

A low-angle photograph of a modern glass skyscraper, likely a corporate headquarters, with green trees in the foreground. The building's facade is composed of a grid of glass panels, reflecting the sky. The trees are lush and green, with some branches extending into the frame from the top and bottom. The overall scene is bright and clear, suggesting a sunny day.

Vinson & Elkins

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V&E Quarterly Securities & ESG Updates



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Letter from the Editors

Welcome to Vinson & Elkins' Securities and ESG Updates. Our aim is to provide insights into notable developments in securities reporting and the environmental, social and governance space over the quarter and, where applicable, offer calls to action for contacting V&E.

Changes in securities reporting requirements (Securities and Exchange Commission ("SEC") rules and disclosure updates) abound as we navigate the 2023 annual reporting and proxy season, major institutional investors release their proxy voting guidelines (see, e.g., page 12) and the SEC continues to release new proposed and final rules. For example, in December 2022, the SEC adopted amendments to Rule 10b5-1 and new disclosure requirements to enhance protections for investors against insider trading (see pages 7-8). Institutional investors, such as BlackRock and Vanguard, have also released their 2023 proxy voting guidelines. And, on March 15, 2023, Larry Fink — BlackRock's CEO — released his much-anticipated annual letter. This year's letter was less focused on ESG actions companies could take and more focused on BlackRock's role in influencing corporate behavior, its role as fiduciary of asset owners' shares, and how certain ESG risks and opportunities are critical to the long-term value of investments. For an analysis of the letter, see pages 15-16.

Good news! We are bringing back our "SEC Watch" (see pages 10-11) to provide an update as to proposed and final rules, and other related developments including comment letters trends.

Our Update also focuses on ESG, with increasing attention being paid in this area not just from stakeholders but also regulators and governments too, and on a global scale. This time last year, the SEC released its proposed rule on climate-related disclosure obligations for all U.S.-listed public companies, creating new sections of Regulation S-K and S-X. The proposed rule signaled just the beginning —

the SEC quickly followed with two additional proposed rules focused on (1) amendments to rules and disclosure forms for investment funds' and advisors' incorporation of ESG factors and (2) changes to prevent misleading or deceptive fund names, including those fund names indicating that the fund's investment decisions would incorporate one or more ESG factors. In between the release of these proposed rules, the SEC's Division of Examinations released its Examination Priorities for 2022 listing "ESG Investing" as number two of its "significant focus areas."

As we await the release of the finalized rules — anticipated for April 2023 — the ESG pendulum (or at least the media and political narrative) has, arguably, shifted somewhat the other way with the rise of the anti-ESG movement. In March 2023, the governors of eighteen states announced the formation of an alliance which would ban the consideration of ESG factors by state and local pension funds. The alliance is the latest in a string of anti-ESG actions, to include the recent disapproval by Congress of a Department of Labor rule allowing fiduciary retirement fund managers to consider ESG when making investments, and state actions, such as Senate Bill 13 in Texas, prohibiting investments in companies "boycotting" the fossil fuel industry (see page 14 for more information).

Preparing for and complying with increasing disclosure requirements and changing stakeholder expectations will require paying particular attention to ongoing developments. Likewise, traversing the uncertainty of ESG-related regulatory and political actions will continue to present challenges over the course of the year. Please remember that V&E is here to assist you.

Proxy Season Reminders

Universal Proxy Card Disclosure (even when there is no universal proxy card contest)

Disclose the effect of a “withhold” vote in an election of directors where applicable (*i.e.*, director elections under a plurality voting standard).

Disclose the deadline for shareholders to provide notice of solicitations of director nominees pursuant to Rule 14a-19 of the Exchange Act (noting that Section 139.03 of the [SEC’s Proxy Rules and Schedules C&DI](#) states that providing an earlier notice deadline pursuant to the company’s advance notice bylaw would satisfy Rule 14a-5(e)(4)).

Pay Versus Performance and iXBRL Tagging

Recall that calendar-year companies are required to comply with the new [Pay Versus Performance rules](#) in their proxy or information statements filed this year.

Note that financial printers are asking for companies to provide them with *up to 20* days for the required iXBRL tagging of such disclosure. We recommend coordinating with your financial printer early to plan accordingly.

Electronic Submission of “Glossy Annual Reports”

In 2022, the SEC [adopted amendments](#) to Rule 14a-3 of the Exchange Act to require companies to electronically submit to the SEC via EDGAR their “glossy” annual reports. The SEC did not define the term “glossy” (despite it appearing in the adopting release more than 50 times). There is therefore uncertainty as to what must be furnished on EDGAR to satisfy this requirement.

Absent additional guidance from the SEC, the safest approach is currently to furnish all annual reports, including glossies, wraps, and integrated annual reports.

Time for Another Say-On-Frequency Vote?

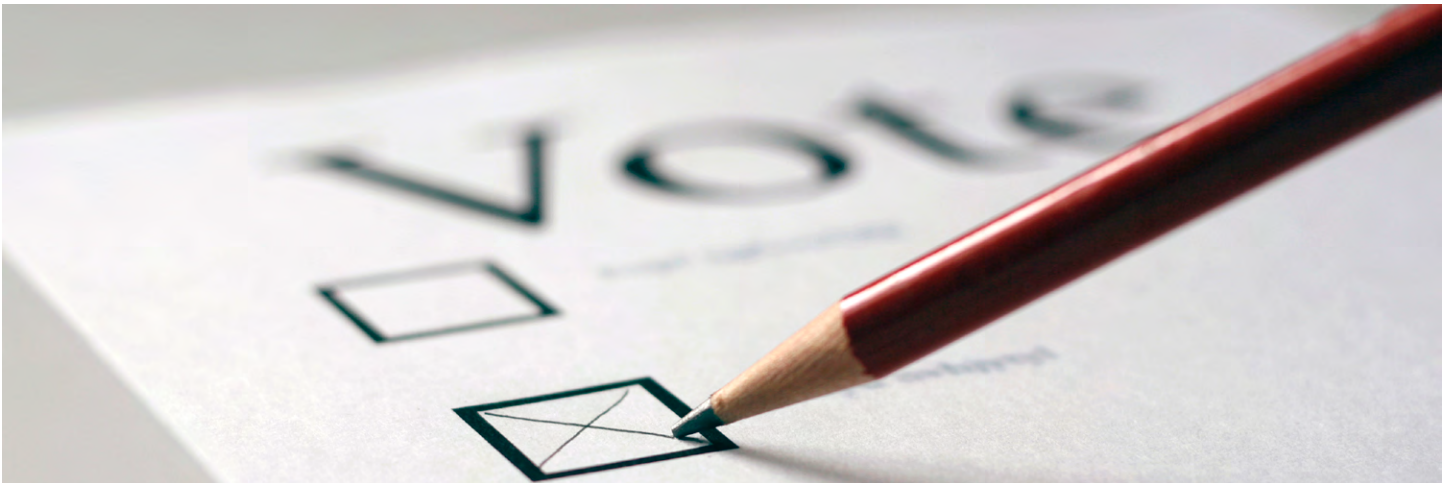
After the Dodd-Frank Act [mandated](#) that public companies submit, no less frequently than once every six years, a non-binding shareholder vote to determine the frequency of “Say-On-Pay” votes, many public companies held their first “Say-On-Frequency” vote in 2011 and their second in 2017. That means that this year, 2023, will be the year for many public companies to hold their third Say-On-Frequency vote.

Be sure to check your calendars and previous disclosures to determine if your company is due for a Say-On-Frequency vote this year.

Nasdaq Diversity Requirements

Section 5606 (Board Diversity Matrix) of the Listing Rules requires that companies disclose information for the current year *and the immediately prior year*. However, note that if a company’s matrix for the immediately prior year remains publicly available (*i.e.*, a proxy statement, information statement or company website), then the company can choose to disclose data for the current year only.

Recall that compliance/disclosure under the comply or explain diversity requirement of Section 5605(f) of the Listing Rules will *not* be required [until December 31, 2023](#).



Unraveling The Mysterious Broker Non-Vote

Every proxy season we are reminded of a headache inducing concept: “broker non-votes.” To help unravel this mysterious term, we have provided a brief explainer below.

When Can Brokers Vote the Shares of Beneficial Holders without Receiving Instructions and When does a Broker Non-Vote Occur?

Brokers are only permitted to vote shares without receiving voting instructions from beneficial holders on “routine” matters, which is commonly referred to as “broker discretionary voting.” Typically the only matter voted on at annual meetings that is “routine” under NYSE rules (which apply for companies listed on any stock exchange) is ratification of the auditor. A couple of less common matters considered “routine” are charter amendments for (1) increasing the number of shares of authorized common stock, (2) a forward or reverse stock split, and (3) to change the name of the company.

Brokers are not permitted to cast votes on “non-routine” matters, also referred to as “nondiscretionary” matters, which includes most other items regularly voted on at annual meetings (e.g., the election of directors, say-on-pay votes, say-on-frequency votes, compensation plans, shareholder proposals opposed by management,

and certain charter amendments). Note that charter amendments to provide for officer exculpation are considered non-routine by the NYSE.

When a broker does not receive instructions from beneficial holders to vote on non-routine matters, a broker non-vote occurs.

What is the Effect of a Broker Non-Vote?

The effect of a broker non-vote on how the outcome of a vote is determined depends on the voting standard applied. While these matters are quite tricky, keep in mind that:

- Broker non-votes are typically considered “present” for quorum purposes when there is a routine item on the agenda for the meeting;
- Broker non-votes are typically considered “entitled to vote *at the meeting*” when there is a routine item on the agenda for the meeting; and
- Broker non-votes are typically not considered “entitled to vote *on the matter*” where the matter is non-routine.

Please contact V&E to further discuss preparation for this proxy season.

Officer Exculpation Amendment Proposals – Glass Lewis Changes Course

In late 2022, Glass Lewis recommended voting **for** several management proposals providing for officer exculpation amendments to companies' certificate of incorporation, citing several reasons in doing so. However, in 2023, Glass Lewis has **changed course**, recommending against multiple management proposals providing for the same amendments, some of which made nearly identical arguments to the proposals that Glass Lewis previously recommended voting **for**.

These developments are in line with [Glass Lewis' 2023 proxy voting policies](#), which stated that Glass Lewis will generally recommend voting against these proposals unless “compelling rationale” for adoption is provided by the board, such as confirmed difficulty hiring or keeping executives (not that it may be more difficult to do so). Note that ISS has continued generally supporting officer exculpation amendment proposals.

Please contact V&E to further discuss proposals for officer exculpation amendments.





Important Considerations Regarding Rule 10b5-1 and Insider Trading Policies

New Scrutiny of Gifts

- The [adopting release](#) for amendments to modernize Rule 10b5-1 and related disclosures make clear that the SEC is zeroing in on gifts of securities (*e.g.*, requiring gifts of securities to be reported within two business days on Form 4 rather than being eligible for deferred reporting on Form 5 and stating that gifts of securities are “sales” that may give rise to Rule 10b5-1 liability in certain circumstances).

“Shadow Insider Trading”

- “Shadow insider trading” refers to a novel theory that the SEC is pursuing in an ongoing enforcement action against an individual (Matthew Panuwat). There, the SEC has alleged that Panuwat committed insider trading in connection with his purchase of securities in a company that was not his employer after he learned of confidential merger discussions between his company and a separate third party. He purchased shares in an unrelated company in the industry that was likely to benefit from the merger announcement. While the case remains ongoing, in 2022 Panuwat’s motion to dismiss was denied largely based on the broad wording of his employer’s insider trading policy (which prohibited using material nonpublic information obtained at work to trade in the securities of another publicly traded company).
- The *Panuwat* case may raise concerns regarding (1) the inclusion of broad language regarding the securities of other companies in insider trading policies creating a basis for enforcement action against company personnel that would not otherwise be actionable and (2) the enforceability of this broad language in insider trading policies.

Preparing for new Item 408(b) of Regulation S-K

- New Item 408(b) of Regulation S-K will require companies to disclose as part of their proxy statements and Form 10-K or Form 20-F filings whether they have adopted insider trading policies and procedures regarding the dispositions of the company’s securities by directors, officers, and employees, *or the company itself*, and companies that have not adopted such policies and procedures must explain why they have not done so. Furthermore, companies will be required to file such policies and procedures as an exhibit to their annual reports.
- Consider whether your company has written insider trading policies and procedures applicable to the company itself.



Compliance Timing: What Do These Dates Actually Mean?

Rule	Compliance Date	First Filing for Calendar-Year Companies
Rule 10b5-1 Amendments (<i>adding mandatory cooling-off periods, adding a certification condition for directors and Section 16 officers, limiting the ability of persons other than the issuer to use multiple overlapping Rule 10b5-1 plans, limiting the use of more than one “single trade” plan in a 12-month period, adding a good faith requirement</i>)	Rule 10b5-1 plans entered into or modified on or after February 27, 2023	-----
Exchange Act Rule 16a-3 Amendments (<i>requiring Section 16 reporting persons to report dispositions of bona fide gifts of equity securities on Form 4 rather than Form 5</i>)	Gifts made before February 27, 2023 remain reportable on Form 5 within 45 days after the end of the fiscal year in which the gift was made Gifts made on or after February 27, 2023 are reportable on Form 4 within two business days	-----
Amendments to Forms 4 and 5 (<i>adding a mandatory 10b5-1 checkbox and requiring the disclosure of the date of adoption of 10b5-1 plans</i>)	All Forms 4 and 5 for beneficial ownership reports filed on or after April 1, 2023	-----
Disclosure and tagging requirements under Item 408(a) of Regulation S-K (<i>requiring quarterly disclosure by companies regarding the adoption, modification, or termination of Rule 10b5-1 plans and certain other trading arrangements by their directors and officers for the trading of its securities</i>)	For companies that are not smaller reporting companies (SRCs), the first filing that covers the first full fiscal period that begins on or after April 1, 2023 For SRCs, the first filing that covers the first full fiscal period that begins on or after October 1, 2023	For companies that are not SRCs, the company’s second-quarter 2023 Form 10-Q filing For SRCs, the company’s third-quarter 2023 Form 10-Q filing

Rule

Compliance Date

First Filing for Calendar-Year Companies

Disclosure and tagging requirements under Item 408(b)(1) of Regulation S-K; Item 16J of Form 20-F (*requiring annual disclosure of a company's insider trading policies and procedures governing the disposition of the company's securities by directors, officers, employees, or the company itself*)

For companies that are not SRCs, the first filing that covers the first full fiscal period that begins on or after April 1, 2023

For SRCs, the first filing that covers the first full fiscal period that begins on or after October 1, 2023

The company's Form 10-K or 20-F for the fiscal year ending December 31, 2024

Disclosure requirements under Item 408(b)(2) and 601(b)(19) of Regulation S-K; Item 16J of Form 20-F (*requiring the filing of insider trading policies and procedures as exhibit(s)*)

For companies that are not SRCs, the first filing that covers the first full fiscal period that begins on or after April 1, 2023

For SRCs, the first filing that covers the first full fiscal period that begins on or after October 1, 2023

The company's Form 10-K or 20-F for the fiscal year ending December 31, 2024

Disclosure and tagging requirements under Item 402(x) of Regulation S-K (*requiring certain tabular and narrative disclosures regarding awards of options, stock appreciation rights, and/or similar option-like instruments granted to corporate insiders shortly before and immediately after the release of material nonpublic information*)

For companies that are not SRCs, the first filing that covers the first full fiscal period that begins on or after April 1, 2023

For SRCs, the first filing that covers the first full fiscal period that begins on or after October 1, 2023

The company's proxy statement for its 2025 annual meeting (or Form 10-K or 20-F for the fiscal year ending December 31, 2024)

In light of these new requirements, companies should consider whether to review their insider trading policies. Please contact V&E to further discuss this process.



SEC Watch

Final Rule: Extending Form 144 EDGAR Filing Hours Under Regulation S-T

- Effective March 20, 2023, the Form 144 submission deadline has been expanded to allow for filing until 10 p.m. ET
- Recall that compliance with the electronic filing requirement will be required by April 13, 2023

Final Rule: Shortening the Securities Transaction Settlement Cycle

- The SEC has adopted a rule amendment to, among other things, shorten the standard settlement cycle for most routine securities trades from two business days after the trade to one business day after the trade (or T+2 to T+1)
- Compliance with the new timing requirement will be required by May 28, 2024

Proposed Rule: Securitizing Without Conflicts

- On January 25, 2023, the SEC re-proposed its 2011 proposed rule to prohibit certain securitization participants from engaging in transactions that could present conflicts of interest vis-à-vis ABS investors
- For more information, see our Insight [here](#)

Reopening the Comment Period: Share Buyback Disclosure

- On December 7, 2022, the SEC reopened the comment letter period for its [proposed rules](#) regarding share repurchase disclosure modernization in tandem with the release of its [memorandum](#) on the potential effects of the 1% excise tax on certain share repurchases imposed by the Inflation Reduction Act
- Recall that the proposed rule, which would apply to companies that repurchase securities registered under Section 12 of the Exchange Act (including FPIs), contemplates two main amendments to the current rules regarding disclosure of a company's buybacks: (1) requiring companies to furnish a new Form SR the

first business day following a buyback and (2) amending Item 703 of Reg. S-K to expand companies' periodic disclosure obligations regarding share repurchases

NYSE and Nasdaq Propose Clawback Rules

- Both the [NYSE](#) and [Nasdaq](#) have proposed rules to comply with the SEC's directive in new Exchange Act Rule 10D-1 that conform closely to the applicable language of Exchange Act Rule 10D-1

SEC Comment Letter Trends: Item 407(h) Disclosure (Leadership and Risk Oversight)

Early this proxy season, the SEC staff ("Staff") issued several comments regarding companies' disclosure under Item 407(h) of Regulation S-K.

SEC Staff comments asked companies to expand their disclosure on matters relating to board leadership, including:

- under what circumstances the company would consider having a combined Chair and CEO role;
- if the company decided to combine the Chair and CEO roles, when shareholders would be notified of such a change;
- whether the company would seek prior shareholder input before making such a change; and
- whether the lead independent director, if applicable, represents the board in communications with shareholders and other stakeholders.

SEC Staff comments additionally asked companies to expand their disclosure on matters relating to board oversight of risk, including:

- how the experience of the lead independent director, if applicable, is brought to bear in connection with the board's role in risk oversight;
- whether the lead independent director, if applicable, requires board consideration of, and/or overrides the company's CEO on any risk matters;

- the timeframe over which the board evaluates risk and how the board applies different oversight standards based upon the immediacy of the risk addressed;
- whether the board consults outside advisors or experts to anticipate future threats and trends, and how often the board reassesses the risk environment;
- how the board interacts with management to address existing risks and identify significant emerging risks;
- whether the company has a Chief Compliance Officer and to whom such person reports if so; and
- how the risk oversight process aligns with the company's disclosure controls and procedures.

Many companies receiving such comment letters publicly responded that they believed that their disclosure was in line with current rules and regulations, but that they would appropriately expand their disclosure in the future. It may therefore be appropriate to maintain the status quo with Item 407(h) disclosure this proxy season, although it will likely be more commonplace to make expanded disclosure incorporating the above concepts next proxy season.

Please contact V&E to discuss these developments and their implications.



Institutional Shareholder Proxy Voting Guidelines Updates

BlackRock

BlackRock's 2023 Guidelines are largely consistent with their 2022 voting guidelines.

Main Updates:

1. encouraging companies where nature-related factors are a core component of the company's ability to generate long-term returns to shareholders, particularly those whose strategy is heavily reliant on the availability of natural capital or whose supply chains are exposed to locations with nature-related risks, to include appropriate risk oversight and relevant metrics and targets to understand how these factors are integrated into the companies' strategies
2. explicitly stating that BlackRock views Scope 3 GHG emissions differently from Scopes 1 and 2 given the methodological complexity of calculating them and recognizes that disclosing such emissions is done in good faith as methodology develops
3. encouraging companies to make sustainability reporting available *before* their annual meetings

Note that a [survey](#) found that in 2022, the "Big Three" (BlackRock, Vanguard, and State Street) backed fewer environmental and social proposals than they did in 2021 and were much more reluctant to support action-oriented ESG proposals from shareholders calling for companies to adopt policies and set targets than they were to support proposals simply calling for disclosure of additional information.

Please contact V&E to discuss these developments and their implications.

Vanguard

Vanguard's 2023 Guidelines are largely consistent with their 2022 voting guidelines.

Main updates:

1. encouraging companies to disclose their overboarding policies, how the board settled on the policy, and how frequently it is reviewed to ensure continuing appropriateness
2. softening the language regarding Vanguard's policies regarding environmental/social proposals, such as deleting the statement that Vanguard is likely to support requests for companies to set goals that articulate the path to implementing a disclosed company policy regarding environmental/social issues
3. stating that Vanguard does not look for non-financial metrics (*e.g.*, ESG metrics) to be a standard component of compensation plans, but when included, will look for the same rigor, disclosure, and alignment with key strategic goals and/or material risks that Vanguard seeks with traditional metrics

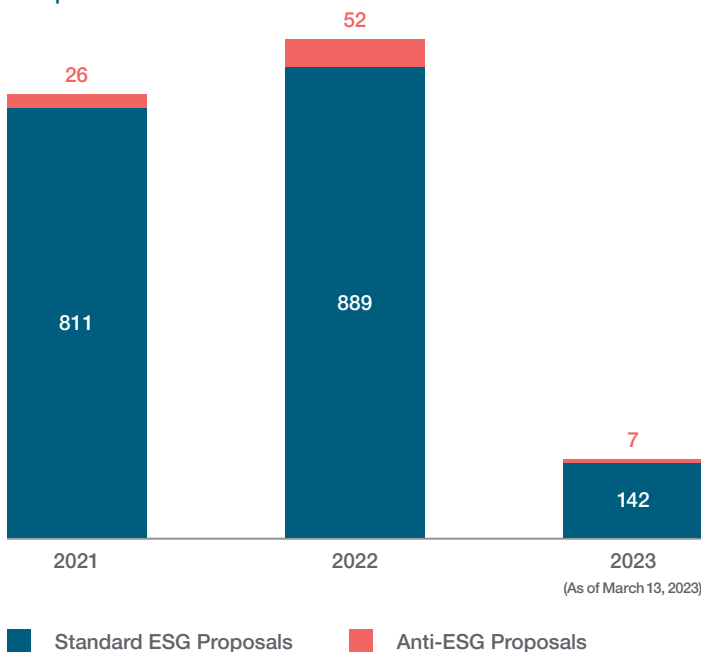


The Rising Anti-ESG Movement



The “anti-ESG” movement has recently gained increased attention in North America, premised on a range of asserted concerns including unreliable (and unavailable) ESG data, antitrust worries, economic uncertainty and “greenwashing.” ESG critics have undertaken efforts including legislation, lawsuits, and resolutions seeking to prevent governmental agencies and companies alike from considering ESG risks in various investment and business-making decisions. For example, anti-ESG shareholder proposals doubled in 2022 and are expected by some to increase again in 2023. That being said, the number of traditional ESG shareholder proposals still vastly outnumber anti-ESG proposals.

Standard ESG and Anti-ESG Shareholder Proposals, 2021-2023



(Source: Georgeson, *An Early Look at the 2022 Proxy Season* (2022); Morrow Sodali as of March 13, 2023)

Perhaps somewhat surprisingly, the Department of Labor’s (“DOL”) [rule](#) allowing fiduciary retirement fund managers to consider climate change and other ESG factors when making investments on behalf of pension plan participants has become the public battleground for ESG versus anti-ESG. In February 2023, House Resolution 30 was published which sought to disapprove the DOL rule via a legislative process established by the Congressional Review Act. The House passed Resolution 30 and, in early March 2023, the Senate followed suit in a final vote of 50-46. However, in a first for his administration, on March 20, 2023, President Biden issued a veto striking down Resolution 30, leaving the DOL rule in effect.

In September 2021, Texas Governor Greg Abbott signed [Senate Bill 13](#) (“SB 13”), the *Prohibition on Investment in Financial Companies that Boycott Certain Energy Companies*. SB 13’s primary purpose is to protect the Texas energy industry from the decarbonization of investment portfolios. State investment entities (e.g., pension funds, asset managers, etc.) are prohibited from investing in companies that “boycott” the fossil fuel industry. Other states have followed suit, adopting similar legislation that limits state business with ESG investment funds, financial services, and others that may impede the oil and gas industry (as well as industries with larger, known environmental impacts, such as agriculture and mining).

The anti-ESG movement is fast becoming a divisive political issue with votes (for the most part) following along party lines. Notwithstanding this, there is increasing pushback from certain [banks](#), [pension administrators](#), and [others](#).

Please contact V&E to discuss these developments and their implications.

BlackRock's Larry Fink's Annual Letter Is Out – What Does It Mean For Your Company?

Chances are that if you are at a publicly listed company, BlackRock is one of your largest shareholders. BlackRock holds more than \$10 trillion in assets under management and its ability to vote large percentages of proxy votes at most Russell 3000 companies gives it an incredibly powerful voice in the financial system.

Each year, BlackRock's CEO, Larry Fink, issues a much anticipated and highly influential letter addressed to CEOs at public companies, in addition to a separate letter he addresses to BlackRock's investors. These letters can lead to sea-changes in corporate policies, practices and disclosures given BlackRock's enormous proxy voting power, and also its ability to influence the media, other major investors and even securities regulators. BlackRock's proclamations in recent years that "climate risk is investment risk," that "ESG is about *value* investing not *values* investing", and even rallying behind nascent reporting frameworks, like the Taskforce for Climate Related Financial Disclosures (TCFD) can mobilize action from most corporate issuers, and the SEC alike.

On March 15, 2023, Fink issued his annual letter, and in a slight change from prior years, he combined his typical two-letters (one to CEOs, the other to asset owners of BlackRock) into one letter.

This year's letter was less focused on the specifics of ESG actions that BlackRock thinks companies should employ around issues such as climate change reporting and diversity equity and inclusion practices — although he remains committed to those ideas and believes they must be appropriately considered for long-term growth (if not corporate *viability*), but is more focused on BlackRock's view of its role in influencing corporate behavior versus governmental action, the appropriate role of BlackRock (and any asset manager) as fiduciary of asset owner's shares,

and how the firm continues to see certain ESG topics as risks and opportunities to the *long-term* value of the investments they hold.

Fink's letter takes a more defensive stance to justify his view that ESG analysis is a critical risk-assessment framework for identifying and quantifying risks in a portfolio to ensure sustained long-term returns over long time-horizons.

Fink's top themes:

- **BlackRock continues to grow despite anti-ESG sentiment.** Even in the face of high-profile pushback and pulling of funds from conservative state legislatures on investments tied to ESG strategies, BlackRock saw net inflows of \$400bn in 2022 (with \$230bn in the U.S.).
- **BlackRock is a fiduciary of its clients' funds.** It believes in democratizing proxy voting and seeks to give more voting power back to asset owners — rather than concentrating it themselves as managers. Fink further described BlackRock's "Voting Choice" initiative, which endeavors to give voting power back to asset owners who wish to vote differently than BlackRock. He notes that BlackRock has invested a lot of resources in its stewardship team to build out robust analyses of risks (including, but not limited to, ESG risks) and that investors who wish to vote their own shares should properly conduct their own diligence. He warns that failing to do so can lead to even more concentrated power with proxy advisory firms, and encouraged the development of a more robust system than just the two primary proxy advisers (*i.e.*, ISS and Glass Lewis).

- **Climate Change and Energy Transition are as important as ever.** Fink notes that BlackRock has for years viewed climate risk as investment risk — and that is still the case. He cites the incontrovertible examples of extreme weather already occurring and the impact on insurance costs (citing that insurers covered approx. \$120bn for natural catastrophes in 2022). Fink notes that the transition to a low-carbon economy is top of mind for many of its clients — which have a range of investment objectives and perspectives (some want to invest in ways that seek to align with a particular transition path or to accelerate that transition and others who choose not to).
- **Oil & gas continues to hold an important role in the energy transition.** BlackRock notes the energy transition will be non-linear. Different countries and industries will move at different speeds, and oil and gas will play a vital role in meeting global energy demands through that journey. Many of BlackRock’s clients see investment opportunities that will come as established energy companies adapt their businesses and recognize the vital role energy companies will play in ensuring energy security and a successful energy transition. Fink notes the imperative to ensure the continuity of affordable energy prices during the transition, and fossil fuels like natural gas, with steps taken to mitigate methane emissions, will remain important sources of energy for many years ahead. BlackRock notes that it is also investing, on behalf of its clients, in responsibly-managed natural gas pipelines.
- **Defense of ESG data and analysis.** Fink notes that much of the value BlackRock brings is its deep analytics capabilities, which are embedded in its investment decisions. Despite recent pushback on using ESG data in investment decisions, Fink believes this provides decision critical information for assessing risk and opportunity in its portfolio.
- **BlackRock should not be the Environmental Police.** Fink notes that while investors have an important role in decarbonizing the economy, a more important role lies with governments. He cites the impact of the Inflation Reduction Act, which creates significant opportunities for investors to allocate capital to the energy transition, which is attracting capital to existing and emerging technologies like carbon capture and green hydrogen. Fink notes that BlackRock is creating opportunities for clients to participate in infrastructure and technology projects, including the building of carbon capture storage pipelines and technology that turns waste into clean burning natural gas. Fink reiterates that some of the most attractive investment opportunities in the years ahead will be in the transition finance space.

What does this mean for your business?

Fink’s letter was far less prescriptive to corporate issuers on specific environmental or social priorities than in prior years, and should be read in the context of the anti-ESG movement, whereby Fink and other “passive” investors are feeling pressure to defend their approach to investing and why they believe ESG is not about a political ideology, but rather is just another tool for investment risk analysis.

We recommend that your company continue to follow its strategic plans and evaluate its most significant ESG risks and opportunities, but to continue considering the evolving dynamics at play, including the important perspectives coming from your largest shareholders, like BlackRock.

Please contact V&E to discuss the implications of these perspectives.



Growing ESG-Related Actions and Litigation

Legal claims targeting companies for social issues are rising (e.g., lawsuits relating to companies' statements relating to sourcing materials and sustainability of their products, involvement in human and labor rights abuses, and supply chains). The SEC's recent enforcement actions against McDonald's and Activision Blizzard [make clear](#) that companies should consider whether workplace misconduct is a matter receiving appropriate board attention, oversight and information collection, and disclosure.

Note that in [refusing to dismiss a shareholder's derivative claim](#) against the former chief human resources officer of McDonald's for allegedly fostering a corporate culture allowing sexual harassment and misconduct to flourish, the Delaware Court of Chancery made a [landmark ruling](#) that held for the first time that corporate officers owe a fiduciary duty of oversight to their company, as corporate board members long have under the court's blockbuster 1996 decision *In re Caremark*, and can therefore be sued derivatively by shareholders on behalf of the corporation for failing to fulfill this duty.

The "E" side of ESG has not escaped increasing ESG-related actions, especially in relation to greenwashing — misleading information or false claims overstating potential ESG benefits. Companies' commitments and public statements with respect to ESG matters are becoming increasingly subject to scrutiny from regulators and stakeholders alike. And although we are still awaiting on updates to the Green Guides from the Federal Trade Commission, the SEC is not waiting on these updates to target alleged greenwashing. Last year, the SEC's Climate and ESG Task Force in the Division of Enforcement settled a number of high profile actions against financial institutions for alleged failure to follow internal ESG policies and procedures when making investments, and the SEC has signaled that it will continue to focus on bringing cases involving potentially misleading ESG disclosures in 2023. A recent development worthy of note concerns the SEC's lawsuit against Vale, S.A., a Brazilian mining company, following the collapse of one of the company's mine tailings dams. Filed in April 2022 in the Eastern District of New York, the SEC alleged that Vale committed securities fraud by "intentionally concealing the risks that one of its older and more dangerous dams ... might collapse." Vale filed a motion to dismiss the SEC's enforcement action in December 2022. On March 28, 2023, the SEC announced in a press release that Vale had agreed to pay \$55.9 million to settle the charges against it. The settlement remains subject to the Eastern District of New York's approval and would require Vale to pay a civil penalty

of \$25 million and disgorgement and pre-judgment interest of \$30.9 million. In connection with the settlement, the SEC agreed not to oppose Vale's motion to dismiss. Per the SEC's press release, the settlement "demonstrate[s] that public companies can and should be held accountable for material misrepresentations in their ESG-related disclosures, just as they would for any other material misrepresentation." Notably, the SEC's allegations focused not just on ESG-disclosures in Vale's SEC filings, but on statements in its voluntary sustainability reporting as well. The settlement represents the risks of unqualified puffery in sustainability reports and how it can give rise to the appearance of greenwashing. The SEC and plaintiffs firms have brought similar cases against public companies in the past based on environmental disclosures in SEC filings following high profile environmental incidents. While there are ways for companies to highlight strong environmental, health and safety compliance records and past successes, careful consideration should be given to these types of statements in any type of public reporting to make sure appropriate safeguards are included to mitigate the risk that future events or incidents at odds with such statements do not give rise to SEC liability in addition to environmental and tort liability arising from the underlying incident.

The next wave of greenwashing claims may likely be fueled by the recent attention regarding carbon offsets. An [investigation](#) reported on by the media indicates that a significant portion of the rainforest offset projects offered by Verra, the world's leading carbon standard for the voluntary offsets market, do not provide genuine emissions reductions through reduced deforestation and are, therefore, largely worthless. The investigation, based on scientific studies of Verra's rainforest schemes, found that few showed evidence of deforestation reductions and that "94% of the credits had no benefit to the climate." Increasingly, many companies with net zero targets are incorporating the use of offsets to help meet such targets. As noted in the investigation, dozens of companies bought offsets from Verra in a bid to mitigate their emissions, mainly when such emissions cannot be actively avoided or directly reduced. Investigations like this highlight the need for careful consideration of what role carbon offsets may play in any corporate net zero goal, especially given the lack of rules and regulations governing the offset market.

Please contact the V&E ESG Task Force to discuss these developments and best practices for ESG-related governance and disclosure, including approaches for avoiding greenwashing claims.

Board Diversity

According to a [new ISS study](#), for the first time, racially/ethnically diverse directors occupy more than 20% of board seats among Russell 3000 companies. Recall that ISS and Glass Lewis will make negative recommendations for companies that do not demonstrate progress of their own in terms of board diversity:

- [ISS](#) will generally recommend **against** the chair of the nominating committee (1) at all companies where there are no women on the board and (2) at Russell 3000 or S&P 1500 companies where there are no apparent racially or ethnically diverse members on the board.
- [Glass Lewis](#) will generally recommend **against** the chair of the nominating committee (1) at Russell 3000 companies where the board is not at least 30% gender diverse, (2) at all companies where there are no gender diverse directors, and (3) at Russell 1000 companies where there are no directors from an underrepresented community.

Please contact V&E to discuss these developments and their implications.

“Tier 1” by *Legal 500 U.S., M&A/Corporate and Commercial* — Shareholder Activism: Advice to Boards, [2021–2022](#)



Increasing ESG Disclosures and Anticipated Final Climate Disclosure Rule From the SEC

Despite the anti-ESG movement, it appears that public companies remain cognizant of the need to respond to stakeholder concerns related to the management of ESG-related risks and opportunities. A [survey](#) of S&P 500 Form 10-K disclosures between November 9, 2020 and May 20, 2022 found the number of stand-alone climate-related risks factors rocketed in the last reporting session. Approximately one-third of companies integrated at least one new stand-alone climate risk factor, with the Financials sector adding the greatest number. Of these new risk factors, nearly half of the companies described both transition and physical risks. And, within transition risk, companies increasingly focused on the risk of failing to meet sustainability commitments and/or investor and stakeholder expectations.

Relatedly, the Financial Times recently [reported](#) that a dozen big U.S. financial companies (think BlackRock, Blackstone, T. Rowe Price, KKR, and others) have incorporated into their annual reports the material risk presented by the “backlash against sustainable investing.” For example, Blackstone disclosed that its fundraising efforts and revenues could be affected by increased state scrutiny over “boycotts” of the fossil fuel industry (see The

Rising Anti-ESG Movement on page 14). Such “divergent” views on ESG could also lead to adverse impacts on reputation and business. It is not just those companies who are the subject of Republican-led investigations regarding votes on shareholder proposals, or those who have been publicly called out for their ESG investing policies — certain other financial companies have the same disclosure despite escaping criticism so far.

Additionally note that in January of this year the SEC updated its [Agency Rule List for Fall of 2022](#) to, among other things, list [April 2023](#) as the date for final action for the climate disclosure rule. While the target date is merely “aspirational” and there is no guarantee that the SEC will meet its target deadline, companies should begin preparing for finalization in the near future.

Please contact V&E to further discuss these developments, the SEC’s proposed climate disclosure rule, and steps to be taken to prepare for the SEC’s final rule.



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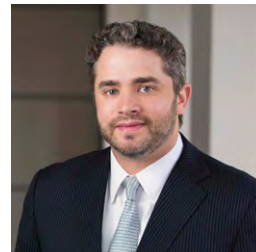
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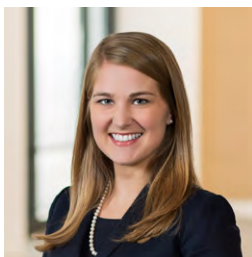
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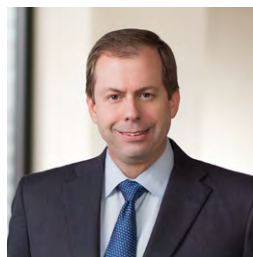
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“ I really enjoy helping my clients develop and implement practical and strategic solutions that anticipate and address the ever-evolving needs of their shareholders and other critical stakeholders. ”

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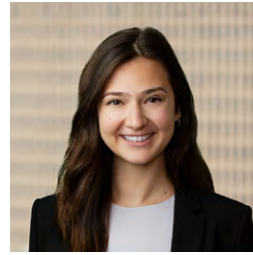
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“ We understand ESG has no finish line. Our impact in our communities and the world is connected to our ability to deliver on ESG solutions for our clients and ourselves, and we look forward to continuing the work. ”

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