

ARTICLE

# CAREMARK AND ESG, PERFECT TOGETHER: A PRACTICAL APPROACH TO IMPLEMENTING AN INTEGRATED, EFFICIENT, AND EFFECTIVE CAREMARK AND EESG STRATEGY

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## I. Introduction

With concerns about climate change, growing economic insecurity and inequality, and the resiliency of critical supply chains has come renewed concern about whether business entities conduct themselves in a manner that is consistent with society's best interests. This concern manifests in a demand that corporations respect the best interests of society and all corporate stakeholders, not solely stockholders.<sup>1</sup> The buzz abbreviation for this is “environmental, social, and governance” (ESG), or as one of us has called it, “EESG.”<sup>2</sup>

Many corporate fiduciaries believe that companies are most likely to create sustainable profits if they act fairly

toward their employees, customers, creditors, the environment, and the communities the company's operations affect.<sup>3</sup> However, boards and management teams struggle to situate EESG within existing reporting and committee frameworks and figure out how to meet the demand for greater accountability to society while not falling short in other areas.

Here, we propose a way of thinking about EESG that promotes ethical, fair, and sustainable behavior without heaping additional work on already-stretched employees and directors. To develop the framework for this proposal, we relate the concept of EESG to the preexisting compliance duty of corporations. This long-standing duty, associated with the Delaware Court of Chancery's landmark decision in *In re Caremark International Inc. Derivative Litigation*<sup>4</sup> but rooted in the much older requirement that corporations conduct only lawful business by lawful means,<sup>5</sup> overlaps with and should be integrated into companies' decisions to hold themselves to even higher levels of responsibility.

This Article proceeds in three parts. Part II observes that corporate law's first principle is that a corporation must

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1. See *infra* Part III.
2. The extra “E” is for employees—a crucial but oftentimes missing component in the ESG discussion. See Leo E. Strine Jr., *Toward Fair and Sustainable Capitalism* 6 (Roosevelt Inst., Working Paper No. 202008, 2020), [https://rooseveltinstitute.org/wp-content/uploads//08/RL\\_TowardFairandSustainableCapitalism\\_WorkingPaper\\_202008.pdf](https://rooseveltinstitute.org/wp-content/uploads//08/RL_TowardFairandSustainableCapitalism_WorkingPaper_202008.pdf) [<https://perma.cc/69BL-P6MD>].

3. See, e.g., John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV. 1407, 1409 (2019); Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK, <https://www.BlackRock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> [<https://perma.cc/NT9H-PKKZ>] (“To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.”).
4. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).
5. Leo E. Strine Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L. REV. 629, 649-51 (2010).

conduct lawful business by lawful means. From this, the Article explains that if a company strives to be an above-average corporate citizen, then it will also be much more likely to simultaneously meet its minimum legal and regulatory duties. In this way, EESG and ordinary compliance should be seen as interconnected and be accomplished in an integrated one-step process. Part III then sketches a high-level framework that allows directors and managers to situate EESG initiatives within their existing compliance and regulatory program. Finally, Part IV advises corporate leaders to update and integrate existing regulatory reporting and compliance processes and EESG standards, share results with stakeholders, and simultaneously fulfill their duty to monitor the corporate enterprise.

## II. The Origins of Today's Intense Focus on EESG

For generations, the prevailing view among many business leaders, institutional investors, and law and economics academics was that corporate law should primarily serve the interests of companies' stockholders, an ideology known as "shareholder primacy."<sup>6</sup>

However, as a response to societal concerns regarding shareholder primacy, many business leaders, institutional investors, and policymakers have gravitated toward the view that corporations should serve the interests of all their stakeholders, not just those who own the company's stock.

Additionally, the economic and human crisis caused by COVID-19 will only boost calls for greater corporate regard for stakeholders like workers, ordinary-course suppliers, and the communities in which companies operate.

The demand for increased attention to stakeholders is clear. But too often lost in this conversation is the first principle of corporate law: corporations may only conduct lawful business by lawful means.<sup>7</sup>

Precisely because of this statutory mandate, corporate fiduciaries are imbued with substantial discretion to manage their corporations in an "other-regarding" manner.<sup>8</sup> Like a human citizen, corporations can consciously choose to avoid ambiguous grey areas of conduct that risk violating the law.<sup>9</sup>

This first principle also helps illustrate our central point: a corporation's plan to fulfill its legal compliance obliga-

tions should not be viewed as separate and distinct from the corporation's plan to operate in a sustainable, ethical manner with fair regard for all the corporation's stakeholders.

In the landmark *Caremark* decision, Chancellor William Allen articulated the fiduciary duty that corporate directors owed to honor this first principle of statutory corporate law<sup>10</sup>:

[C]orporate boards may [not] satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.<sup>11</sup>

*Caremark* and other developments stimulated focus on corporations adopting sound procedures to ensure lawful business conduct. Although liability under *Caremark* is hard to prove,<sup>12</sup> scholars have viewed the case as having enormous value in encouraging more intensive diligence in compliance,<sup>13</sup> amplified by substantial government penalties on corporations that run afoul of the law with weak compliance programs. And recent *Caremark* decisions denying the defendants' motions to dismiss have resulted in renewed attention to directors' oversight obligations.<sup>14</sup>

In response to major accounting scandals and a market-shaking financial crisis within a decade, federal law also substantially enhanced the requirements for corporations to address financial risk and seat independent board members as the exclusive members of committees relevant to compliance.<sup>15</sup>

This period coincided with predominance of institutional investors over human stockholders, which facilitated collective action to change corporate management and strategy. Many investor initiatives have focused on making companies more, rather than less, responsive to immediate market pressures and paid little to no attention to issues like risk management.<sup>16</sup> And some investors have pushed

6. Shareholder primacy dictates that corporations should, within the limits of law and ethics, focus on the best interests of their stockholders. See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32; William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 268-70 (1992).

7. DEL. CODE ANN. tit. 8, §101(b) (2020) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes. . . ."); MODEL BUS. CORP. ACT §3.01(a) (AM. BAR ASS'N 2016) ("Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.").

8. See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* (2012); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738, 761 (2005).

9. See Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 710-11 (2019).

10. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

11. *Id.* at 970.

12. See, e.g., *Guttman v. Huang*, 823 A.2d 492, 505-06 (Del. Ch. 2003).

13. Donald C. Langevoort, *Commentary, Caremark and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727, 728 (2018); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 967 (2009).

14. See *Marchand v. Barnhill*, 212 A.3d 805, 807-09 (Del. 2019); *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at \*10 (Del. Ch. Oct. 1, 2019); *Hughes v. Xiaoming Hu*, No. 2019-0112, 2020 WL 1987029, at \*1 (Del. Ch. Apr. 27, 2020).

15. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §301, 116 Stat. 745, 775-76 (codified as 15 U.S.C. §78j-1 (2018)).

16. See KOSMAS PAPADOPOULOS ET AL., U.S. BOARD STUDY: BOARD ACCOUNTABILITY PRACTICES REVIEW 5 (2018), <https://www.issgovernance.com/file/publications/board-accountability-practices-review-2018.pdf> [https://perma.cc/E374-BC8V] (documenting the changes in governance at S&P Composite 1500 companies from 2009 to 2017).

companies to deliver immediate returns or risk being ousted from office or otherwise publicly embarrassed.<sup>17</sup>

This new dynamic has led naturally to an intense corporate focus on pleasing stockholders, even if doing so harms other key stakeholders such as creditors and, most importantly, employees. During this period, the traditional gainsharing from increased corporate profitability and productivity between employees and stockholders has markedly tilted toward stockholders and top corporate management.<sup>18</sup> This tilt has contributed to greater inequality and growing economic insecurity and dissatisfaction.<sup>19</sup> Likewise, some observers have expressed concern that the avid pursuit of stock market gains has led corporations to be insensitive (or worse) to the long-term consequences of their conduct for the planet's health and the health and welfare of their consumers.<sup>20</sup>

One consequence of inequality and economic insecurity has been an increasing sense that corporations need to do more than the legal minimum and that the so-called stockholder wealth maximization principle is legally erroneous and socially harmful. Even mainstream institutional investors recognize that most investors whose money the institutions manage are human beings who invest for long-term objectives like retirement.<sup>21</sup>

The increased salience of so-called ESG, today's word for yesterday's corporate social responsibility, is one manifestation of this. Recognizing developments that highlight employees as well as environmental and social concerns, we will use the term "EESG" to incorporate the interests of employees into the ESG framework instead of just "burying them in the S."<sup>22</sup>

In reaction to this EESG movement, corporations have taken action to adopt policies and practices reflecting their commitment to sustainable governance and ethical treat-

ment of stakeholders.<sup>23</sup> However, managers and directors are struggling with how to implement a commitment to good EESG practices, along with all their preexisting legal obligations and business requirements. If EESG just becomes another add-on to a list of already difficult-to-accomplish checklist items, the proponents of greater corporate social responsibility, i.e., EESG, will fail to achieve their worthy purpose. We next turn to the task of avoiding this wasteful and harmful outcome.

### III. Toward an Integrated, Efficient, and Effective Approach to Corporate Compliance and EESG

We are optimistic about EESG for two reasons. First, the demand that corporations treat stakeholders and society with respect is a fundamentally critical function of social institutions.<sup>24</sup> Second, because EESG is intrinsic to good corporate management, there is good news: there is an effective method for corporations to embrace quality EESG standards that does not simply pile EESG responsibilities on top of existing duties of managers and the board. This method involves the recognition that the company's compliance and EESG plans should be identical, and that the work of implementing that singular plan should be allocated across company management and across the board's committee structure itself. That is, if a corporation already maintains a thorough and thoughtful compliance policy, the corporation has a strong start toward a solid EESG policy.

To grasp why, focus on the traditional "E" in ESG: the environment. Without minimizing the importance of carbon emissions, let's not lose sight of the fact that there are other sorts of dangerous emissions (e.g., particulate matter), there are other sorts of harmful excess (think plastic), and there will be evolving standards as new innovations result in unanticipated consequences. Since before *Caremark*, environmental concerns have been a core focus of corporate compliance programs.<sup>25</sup> The growing focus on climate change and other negative effects of intensive economic activity on the environment has manifested itself in litigation under *Caremark*.<sup>26</sup> Corporate compliance programs that effectively addressed these environmental risks have thus better-positioned their companies to confront

17. See Lyman Johnson, *A Fresh Look at Director "Independence": Mutual Fund Fee Litigation and Gartenberg at Twenty-Five*, 61 VAND. L. REV. 497, 534 n.228 (2008).

18. We are not arguing in this Article that this reduction in gainsharing can be causally attributed to the interaction of greater company responsiveness to stockholders and a simultaneous weakening of worker leverage.

19. See generally THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer, trans., 2014) (documenting growing inequality throughout the United States and other OECD countries). Growing inequality has resulted, in part, in increased economic instability. See generally Austin Nichols & Philipp Rehm, *Income Risk in 30 Countries*, 60 REV. INCOME & WEALTH S98 (2014) (documenting the rise of economic insecurity in America). [research.org/global/2017/06/05/2-public-divided-on-prospects-for-the-next-generation](https://research.org/global/2017/06/05/2-public-divided-on-prospects-for-the-next-generation) [<https://perma.cc/7XE4-TJR7>].

20. See, e.g., Henry M. Paulson Jr., *Short-Termism and the Threat From Climate Change*, MCKINSEY & CO. (Apr. 1, 2015), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/short-termism-and-the-threat-from-climate-change> [<https://perma.cc/J8A4-GJF3>]; see Jamie Dimon & Warren E. Buffett, *Short-Termism Is Harming the Economy*, WALL ST. J.: OPINION (June 6, 2018, 10:00 PM), <https://www.wsj.com/articles/short-termism-is-harming-the-economy-1528336801> [<https://perma.cc/Z2SM-QP64>].

21. BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: 2018 ANNUAL REPORT 1 (2018), <https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2018.pdf> [<https://perma.cc/G4YJ-R3KZ>].

22. Some commentators and market participants have lumped employees into the "social" prong of ESG. See, e.g., *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> [<https://perma.cc/64SE-LTXF>].

23. See, e.g., Brad Smith, *Microsoft Will Be Carbon Negative by 2030*, MICROSOFT: OFF. MICROSOFT BLOG (Jan. 16, 2020), <https://blogs.microsoft.com/blog/2020/01/16/microsoft-will-be-carbon-negative-by-2030> [<https://perma.cc/PD7X-632V>] (announcing that Microsoft will decrease its carbon emission to below zero by 2030).

24. See generally COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD (2018) (laying out a stakeholder vision of business, with a focus on the corporate commitment to both customers and communities).

25. See Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 140-61 (2013).

26. See *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 50 (Del. 2017); *Inter-Mktg. Grp. USA, Inc. ex rel. Plains All Am. Pipeline, L.P. v. Armstrong*, No. 2017-0030, 2020 WL 756965, at \*\*10-15 (Del. Ch. Jan. 31, 2020).

emerging demands to meet the “environmental” prong of EESG for action going beyond the legal minimum.

The environmental example is not isolated. For instance, to the extent that EESG embraces a responsibility toward company customers, it overlaps with compliance. Many *Caremark* cases and regulatory actions have focused on corporations that allegedly exposed consumers to undue harm, financial or otherwise.<sup>27</sup> Similarly, the responsibility to provide employees with safe working conditions,<sup>28</sup> an environment that is tolerant toward diverse beliefs and backgrounds,<sup>29</sup> and fair wages and benefits,<sup>30</sup> overlaps with important compliance duties. As with other EESG factors, the employee factor has also been a focus of *Caremark* cases and actions by regulators.<sup>31</sup>

Finally, to the extent that good EESG could be thought to involve yet another E, ethics and the overall commitment to conducting business with high integrity and an other-regarding spirit, EESG also overlaps with compliance. And as with the previous EESG factors, perceived ethical lapses have often prompted *Caremark* suits.<sup>32</sup>

The overlap between compliance and EESG is understandable and unremarkable when considered from this perspective. Perhaps the most important foundational question corporate directors and managers need to be able to answer to be an effective fiduciary is: “How does the company make money?”<sup>33</sup>

This simple question is powerful because it forces directors to examine closely what the company does that results in the ultimate profitable sale of a product or service. What will naturally flow from asking this core question is an understanding that the legal regimes likely to be most salient for the company are identical to the EESG issues that have the most salience. Why? Because society learns from experience, and the law is likely to have the most relevance to the company in those areas where the company has the most impact on the lives of its stakeholders, be they the company’s workers, its consumers, or the communities in which its operations have a material impact. So too will the pressures on particular companies to implement more ambitious EESG standards and practices likely coincide with the areas of company operations that have the most impact on particular stakeholders and society.

Therefore, by analyzing in a rigorous way how a company makes money, and the impact that has on others, directors will be well-positioned to best shape an effective compliance system and an effective EESG plan. If directors seek to go beyond the legal minimum and treat all the corporation’s stakeholders and communities of impact in an ethical and considerate manner, the corporation minimizes the risk of breaking the law. By trying to engage in EESG best practices, the corporation will have a margin of error that keeps it largely out of the legal grey and create a reputation that will serve the company well with its stakeholders and regulators when there is a situational lapse.

Unfortunately, for too many companies, their existing board compliance structures are not well thought-out. This may result in an imbalanced approach to legal compliance and risk management that hazards failing to identify and address key areas where the company could negatively affect stakeholders and society—and run afoul of the law.

#### IV. A Practical Way to Think About Organizing and Implementing an Integrative Compliance/EESG Strategy

For a public company seeking to reorganize its compliance and EESG functions, the most rational starting point involves building on the thought process discussed. The company’s board, management, and advisors should identify how the company makes money and the affected stakeholders.

As to material business lines, top management must address the relevant regulatory regimes that constrain the company’s conduct, consider the reasons why that is so, and identify the stakeholders whose interests the law protects. Relatedly, managers and boards should undertake the same inquiry in addressing reputable EESG criteria and their application. The results of these inquiries should then be integrated. The concerns addressed by law and EESG standards will tend to track.

This is an important point in the ongoing discussion about EESG reporting. Regulatory systems already require disclosure that is essential to a quality EESG monitoring and reporting system. And in the instances in which governments do not formally mandate reporting but still set metes and bounds for appropriate conduct, trade and industry groups often coalesce around best practices for monitoring and reporting.

However, the proliferation of different approaches to EESG reporting cannot be ignored.<sup>34</sup> It is inefficient, encourages greenwashing<sup>35</sup> and gamesmanship, and threatens to engage companies more in the rhetoric of EESG

27. See, e.g., *Marchand v. Barnhill*, 212 A.3d 805, 807 (Del. 2019).

28. See generally Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (ensuring safe working conditions).

29. See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (prohibiting discrimination on the basis of race, color, religion, sex, or national origin).

30. See generally Fair Labor Standards Act of 1938, 29 U.S.C. §§201-262 (2018) (establishing fair labor standards).

31. See *In re Am. Apparel, Inc. 2014 Derivative S’holder Litig.*, No. CV-14-05230, 2015 WL 12724070, at \*\*2-4, 16-17 (C.D. Cal. Apr. 28, 2015); *In re FedEx Corp. S’holder Derivative Litig.*, No. 08-2284, 2009 WL 10700362, at \*11 (W.D. Tenn. July 30, 2009).

32. See, e.g., *In re McKesson Corp. Derivative Litig.*, No. 17-cv-01850, 2018 WL 2197548, at \*\*1, 7-12 (N.D. Cal. May 14, 2018) (*Caremark* claim based on alleged maximization of “short-term profits over safety with respect to sales and distribution of prescription opioids and fail[ure] . . . to [properly] implement a Controlled Substance Monitoring Program”).

33. Leo E. Strine Jr., *Warning—Potential Danger Ahead!*, DIRS. & BDS., Third Quarter 2004, at 25, 29.

34. See Jill Fisch, *The Uncertain Stewardship Potential of Index Funds*, in GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press, forthcoming), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3141&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3141&context=faculty_scholarship) [https://perma.cc/T8TS-269H].

35. Richard Dahl, *Green Washing: Do You Know What You’re Buying?*, 118 ENV’T HEALTH PERSPS. A246, A247 (2010).

than the logistics.<sup>36</sup> Until this proliferation is alleviated, however, the only rational way to proceed is for the company to exercise judgment and to carefully select the most relevant and credible EESG standard. Management should also be prepared to explain the selection to its stakeholders.

The critical next step is determining what expertise is needed to implement the company's compliance and EESG plan, the allocation of responsibility among the company's management team, and the organization of the board to oversee management's implementation of the adopted plan.

Diversity is rightly a salient topic in the conversation about corporate citizenship. To be clear, we are not referring to the idea that having a board and management team with diverse socioeconomic, racial, ethnic, national, and gender backgrounds might enhance the company's ability to look at key issues from multiple perspectives. That very well may be the case.<sup>37</sup>

But for present purposes, we are referring to the more mundane idea that the world is complex and diverse expertise is essential. In corporations whose products involve complex science and safety considerations, it is vital to have employees with the skill set and experience to enable the company not only to develop and market new products, but to do so in a manner that is safe and compliant with regulatory regimes.

The problem, however, is that the same kind of sensible deployment of expertise has not characterized how American corporations have addressed EESG. It remains the case that, for a large percentage of American public companies, the audit committee is the corporate committee singularly charged with approving and monitoring the corporation's compliance.<sup>38</sup> This is problematic for two reasons: (1) audit committees' core responsibilities in accounting and financial compliance, prudence, and integrity have grown even more challenging, complex, and time-consuming; and (2) corporations rarely face risk and compliance issues only in the financial arena, and often have issues in areas where specialized expertise of a non-financial nature is essential to effective management.

The interactive effect is easy to explain. With increased complexity in accounting and finance has come requirements that audit committees be comprised solely of directors who consider themselves financially expert.<sup>39</sup> Directors whose background is not in finance, but who

have other relevant talents, may be excluded from qualifying for those committees.

The core duties of an audit committee mean that the CFO, the head of internal audit, and other top finance officers will not just want, but need, a lot of time with the audit committee. There is an obvious danger that the audit committee will not have enough time to responsibly consider and address non-financial risks.

And the reality is that it is exceedingly unlikely that the skill set necessary to address the company's other non-financial risks and compliance issues is identical to that sought in audit committee members. More likely, corporations would want directors with substantial industry expertise in other relevant subjects.

The time crunch imposed by core financial and accounting duties means that the access that non-financial officers will get to the audit committee will be carefully rationed. It is natural to expect that the CFO and auditors will have an agenda of items to accomplish at each audit committee meeting. Other officers will have to fight for time.

The resulting allocation of talent and time is suboptimal. By putting a critical function in a committee that cannot perform it effectively, the board risks missing issues, limits communication between the directors and a more diverse set of company officers, and is likely to be spreading its work across its members in a highly inequitable way.

It is also unlikely that the corporation organizes its management-level approach to risk and compliance by giving its accountants responsibility for compliance with non-financial regulatory requirements, such as environmental rules. Much more likely, the corporation has developed methods to balance the competing values in specialization and generalization and has developed some industry-specific structures to address non-financial risk.

For these reasons, it seems much more effective and efficient to make sure that committee-level responsibility for risk management and compliance is thoughtfully allocated among the board's committees, rather than solely vested in the audit committee. With such a thoughtful allocation should come an alignment of officer-to-board-level reporting relationships.

Specifically, this allocation facilitates management-to-director communication on a regular basis on all the industry-relevant areas of compliance. Such a structure also maximizes the ability of a company to comprise a board with directors having the full range of talents the company's business needs, because directors can be seated and given roles that make sense for them.

This topic is an urgent one to date, as there has been a noticeable trend toward entrusting the nominating and corporate governance committee with responsibility for approving and overseeing the implementation of the company's EESG policies.<sup>40</sup> Rather than integrate EESG into the corporation's compliance oversight process,

36. See Sanjai Bhagat et al., *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803, 1826-27 (2008); Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1268-69 (2009). See SUSTAINABILITY ACCT. STANDARDS BD., *THE STATE OF DISCLOSURE 21* (2017), [https://www.sasb.org/wp-content/uploads/2019/08/StateofDisclosure-Report-web11271.pdf?\\_\\_hstc=105637852.135a89045bd6ea85f68591478e99eb09.1553809423920.1570492048390.1570494269935.17&\\_\\_hssc=105637852.1.1570494269935](https://www.sasb.org/wp-content/uploads/2019/08/StateofDisclosure-Report-web11271.pdf?__hstc=105637852.135a89045bd6ea85f68591478e99eb09.1553809423920.1570492048390.1570494269935.17&__hssc=105637852.1.1570494269935) [https://perma.cc/4TPC-SAAF].

37. See, e.g., David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003).

38. See NAT'L ASS'N OF CORP. DIRS., 2019-2020 NACD PUBLIC COMPANY GOVERNANCE SURVEY 18 (2020), <https://corpgov.law.harvard.edu/wp-content/uploads/2020/01/2019-2020-Public-Company-Survey.pdf> [https://perma.cc/7QFF-4B36].

39. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §407, 116 Stat. 745, 790 (codified as 15 U.S.C. §7265 (2018)); see also NYSE LISTED COMPANY

MANUAL §303A.07(a) cmt. (2021); NASDAQ STOCK MARKET RULEBOOK §5605(c)(2)(A) (2021).

40. Nat'l Ass'n of Corp. Dirs., *supra* note 38, at 27.

most companies seem to be keeping primary responsibility for compliance in the audit committee, while putting EESG in another committee or on the whole board, splitting up what ought to be one integrated approach to inextricably linked goals. This is wasteful, risks missing key issues, and will be less effective in creating an ethical corporate culture.

To organize the EESG function of the corporation, the board should allocate responsibility to committees in a sensible way. This allocation of responsibility should track the skills needed to do the task well and mirror the way it is allocated at the management level.

The board's committee structure should be informed by the process outlined above, and when the fundamental compliance and EESG concerns are lined up, committees should be formed correspondingly based on board member expertise and functional purpose. For most companies,<sup>41</sup> this will necessitate creating at least one committee that has risk management, compliance, and EESG functions.

Generally, it is important not to proliferate committees. Rather, in addition to considering whether to establish an EESG committee, what also needs to be revisited is the function of some of the mandated committees, such as the compensation committee. Compensation committees have focused obsessively on the compensation of top management. They have not been focused on the company's over-

all human capital strategy, or whether it would create more value to focus more on good pay for the many rather than the few at the top. But, there is an increased demand for corporations to give greater consideration to these areas.<sup>42</sup>

Skeptics might contend that it is essential that the entire board be involved in compliance, risk management, and EESG. Yes, we agree, but there is an advantage to specialization. Specialization allows boards to use their management's diverse talents and limited time effectively to make sure that they identify all key issues. The result is a board that is better able to develop and implement an overall approach that is most effective.

## V. Conclusion

With careful thought, corporate leaders can position their companies to better identify and address known and emerging risks; adopt goals for responsible corporate behavior toward workers, other stakeholders, and society; and establish standards and policies designed to promote and measure the attainment of both EESG goals and legal compliance. This will not be easy, but it is an exercise that is long overdue for most companies and will have long-lasting value if it becomes a regular process of serious thought about how the company makes money and how it affects the world in doing so.

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41. *See, e.g.*, Ashland Glob. Holdings Inc., Proxy Statement (Schedule 14A) 33 (Dec. 9, 2019).

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42. FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 5 (2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> [<https://perma.cc/P4HG-BNMJ>].