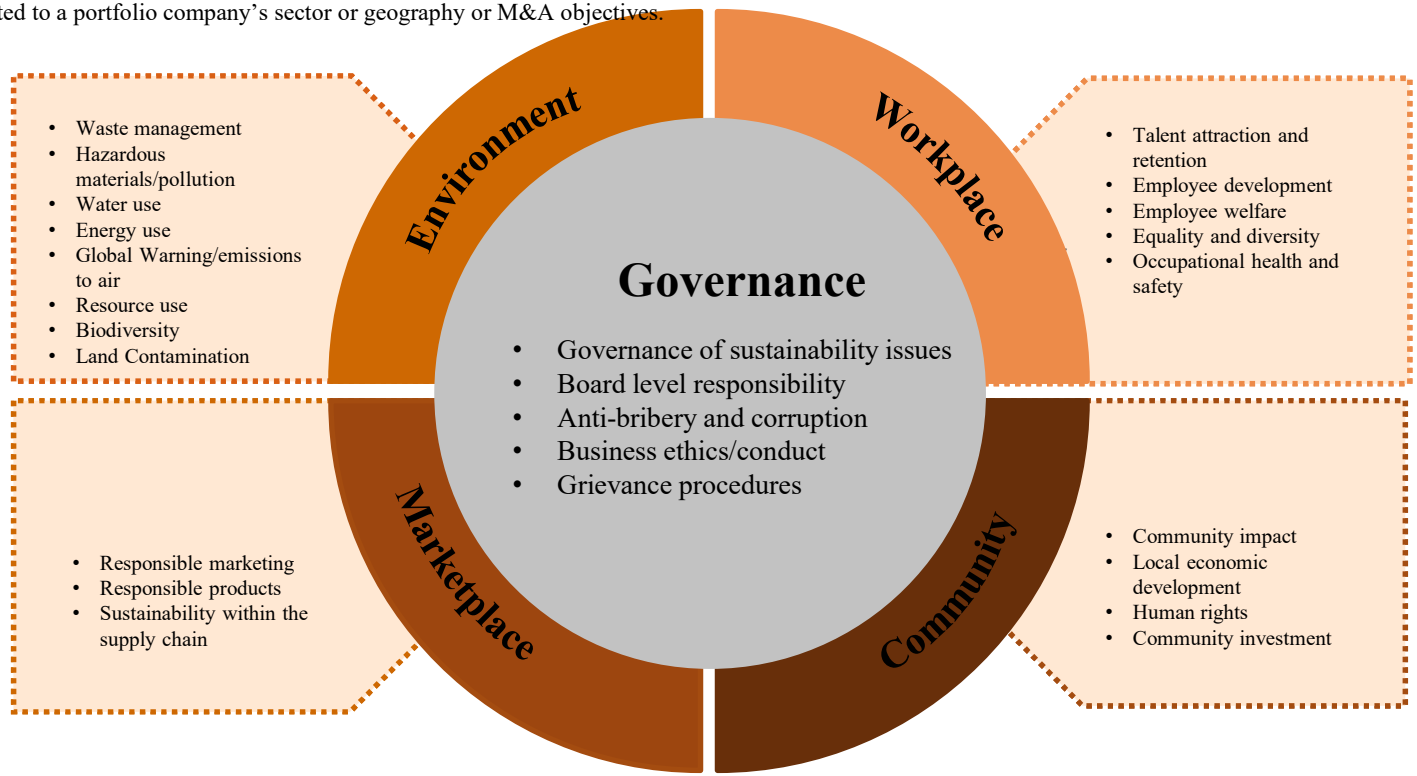


Relevant ESG/CSR/Impact Investing Trends:

- ESG is not a fad – it is here to stay as a critical social, strategic and cultural imperative
- Business Roundtable “Stakeholder” mandate
- Robin Hood investor community
- Glue to help mend broken political/social/economic divisiveness
- Activist shareholders with ESG/CSR agenda
- Rise of PE/VC ESG-driven funds
- Governance and Leadership mandates/Diversity and Inclusion
- Supply chain and distribution channel issues
- Fortune 100 leaders such as Nike, Home Depot, and Mastercard have set the bar high with their commitment to high ESG standards (“trickle-down” and “trickle-across” effects) (Peer Pressures)
- ESG Impact on Short Term/Long Term Valuation and enterprise value

What do we mean by ESG issues?

Environmental, social and governance (ESG) issues cover a broad agenda. Issues are typically broken down into five categories: Environment, Workplace, Community, Marketplace and Governance. The 'ESG wheel' below shows examples of issues within each category. The relevance of the issues will depend on the specific situation, for example, related to a portfolio company's sector or geography or M&A objectives.



Source: PWC Report on ESG (2019)

ESG Driven – Due Diligence Considerations

- Climate Change/Carbon Footprint/Recycling and Environmental Impact and Regulatory Compliance (Laura Mulry drill-down)
- Cultural/HR Compliance
- Ecosystem Fairness and Integrity
- IP Ownership “Inclusion” Policies (*e.g.*, shop rights, royalties, co-investor status, etc.)
- Social and Digital Media Assets Review
- Brand Equity/Reputation Risk
- Data Security and customer/employee privacy and HIPPA compliance
- Supply chain and distribution channel integrity/pay equity/underage workers/compliance/working conditions
- Health and safety considerations (food handling, OSHA, hygiene, COVID-19 compliance, etc.)
- Respect for the IP rights of third parties (infringement and misappropriation analysis, idea submission policies, NDA disputes, etc.)

ESG Driven – Due Diligence Considerations (Cont'd).

- Consumer and Product Safety (CPSC/FTC/FDA, etc.) and labeling/packaging/warranty compliance
- Disaster recovery and crisis management plans
- Succession and transition plans/Aging Baby Boomers
- Regulatory Compliance and internal controls
- Labor and employment manuals/policies/employment agreements/pay equity/optics and digital media posts

ESG Driven – Representations, Warranties, Covenants in Definitive M&A Documents (Allocation of ESG Risks)

- Culture/Ethical Treatment of Workforce
- Workers rights in supply chain
- Mitigation of carbon footprint
- Diversity and Inclusion
- Representation/Composition of boards and leaders

Post-Closing Integration

- Preserving ESG mandates and investment/closing conditions/post-transaction and integration
- Comprehensive plan needed to implement objectives
- Clear post-closing conditions to closing
- Meaningful penalties/hold-backs for non-compliance
- Digital media assets alignment and transparency

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ANDREWS KURTH

ESG Considerations in M&A

Addressing ESG in Due Diligence and Definitive Agreements

Richard Massony
Hunton Andrews Kurth LLP

ESG IN DUE DILIGENCE

ESG in Due Diligence

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General Legal Due Diligence

- Focus on Legal Liability
- Risk of Non-Compliance with Law
- Risk of Breach of Contractual Obligations

ESG Due Diligence

- Focus on Extra-Legal Risk
- Potential for Reputational Harm
- Misalignment with Aspirations of Buyer's Stakeholders

Due Diligence - Preliminary Questions

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- About the **Buyer**
  - What are the buyer's needs/expectations with respect to ESG?
  - Does the buyer have an ESG policy on its website?
  - Does the buyer have a person or team directly tasked with managing ESG issues?
  - Who on the buyer's deal team is focusing on ESG due diligence?

Due Diligence - Preliminary Questions

HUNTON ANDREWS KURTH

- About the **Target**
  - Is the target private or public?
  - What is the target's industry? Has the industry adopted specific standards? See SASB Materiality Map.
  - Where does the target operate?

Due Diligence - New Requests

HUNTON ANDREWS KURTH

- General ESG Requests
  - Please describe the target's ESG strategy, policies and procedures and provide any documentation relating thereto.
  - Please provide any ESG disclosures made by the target.
  - Please provide any internal or external reports regarding the target's ESG policies or ESG performance.
  - Please provide any written communication from any governmental authority, NGO or other third party regarding material ESG issues.
  - Has the target committed to complying with any established standards (such as SASB, TCFD, or GRI)?

Due Diligence - New Requests

HUNTON ANDREWS KURTH

- Environmental Matters
  - Does the target have a strategy to reduce greenhouse gas emissions, water usage, waste disposal, and general impact on the environment?
  - If so, please describe the strategy, including any short-term, medium-term and long-term goals and the target's progress in achieving them.
  - Has the target made any representations to the public about its commitments to sustainability?

Due Diligence - New DD Requests

HUNTON ANDREWS KURTH

- Social Matters
  - Workforce Diversity
    - ❑ Does the target have a diversity policy? See EEO-1 Report.
  - Supply Chain Transparency
    - ❑ Who are the target's top suppliers?
    - ❑ How does the target conduct oversight over its suppliers?
  - Health and Safety
    - ❑ Please explain how the target has adapted to the COVID19 pandemic and describe any related changes to employee policies.
  - Sexual Harassment/Misconduct
    - ❑ Please describe any litigation brought by employees against the target [in the last 10 years].

Due Diligence - New DD Requests

HUNTON ANDREWS KURTH

- Corporate Governance Matters
  - Please describe the target's efforts to promote diversity on its board of directors and in management.
  - Please provide the target's code of conduct and any other materials that address the target's requirements and expectations with respect to business ethics.
  - Please describe any changes to the target's corporate governance to address ESG issues. Are there management incentives for achieving ESG goals?

ESG IN DEFINITIVE AGREEMENTS

Definitive Agreements

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- Definitive agreements have addressed matters related to ESG for some time with what are now standard reps, including:
  - Environmental Matters
  - Privacy and Data Security
  - Labor Relations
  - Corruption and Anti-Bribery
- However, given the increasing value placed on ESG issues by stakeholders, the expectation is that buyers will increasingly seek contractual protections regarding ESG matters.

Definitive Agreements - Reps

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- Reps regarding ESG Disclosures
- "Weinstein Reps" / #MeToo Provisions
- Reps regarding COVID-19

Definitive Agreements - Covenants

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General Behavior

Compliance with Standards

WHITE & CASE

Environmental-specific ESG Considerations in M&A

White & Case LLP

December 17, 2020

What is “ESG”?

At its core, ESG refers to the Environmental, Social, and Governance risks and opportunities that could impact a company’s ability to create value over the long term – and how a company is managing those risks and taking advantage of those opportunities to ensure its long-term economic stability and growth.

- ESG encompasses a wide range of issues, including climate change and other environmental risks, energy efficiency, resource management, business continuity and supply chain resiliency, human capital management, including diversity and inclusion, human rights, and labor and health and safety standards.
- **ESG includes compliance with legal requirements as a baseline, and extends to issues that go “above and beyond” such mandatory legal requirements**.

ESG Drivers


Investor and stakeholder mandates
ESG ratings
Access to capital

Institutional Investor Mandates and Expectations

BLACKROCK

"This year, we are asking the companies that we invest in on behalf of our clients to: (1) publish a disclosure in line with industry-specific SASB guidelines by year-end, if you have not already done so, or disclose a similar set of data in a way that is relevant to your particular business; and (2) disclose climate-related risks in line with the TCFD's recommendations, if you have not already done so. This should include your plan for operating under a scenario where the Paris Agreement's goal of limiting global warming to less than two degrees is fully realized, as expressed by the TCFD guidelines…. Where we feel companies and boards are not producing effective sustainability disclosures or implementing frameworks for managing these issues, we will hold board members accountable. **Given the groundwork we have already laid engaging on disclosure, and the growing investment risks surrounding sustainability, we will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them."**

Vanguard®

"Clear, comparable, consistent, and accurate disclosure enables understanding of the strength of a board's risk oversight. Recognizing that **sustainability disclosure is an evolving and complex topic**, in considering related proposals, the Investment Stewardship team's analysis aims to strike a balance between avoiding prescriptiveness and providing a long-term perspective."

STATE STREET GLOBAL ADVISORS

"We believe ***a company's ESG score will soon effectively be as important as its credit rating. Beginning this proxy season, we will take appropriate voting action against board members at companies in the S&P 500, FTSE 350, ASX 100, TOPIX 100, DAX 30, and CAC 40 indices that are laggards based on their R-Factor scores and that cannot articulate how they plan to improve their score.*** Beginning in 2022, we will expand our voting action to include those companies who have been consistently underperforming their peers on their R-Factor scores for multiple years, unless we see meaningful change. We believe doing so is in the best interests of investors and companies alike…. Drawing on data from four leading providers and leveraging SASB,R-Factor generates unique ESG scores for over 6,000 listed companies globally and allows us to evaluate a company's performance against both regional and global industry peers."

U.S. SEC Regulatory Landscape

No Prescriptive Rules	▪ The SEC has so far generally declined to adopt prescriptive rules, but recent SEC rule changes open the door to increasing ESG disclosure ▪ SEC Chair Clayton: "Each company, and each sector, has its own circumstances, which may or may not fit within a standard framework"
Current SEC Guidance	▪ Focus of SEC guidance/statements has been on bedrock disclosure principles of materiality and providing information that facilitates well-informed decision making by investors
Liability Considerations	▪ Companies are still liable for misstatements ▪ Information on a company's website or in its sustainability report must be accurate and not conflict with filed information – the SEC may check!

Two Different Considerations

Reporting Frameworks

- **Task Force on Climate-Related Financial Disclosures (TCFD):** informs investment/underwriting decisions and identifies carbon-related assets and risk in financial sector
- **Sustainability Accounting Standards Board (SASB):** industry-specific approach with a focus on material financial issues relevant to investors
- **Global Reporting Initiative (GRI):** focuses on broader array of topics important to a wide variety of stakeholders

ESG Research/Ratings Firms

- MSCI
- Sustainalytics
- Bloomberg
- CDP (focuses solely on climate change)
- RobecoSam (extremely onerous requirements)
- ISS E&S QualityScore (new)

ESG – Project Development and Finance

IFC International Finance Corporation WORLD BANK GROUP

IFC Performance Standards on Environmental and Social Sustainability and World Bank Group Environmental, Health and Safety Guidelines

EQUATOR PRINCIPLES

The Equator Principles - A financial industry benchmark for determining, assessing and managing environmental and social risk in projects

- United Nations Principles for Responsible Investment, Green Bond Principles and Climate Bonds Initiative, Poseidon Principles, and Social Bonds

Environmental Due Diligence

- Retain and oversee environmental consultants in performing environmental site assessments and compliance reviews, and generating cost estimates
- Review (with environmental consultants) documents provided and other publicly available information (e.g., EPA and news databases)
- Draft targeted diligence requests and interview personnel familiar with environmental matters
- Analyze known and potential environmental liabilities

Categories of Environmental Liability

- Environmental permitting deviations
- Noncompliance with other environmental legal requirements
- Contamination
  - Legacy, migration, disposal at third-party sites
- Contractual liabilities
- Pending or threatened claims
- Financials (e.g., reserves, CapEx, asset retirement obligations, financial assurance requirements)
- Reputational risk (ESG?)

Environmental Provisions in Transaction Agreements

- Type of deal
  - Stock vs. asset deal – different risks
- Key provisions: definitions, reps, covenants, CERCLA waiver/release, indemnities, site access
- Environmental liabilities identified during due diligence are then considered in drafting/negotiating
- Consider buyer's risk tolerance, budget and timing limitations, whether bid context, what information has been provided, rep and warranty insurance

Environmental Representations

Buy Side

- Robust Environmental Representations
  - No materiality or knowledge qualifiers
  - Longer look-back periods
  - Survival: 4 to 6 years, SOL
  - Cover former sites, third-party sites, and predecessors

Sell Side

- Limited Environmental Representations
  - Materiality qualifiers
  - Knowledge qualifiers
  - Short or no look-back periods
  - Do not survive closing
  - Cover current operations

Environmental Indemnification

Buy Side

- Robust Indemnification
  - Breach of reps, long survival
  - Stand-alone environmental indemnity for specific liabilities
  - Low or no monetary limitations:
    - Low or no *de minimis*
    - Threshold over basket
    - High cap

Sell Side

- Limited or No Indemnification
  - Breach of reps, short or no survival
  - High monetary limitations (if indemnification provided)
    - High *de minimis*
    - Basket over threshold
    - Low cap
  - Control of remediation
  - No dig/regulatory triggers
  - Anti-gold plating

ESG in M&A Transactions

- Investor focus on ESG is starting to steer buyers

- Buyers (especially private equity firms) are inquiring into:
  - UNGP, flooding, severe weather, and supply chain risks (e.g., labor and human rights, environmental)
  - Energy intensity and greenhouse gas emissions, including whether a target is monitoring and reducing emissions (in addition to legal compliance)
  - Use of raw materials (e.g., that are scarce, come from sensitive ecosystems/habitats, result in significant pollution) and other product related issues

- Not in transaction documents…yet

Climate Change Considerations in M&A Transactions

- Phase I ESA does not typically address climate-related risks
- Due diligence will need to be tailored to the target and will vary substantially depending on the industry and the location of the target's operations
- It is increasingly important to understand an asset's vulnerability to climate risks (e.g., sea level rise, extreme weather events, water scarcity, regulations, consumer or lender-scrutiny) and the asset's level of climate preparedness
- Traditional real estate due diligence involves scrutiny of Federal Emergency Management Agency (FEMA) flood maps, which do not consider climate change impacts on flooding
  - If a target asset is in an area where flooding may be a significant risk, flood insurance may be prudent, but is often insufficient

Types of Climate Risks

- Physical Risks
  - Longer-term shifts in climate patterns (CHRONIC)
    - Rising temperatures that may cause sea level rise or chronic heat waves
      - Damage to coastal assets, increased insurance premiums, increased resiliency costs
  - Event-driven (ACUTE)
    - Increased frequency and severity of extreme weather events, such as hurricanes, floods, wildfires, and temperature volatility
      - Interruption of operations, damage to assets, delays in construction or other schedules, increased insurance premiums

- Transition Risks
  - Policy and Legal Risk – carbon pricing mechanisms, shift to renewable energy
  - Technology Risk – competitive disadvantage of using older technologies
  - Market Risk – shifts in supply and demand for certain commodities, products, and services
  - Reputation Risk – changing customer and/or community perceptions of an organization's contribution to or detraction from the transition to a lower-carbon economy

Example of W&C ESG Assistance

- ESG diligence proactively identified known and potential ESG risks and opportunities
  - Interviewed Regional EHS Directors with knowledge at both corporate and site / operational levels
  - Drafted a legal memorandum (i) summarizing how ESG matters are managed, including reporting and auditing practices, (ii) identifying deficiencies in ESG management, and (iii) providing recommendations, including creation of a Chief Sustainability Officer position, standardized auditing/reporting practices, and internal ESG goals

- Drafted Board of Directors' Sustainability Committee Charter
  - Part of the internal framework that embeds ESG into core business plans, strategic business decisions, and enterprise risk management
  - Committee has advisory responsibilities to (i) identify and advise the board on key ESG risks and opportunities, (ii) consult with ESG and Sustainability leads, but also with committees that oversee auditing, finance, loss/profit, capital expenditures, governance, executive compensation, and insurance, and (iii) advise on stakeholder engagement.

Board Oversight of ESG

1. Board and board committees should partner with management to achieve appropriate oversight; consider how risk oversight role specifically applies to ESG-related risks and the connections between ESG-related risks and broader enterprise risks.
2. Identify which issues are most pertinent to company's business and key stakeholders and oversee implementation of appropriate policies and processes to evaluate and manage ESG risks and opportunities.
3. Receive regular briefings on relevant ESG matters and company's approach to handling them.
4. Conduct peer/competitor/sector benchmarking of ESG disclosure and ESG management – but priority is on disclosure that is appropriate for the company and its stakeholders.
5. Although ESG considerations are important, boards should consider the value proposition of ESG initiatives relative to other business priorities and opportunities.

Why is ESG Reporting Important?

Why is ESG Reporting Important?

Long-term Value (LTV) Creation + Risks

Investors want to understand a company's LTV creation plan and receive credible, standardized information to support long-term risk assessments

Changing Demographics

Of the global investor base → increased interest in and focus on ESG metrics. Customers within a supply chain and buyers of sites/businesses are also showing increased interest.

Corporate Value and Access to Capital

Increasingly derives from ESG ratings and intangibles – including reputation. ESG ratings are based on ESG reporting.

Corporate Strategic Focus, Stakeholder Engagement

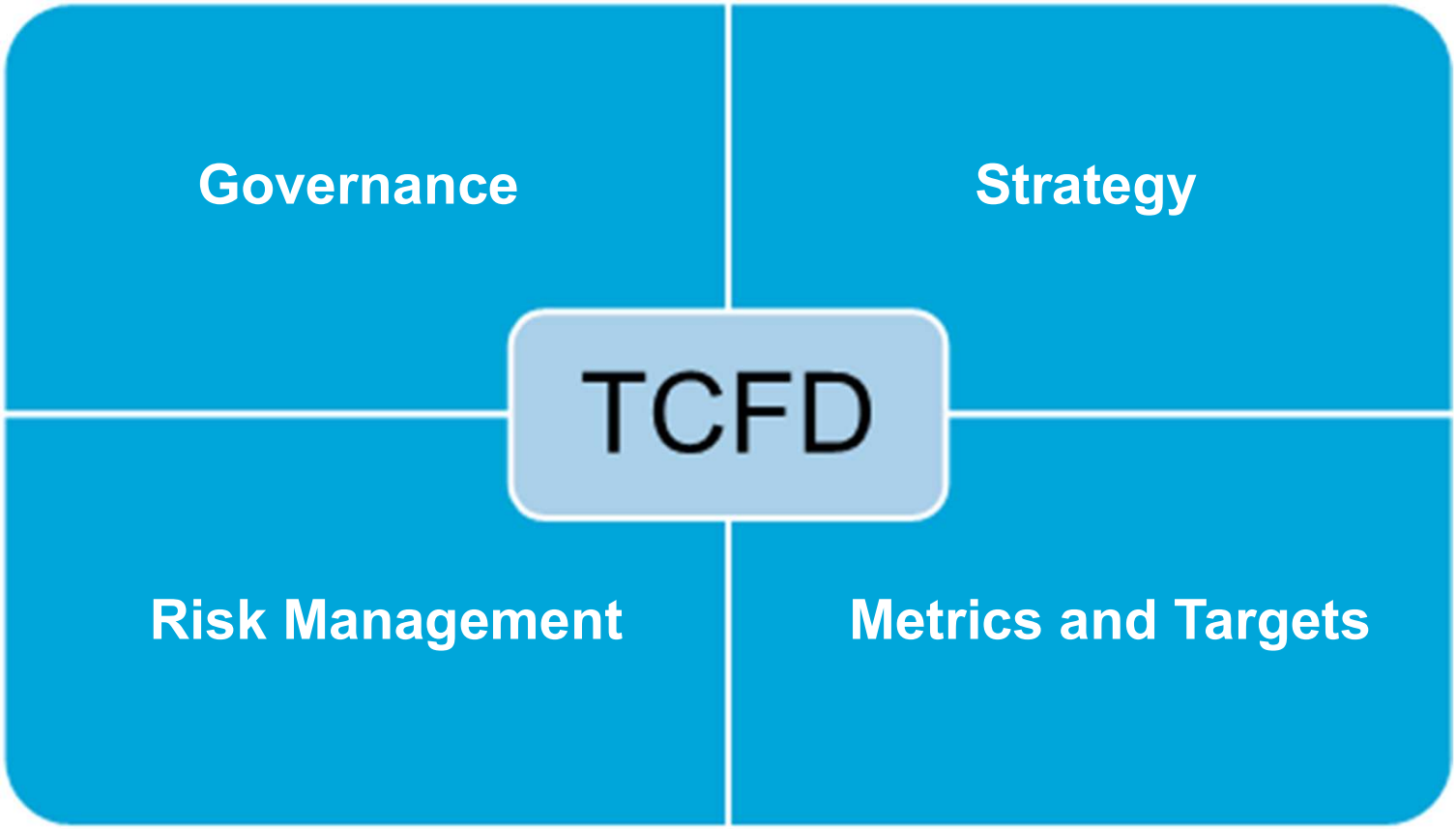
Critical thinking around ESG issues can help hone corporate strategy. Reporting provides transparency and translates a company's values to stakeholders.

BUT many companies, even those with a good story to tell and robust ESG management practices, are not giving investors the right information in the right format.

Sustainability Accounting Standards Board or "SASB"

- Focuses on material sustainability issues that are likely to impact shareholder value (i.e., ESG issues that will have financial impacts in the short or long term)
- Industry-specific standards for 77 industries
- Metrics within the standards are a culmination of comprehensive research and liaison with companies
- Quantitative and qualitative metrics, some requiring discussion and analysis

Task Force on Climate-Related Financial Disclosures



TCFD Disclosure Recommendations

- Governance
  - Describe the board's oversight of climate-related risks and opportunities
  - Describe management's role in assessing and managing risks and opportunities

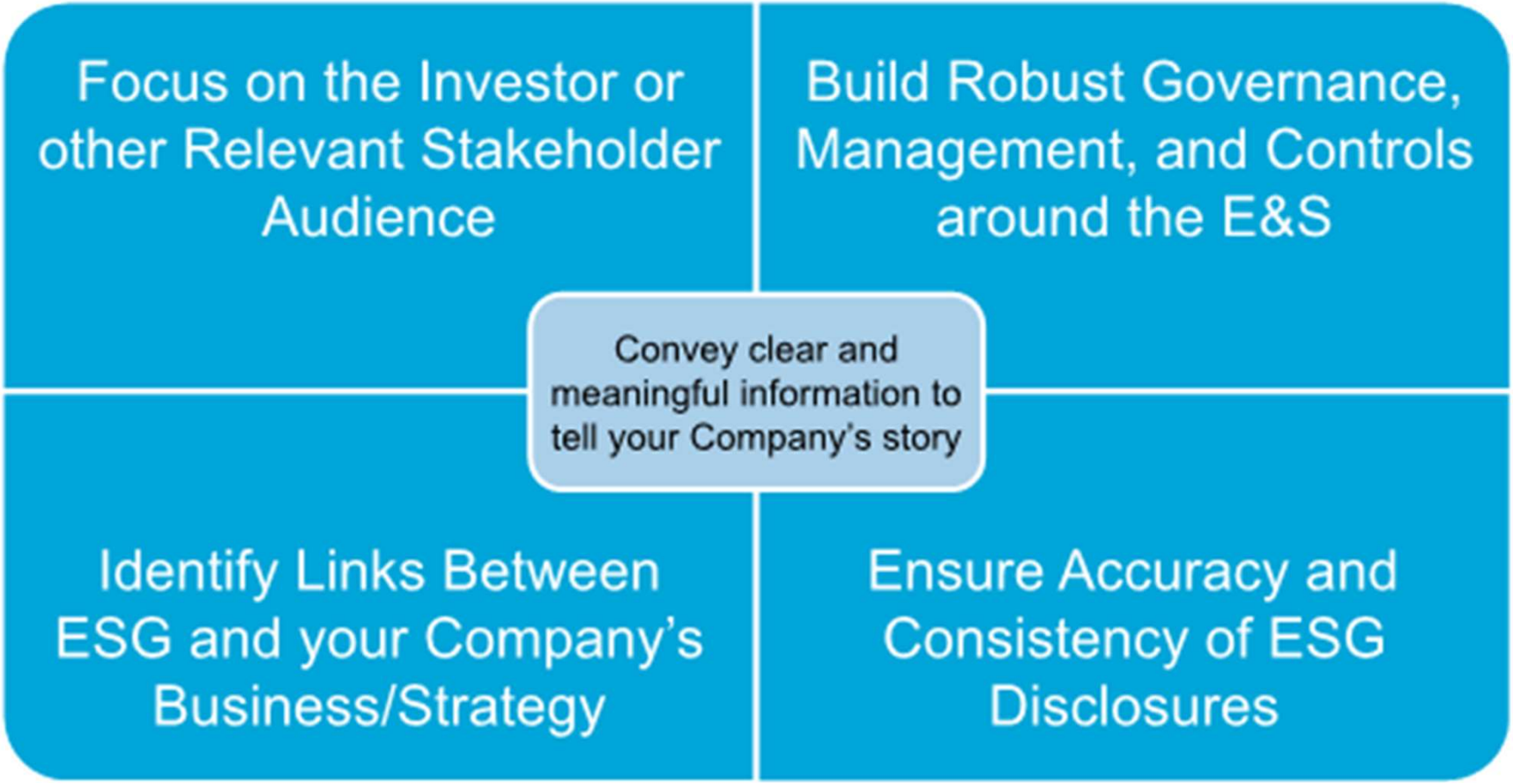
- Strategy
  - Describe the climate-related risks and opportunities the organization has identified over the short, medium, and long term
  - Describe the impact of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning
  - Describe the resilience of the organization's strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario

TCFD Disclosure Recommendations, continued

- Risk Management
  - Describe the organization's processes for identifying and assessing climate-related risks
  - Describe the organization's processes for managing climate-related risks
  - Describe how processes for identifying, assessing, and managing climate-related risks are integrated into the organization's overall risk management

- Metrics and Targets
  - Disclose the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process
  - Disclose Scope 1, Scope 2, and, if appropriate, Scope 3 greenhouse gas (GHG) emissions and related risks
  - Describe the targets used by the organization to manage climate-related risks and opportunities and performance against such targets

Principles of a Strong ESG Program



Takeaways

- Robust ESG management can be advantageous in future sales of sites/businesses
- Increasing lender, shareholder, and insurance focus on ESG; potential future federal mandates for climate disclosure in public filings
- ESG management is a journey; environmental attorneys and environmental technical consultants can help companies manage ESG

Thank you

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