Procedural ESG Disclosure

Aisha Saad[1]

Discussion of ESG disclosure, both in policymaking and in legal scholarship, has to this point focused on developing a regime of substantive disclosure.[2] However, another important dimension of ESG accountability is *procedural* disclosure that provides information about who is making decisions about ESG within the corporation and the governance arrangements that are routinizing ESG decision-making. This information is important to investors and policy-makers who seek to identify, oversee, and correct the agency costs of ESG governance.

ESG's Principal-Agent Challenges

References to "corporate ESG" bundle together two distinct claims—one claim about ends (what ESG is) and another claim about means (who controls ESG). Combined, these two claims generate four main models of ESG governance: 1) shareholder pluralism, 2) enlightened shareholder primacy, 3) managerial stakeholderism, and 4) codetermination. Thus, even those who agree on the merits of pursuing an ESG agenda have differing, sometimes even contradictory, views of who should control and administer it.

Corporate Ends

	Profit	Stakeholder Interest
Shareholder Control	X	Shareholder Pluralism

[1] Dr. Aisha Saad is an Associate Professor at Georgetown Law specializing in corporate law and governance and environmental law. Professor Saad was a Dickerson Fellow at the University of Chicago Law School as well as a fellow at the Harvard Law School Program on Corporate Governance, where she was editor of the *Harvard Law School Forum on Corporate Governance.*

[2] See, e.g., SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors, Press Release, U.S. Securities and Exchange Commission, (March 6, 2024) https://www.sec.gov/news/press-release/2024-

Governance Means	Managerial Control	Enlightened Shareholder Primacy	Managerial Stakeholderism
	Stakeholder Control	X	Codetermination

Of the four main governance approaches to ESG, managerial stakeholderism and shareholder pluralism dominate the scholarly and practical discourse. Managerial stakeholderism had its spotlight in the fall of 2019 when the Business Roundtable, an association of over 200 CEOs of America's largest companies, published its *Statement on the Purpose of the Corporation,*[3] which claimed that corporations should be governed in the interests of their stakeholders as well as their shareholders. This managerial model suggests that corporate managers can run the corporation on behalf of various stakeholders and that they should be given discretion to do so for the good of society and for shareholders.

The shareholder pluralism model of ESG governance has been ascendant for several years now with the rise of socially responsible and ESG investing. The Global Sustainable Investment Alliance reports that $30.3 trillion is invested globally in sustainable investing assets, $8.4 trillion of that in the United States.[4] Recall Larry Fink's letter to CEOs in 2019 highlighting the links between profit and corporate purpose,[5] in 2020 focusing on climate as a focal point in the reshaping of finance,[6] and in 2021 emphasizing stakeholder capitalism, climate change, and sustainability.[7] Fink is the Chairman and CEO of the BlackRock, the world's largest asset manager, and these letters are widely viewed as a benchmark of investor zeitgeist. The shareholder-driven model of ESG governance holds that shareholders are not merely interested in making a profit, that they seek to advance various pro-social purposes through their investments, and that they should be granted more power to direct a

[3] *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf [https://perma.cc/XC2Q-F3FJ].
[4] Global Sustainable Investment Review 2022, Global Sustainable Investment Alliance, 5 https://www.gsi-alliance.org/wp-content/uploads/2023/12/GSIA-Report-2022.pdf, [https://perma.cc/Q3HH-YXVF].
[5] *A Fundamental Reshaping of Finance,* Larry Fink's 2020 Letter to CEOs, BLACKROCK.COM, https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo- letter [https://perma.cc/ENE7-TC6Z].
[6] *Id.*
[7] Larry Fink's 2021 Letter to CEOs, BLACKROCK.COM https://www.blackrock.com/americas-offshore/en/2021-larry-fink-ceo-letter [https://perma.cc/FPB9-MJA9].

corporation's decisions in pursuing nonpecuniary interests, for example through the SEC's Rule 14a-8 shareholder proposal process.[8]

Both the managerial and the shareholder models of ESG governance reveal a new variation of an old principal-agent problem resulting from the separation of ownership and control at the heart of the modern corporation. The managerial model adds new dimensions of complexity to managers' mandate, by adding objectives besides the generation of profit, which in turn introduces new dimensions to the risks of rent-seeking that arise when managers run the company on behalf of stakeholders. The shareholder model, too, adds a new layer of principal-agent considerations by characterizing shareholders as the agents of stakeholders in one version, or by allowing shareholders to advance various nonpecuniary preferences in their role as investors.

These novel agency challenges provide credible fodder to the attacks on ESG.[9] In recent work, I've argued that resolving the challenge of ESG governance is not as simple as assigning control rights to shareholders or to managers, which many advocates seek to do, and that ESG's supporters should instead embrace a model of technocratic governance that focuses on institutionalizing routine ESG expertise and decision-making.[10]

Reviewing ESG Governance

To assess what we currently know about how corporations make ESG-related decisions, and who they charge to do so, I reviewed a set of documents for Fortune 100 companies—10Ks, annual reports, board committee charters, proxy statements, corporate governance guidelines, and codes of conduct. This initial mapping of the existing ESG technocracy provides a baseline understanding of whether, and to what extent, companies are institutionalizing ESG decision-making into their corporate governance arrangements, laying the groundwork for a regime of procedural ESG disclosure that enables comparability, reviewability, and accountability.

10Ks

Almost all Fortune 100 companies mentioned ESG in their 10Ks. A majority of used boilerplate language or discussed ESG as a potential liability. About 10% of

---

[8] *See* 17 C.F.R §240.14a-8. *See also* James D. Cox and Randall S. Thomas, *The SEC's Shareholder Proposal Rule: Creating a Corporate Public Square*, COLUM. BUS. L. REV. 1147 (2021).

[9] *See, e.g.,* Warren Rojas, *Republicans Stoke 2024 Culture Wars by Attacking Biden's Socially Conscious Investing Rule*, BUS. INSIDER (Mar. 1, 2023), https://www.businessinsider.com/republicans-attack-biden-esg-investing-culture-wars-2024-election-2023-3 [https://perma.cc/DHU9-85DN]; Brooke Masters & Patrick Temple-West, *Vivek Ramaswamy's Fund Manager Strive Sticks to its 'Anti-Woke' Mission*, FIN. TIMES (Feb. 23, 2023), https://www.ft.com/content/c7ccc5ea-3e8f-49a1-b250-31365f4f33e0 [https://perma.cc/9BYT-SWP7].

[10] Aisha I. Saad*, Corporate Technocracy: ESG Governance Byond Shareholder Democracy of Managerialism*, 23 COLUM. BUS. L. REV., 825, 831 (2023)

companies included robust language about a commitment to ESG issues, specifically outlining relevant goal and initiatives. About 20% of companies had ESG, or ESG-equivalent, committees. Companies generally mentioned ESG in the risk analysis section of their 10Ks and some companies also mentioned ESG in the business discussion section. The most common language focused on the risk of failing to meet ESG expectations, while some companies highlighted the expanding disclosure requirements associated with ESG regulations. Reputational risk was also mentioned frequently, both in terms of companies failing to meet ESG regulations and as a more general matter. Those companies that mentioned ESG in the business section of their 10K focused was on the importance of ESG to the company's strategy and value.

Committee Charters

86 companies mentioned ESG or equivalent notions in at least one of their committee charters. 60 included it in their Nominating Committee charter which evaluates board composition and characteristics ,and selects the best candidates. The language in these charters was also quite consistent and pertained to assisting the Board with overseeing corporate social responsibility and sustainability. 20 companies referenced ESG in the Audit Charter, mostly under risk oversight or disclosure sections of their charters. 6 companies mentioned ESG in their Compensation Committee charter, with the overarching theme of tying compensation policies and practices to performance on relevant ESG goals. 24 companies had a separate committee for ESG, tasked with overseeing significant strategies, policies, and programs.

Proxy Statements

In recent years, many companies have included ESG-related proposals or disclosures in their proxy statements, reflecting the growing importance of these issues to investors and other stakeholders. In the set of companies examined, 77 companies mentioned ESG. 42 companies included ESG or its equivalent as a skill/qualification in a board skills matrix. Many companies cited oversight of strategy and risk as a key reason for including ESG. Whenever ESG was listed in the board skills matrix, at least half of directors had relevant experience and, in some cases, all directors had relevant experience.

Governance Guidelines

Governance Guidelines outline the roles and responsibilities of the board of directors, including establishing committees and overseeing key business areas such as risk management and sustainability. In recent years, many companies have updated their Corporate Governance Guidelines to include specific provisions related to ESG considerations and reporting. In the set of Fortune 100 companies examined, 49 companies mentioned ESG or sustainability in one or more capacities: 28 mentioned sustainability/environmental committee in their Governance Guidelines, 12 allowed the Sustainability Committee access to board membership, 6 mentioned periodic review of ESG policies, 29 mentioned sustainability, and 28 companies allowed

consideration for stakeholder interests. The majority of ESG mentions were included under the "Role of the Board," "Director Responsibilities," "Board's Purpose," and "Risk Oversight."

Codes of Conduct
The corporate Code of Conduct outlines a company's ethical and compliance standards, including expectations for employees, suppliers, and other stakeholders. 70 companies included an environmental section in the Code of Conduct. The common theme among them is the preservation of the environment and the reduction of negative impact on the environment. 66 companies had a labor or human rights section. They all emphasized the importance of respect for human rights and respect for relevant human right laws. 33 companies included statements on stakeholderism. They emphasized the importance of working closely with all stakeholders and responsibility to stakeholders. 33 companies mentioned responsible sourcing. Nearly all companies emphasized working with suppliers who are ethical and who share a commitment to integrity. 43 companies mentioned investment in communities, including supporting local communities through charitable donations or other ways of helping communities thrive. 19 companies had action points for environmental stewardship, mostly focusing on reducing emissions.

Conclusion

A disclosure regime focused on means and not just ends is key to a durable ESG agenda. This preliminary survey, while limited to the content available in public documents, provides a baseline account of ESG decision-making in Fortune 100 companies. Disclosure of ESG governance is emerging but remains limited and incomplete. This is a starting point for developing standards and best practices for procedural ESG disclosure, focusing on processes and capacities, accountability and reviewability, and not just defining ESG issues.