

Everything Everywhere All At Once: Advising Your Board in the Age of ESG

Guest and Dorsey Panelists

James Chosy, Senior Executive Vice President and General Counsel, U.S. Bancorp

Trevor Gunderson, Vice President and Deputy General Counsel, General Mills, Inc.

Amy Schneider, Vice President, Corporate Secretary and Securities, Xcel Energy Inc.

Robert Rosenbaum and **Cam Hoang**, Dorsey & Whitney LLP

Program Materials

PowerPoint Presentation

Publications / Dorsey eUpdates & Blog Posts

Dorsey eUpdate: *SEC Issues FAQ Relating to Investment Adviser Considerations of DEI Factors*, David Tang (11/1/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/11/sec-faq-investment-adviser-considerations-of-dei>

Dorsey eUpdate: *SEC Adopts Mandatory Pay-versus-Performance Disclosure for 2023 Proxy Statements*, Cam Hoang & Dale Williams (9/13/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/09/pay-versus-performance>

Dorsey Blog: *Thoughts About ESG Investing in Your 401(k) Plan: The Problem Is Choice (Pop Culture Nod to the Matrix)* Michael Voves (7/26/22)

Available at: https://www.dorsey.com/thoughts-about-esg-investing-in-your-401k-plan-the-problem-is-choice-pop-culture-nod-to-the-matrix/?utm_source=rss&utm_medium=rss&utm_campaign=thoughts-about-esg-investing-in-your-401k-plan-the-problem-is-choice-pop-culture-nod-to-the-matrix

The Banking Law Journal: *BANKS, CLIMATE RISKS, AND THE EMERGING REGULATORY FRAMEWORK*, Lanier Saperstein and Marc Kushner (6/22)

Available at: <https://www.dorsey.com/-/media/files/newsresources/news/2022/lanier-saperstein-and-marc-kushner.pdf>

Dorsey eUpdate: *The SEC and ESG*, Thomas Gorman (6/9/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/06/the-sec-and-esg>

Dorsey eUpdate: *SEC Requires Universal Proxy Cards for Contested Director Elections, Amends Other Proxy Disclosure Requirements for All Director Elections*, Cam Hoang (11/18/21)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2021/11/sec-proxy-cards-for-contested-director-elections>

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Guest and Dorsey Speakers



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Housekeeping - Hybrid

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Attendance Sheets are set on tables in this room. Webinar attendees must download same from the Event Reminder email sent from Events@Dorsey.com or visit the Zoom Events Lobby.

Q&A. The speakers will not have time to answer audience questions, please contact the speakers or your trusted Dorsey contact.

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CLE Expected: AZ, CA, CO, IA, IL, MN, ND, NY, OR, TX, UT, WA, WI.

Webinar Attendees. Please check CHAT for announcements.

Agenda

- **ESG Dominates the Conversation**
 - But do consumers and employees care?
 - The anti-ESG movement
 - Greenwashing risks
 - Is ESG here to stay?
- **ESG Hot Topics**
 - Climate-related disclosures
 - Racial equity and civil rights audits
 - Board leadership structure
- **CEOs Taking a Stand**
- **Universal Proxy Card – Game-Changer??**

The Universe of ESG (According to SASB)

- Image intentionally omitted
- **Source: SASB Materiality Map**
Available at: <https://www.sasb.org/standards/materiality-map/> -

Consumers want to buy from responsible companies







- Image intentionally omitted
- **Source: June 2022 Global Consumer Insights Pulse Survey**
Available at: <https://www.pwc.com/gx/en/consumer-markets/consumers-respond-to-waves-of-disruption/gcis-report-june-2022.pdf>

Directors don't see a link between ESG and the bottom line



- Image intentionally omitted
- **Source:** PwC 2022 Consumer Intelligence Series and Annual Corporate Directors' Survey.
- **Available at:** <https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-2022-annual-corporate-directors-survey.pdf>.

Anti-ESG Movement

- **September 20, 2022:** Senator Pat Toomey sends letter to more than a dozen ratings firms expressing concerns that ratings improperly influence capital investments and requests documents and other responses to 20 questions, focusing on compliance burdens for companies, data veracity, and other issues.
 - One commentator predicts this is a harbinger of federal regulation of such agencies.
- **November 3, 2022:** Five Republican Senators send letters to 51 large U.S. and global law firms strongly suggesting that they may be engaging in antitrust violations for collaborating on ESG initiatives.

	<p align="center">United States Senate WASHINGTON, DC 20510 November 3, 2022</p>	
<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="width: 30%; text-align: center;">  Dear [Redacted] </div> <div style="width: 65%;"> <p><small>We are writing about your firm's Environmental, Social, and Governance (ESG) practice. Although businesses would certainly be wise to lawyer up before undertaking ESG initiatives, your firm has a duty to fully inform clients of the risks they incur by participating in climate cartels.</small></p> </div> </div>		
<p>We are writing about your firm's Environmental, Social, and Governance (ESG) practice. Although businesses would certainly be wise to lawyer up before undertaking ESG initiatives, your firm has a duty to fully inform clients of the risks they incur by participating in climate cartels and other ill-advised ESG schemes.</p>		
<p><small>would never endorse at the ballot box. Of particular concern is the collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America's adversaries abroad. Over the coming months and years, Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG, and refer those violations to the FTC and the Department of Justice. To the extent that your firm continues to advise clients regarding participation in ESG initiatives, both you and those clients should take care to preserve relevant documents in anticipation of these</small></p>		
<p>would never endorse at the ballot box. Of particular concern is the collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America's adversaries abroad. Over the coming months and years, Congress will increasingly use</p>		
<p> Charles E. Grassley United States Senator</p> <p> Marco Rubio United States Senator</p>	<p> Marsha Blackburn United States Senator</p>	<p>Sources: Rubio, Cotton Warn Law Firms to Prepare for Congressional Oversight of ESG Initiatives - Press Releases - U.S. Senator for Florida, Marco Rubio (senate.gov) and Grassley, Cotton, Colleagues Warn Law Firms About ESG Initiatives (senate.gov)</p>

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<h2 style="margin-top: 0;">Anti-ESG Movement</h2> <ul style="list-style-type: none"> • Anti-ESG Organizations <ul style="list-style-type: none"> – ACRP: A law firm representing anti-ESG organizations, has sent several DE&I policy retraction demand letters threatening lawsuits as a consequence of non-retraction. – NCPWR <ul style="list-style-type: none"> • Submits anti-ESG proposals advancing the “conservative movement.” These anti-DE&I proposals have been put to a vote at 12 different companies, including Walmart, Twitter, and AT&T. These proposals received less than 5% support. • Commenced an initiative titled “Stop Bank of America’s Divisive ‘Woke at Work’ Agenda” asking people to sign on to ending Bank of America’s “radical and divisive ‘racial justice’ initiatives.” • Anti-ESG Movement in States <ul style="list-style-type: none"> – Florida Governor trying to enact rule that fiduciaries overseeing pensions cannot consider ESG unless material to risk and return. – Texas released list of 10 financial firms and 350 investment funds it deems to be “boycotting energy companies,” clearing the way for Texas officials to bar the companies from state business. 		

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Greenwashing Risks

- **Greenwashing lawsuits are trending:**
 - **May 2022:** SEC charged BNY Mellon Investment Advisor for making statements or implying that all investments in certain mutual funds had undergone an ESG quality review, even though that was not always the case. BNY Mellon agreed to pay a \$1.5 million penalty.
 - **September 2022:** Class-action lawsuit filed against KLM for marketing that customers who purchase carbon credits offset and reduce the environmental impact of flying.
 - **Ongoing lawsuit against ExxonMobil by Mass. AG** alleging Exxon misled investors as to the effects of burning fossil fuels on climate change and as to the steps it was taking to reduce carbon emissions.
- **The SEC has established an ESG Taskforce within its Division of Enforcement.**

Is ESG here to stay?

Top 10 Reasons Why the Answer is “Yes”

- **ESG Offers a Fuller View of Risk**
- **Identifying the Risks Leads to Opportunities**
- **Rise of Stakeholder Capitalism Is Good for Companies**
- **Regulations Are Leading to Improvements**
- **Sustainable Investing Is Growing ...**
- **... Particularly Among Women and Young Investors**
- **Performance Is on Par**
- **More Shareholders Are Voting**
- **Countering the Broad Consensus on ESG Would Be Difficult**
- **ESG May Be Better for Investor Outcomes**

Source: Leslie Norton of Morningstar, 10 Reasons Why ESG Won't Be Stopped,
Available at: <https://www.morningstar.com/articles/1123647/10-reasons-why-esg-wont-be-stopped>

**CLE Code
for
Attendees in States that Require a Code**
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**ESG Hot Topics:
Climate-Related Disclosures**

In March 2022, the SEC released its proposed rules on climate-related disclosure:

- Its most extensive rulemaking in recent history,
- which is almost certain to be legally challenged.
- The compliance costs, as estimated by the SEC, are \$500,000-\$600,000 a year for most reporting companies. Chamber of Commerce (and others) say it's higher.

Disclosure would include:

- Climate-related risks and their actual or likely material impacts on the registrant's business, strategy, and outlook;
- The registrant's governance of climate-related risks and relevant risk management processes;
- The registrant's greenhouse gas ("GHG") emissions, which, for accelerated and large accelerated filers and with respect to certain 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.

ESG Hot Topics: Racial Equity and Civil Rights Audits

- Shareholder proposals for audits received strong support in the 2022 proxy season:

# of Proposals Voted On	Average Support	# of Proposals w/ Majority Support
22	44.9%	8

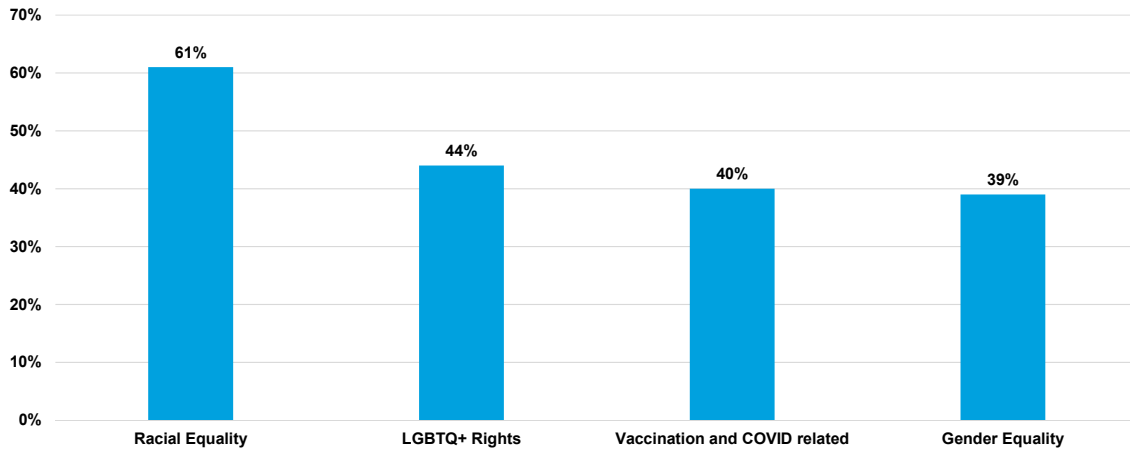
- Pushback from anti-ESG proponents, as discussed previously.

ESG Hot Topics: Board Leadership Structure

- For 2023 proxy season: SEC staff reviewing rationale for board leadership structure and its impact on risk management.
- Representative comments:
 - Provide reasons why board leadership structure is appropriate, addressing company-specific circumstances.
 - When Chair/CEO roles are split, provide circumstances where roles would be combined.
 - Describe the role of the chair or lead director's experience is brought to bear in connection with risk oversight.
 - Provide expanded disclosure on board oversight of risk.

Comments are to enhance future disclosure vs requiring revised disclosure.

Issues on which US Companies Most Frequently Take a Public Stance



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Source: Conference Board survey of 300 public, private and non profit companies

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CEOs Taking a Stand

- **Reproductive Rights post-Dobbs:**
 - 61% of companies cited the issue's relationship "to the company's core values" as criteria in determining whether to speak publicly.
 - Only 29% of companies cited relationship to its business as one of the reasons for speaking out.
- **Suits filed against Unilever, Wells Fargo and Starbucks based upon public positions, with shareholder plaintiffs on both sides of the DE&I debate.**

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Universal Proxy Card (“UPC”)

- SEC adopted new Rule 14a-9, effective September 9, 2022
 - SEC Release with final rule: [34-93596.pdf \(sec.gov\)](#)
- R. 14a-9 mandates use of UPC in all contested director elections
- Requires *all* parties to include *all* candidates (*i.e.*, those nominated by Board *and* those nominated by dissidents) on same proxy card
- Each party will be able to express support, and solicit votes, for other party’s individual candidates in its proxy materials

Universal Proxy Card (“UPC”)

- Rule designed to enable shareholders to pick and choose among *all individual* candidates, rather than *between slates* of nominees.
- Much speculation about whether rule will:
 - *increase* number of contests, and
 - make contests more about *individual directors* rather than *slates of directors* (*i.e.*, much more focus on directors deemed “most vulnerable”).
- ISS predicts that R. 14a-9 will lead to “elective surgery.”
 - Some commentators fear that ISS and Glass-Lewis will have even more power, as they move toward a regime of recommending individual directors.

Universal Proxy Card (“UPC”)

- **UPC rule may lead to more systematic, annual reviews of:**
 - Board’s skills matrix, including a gap analysis as circumstances change over time
 - Performance of individual directors, including whether each director is continuing to supply relevant contributions to Board deliberations and activities
- **Rule will require Board to provide more particularized information supporting its rationale for (re-)electing *each* of its nominees**
- **Companies should consider reviewing and updating their advance notice bylaw provisions, both to conform to the new Rule and to provide appropriate process for nominations by shareholders**

Appendix

- **Officer Exculpation in Delaware**

Officer Exculpation in Delaware

- **Effective August 1, 2022, DGCL §102(b)(7) was amended to permit limitation or elimination of monetary damages for breaches of duty of care of officers, similar to (but not as broad as) protection for directors**
 - Amendment for directors occurred in 1986, following DE S. Ct. *Van Gorkum* decision
- **Amendment applies to direct actions (including stockholder class actions) against officers**
- **Amendment does NOT extend to actions brought by or in the name of corporation (i.e., derivative actions)**

Officer Exculpation in Delaware

- **Just as with directors, as amended, DGCL §102(b)(7) does NOT exculpate officers for breaches of duty of loyalty**
- **Officers statutorily covered by amendment are:**
 - President, CEO, COO, CFO, CLO, Controller, Treasurer or CAO
 - Any NEO in SEC-filed documents, and
 - Any individual who, by contract, has consented to be so identified
- **In order to be effective, officer exculpation must be included in Certificate of Incorporation**
 - Therefore, all existing DE companies must obtain stockholder approval of any such exculpation clause

Officer Exculpation in Delaware

- **On November 4 ,2022, ISS released its proposed benchmark voting policy changes for 2023**
 - It is proposing to “generally recommend for” charter amendment proposals providing for exculpation of officers (limited to those identified in the DGCL)
- **Glass-Lewis has not taken a position, but notes, more generally, its support for “reasonable” liability protections for officers, including indemnification and insurance**
- **Institutional investors’ proxy guidelines vary, but do not yet address officer exculpation specifically; we expect guidelines to be updated**

Officer Exculpation in Delaware

- **Newly formed DE companies are likely to include such a provision in their certificates as a matter of course**
- **Existing DE companies, particularly, publicly held companies, must consider carefully the:**
 - need to take such action and
 - the likely reaction of their key investors

Thank you for attending!

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